Law Society
of British Columbia

Practice Management Course (PMC)

Learning Materials

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MODULE 1 – ACCOUNTING

1 - Introduction to the Accounting Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***1 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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1.1 - Accounting Basics

1.1-1 - The Accounting Process

Though you may delegate most of the accounting functions to others, you must have a basic understanding of your accounting system. You are personally responsible to ensure that all duties under Part 3, Division 7 of the Law Society Rules are carried out (Rule 3-54 (Personal responsibility)). You cannot rely on your financial institution or your staff to take responsibility for you.

Be cautious about taking advice from your financial institution and always verify that the advice conforms to the Law Society Rules. Some financial institution information could be unintentionally misleading.

Steps in the Accounting Process

There are three basic steps in the accounting process:

- Record transactions in the accounting records.
- Prove the accuracy of the recording (balance/reconciliation).
- Produce financial information and filings such as financial statements, government filings for GST, income tax and so on.

Basic Accounting Records

There are four basic accounting records in a lawyer's accounting system, but many more are mandated by the Law Society.

1. **General Ledger** is the central repository for all the accounting data transferred from each subledger (a ledger containing all the details of a sub-set of transactions). The information reflected from this ledger comes from source documents that your firm handles (e.g., deposit receipts, cancelled cheques, credit card slips, invoices, lawyers' bills). The purpose of the General Ledger is to provide a complete record of all the financial transactions of your firm. It also summarizes information that is posted to the

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various subledgers. When using accounting software to record transactions, this data is entered only once and is automatically reflected in the appropriate subledgers.

2. **Accounts Receivable** is where you record all bills delivered to clients and all receipts from clients (including transfers from the trust account). The Accounts Receivable Subledger breaks down all accounts receivable by client.
3. **Trust Book of Entry**, also known as the Trust Ledger, is where you record all deposits and withdrawals made from the trust account. The Client Trust Ledger breaks down all trust transactions by client.
4. **Book of Original Entry**, also known as the General Account Ledger, is where you record all deposits and withdrawals made from the general account. The funds and accounting records for the trust account must not be commingled with your general funds. This is why you must keep separate records for trust transactions.

1.1-2 - Double Entry Bookkeeping

Double entry bookkeeping requires that each accounting transaction have at least two financial impacts. In other words, each transaction is entered twice in the books, affecting at least one account as a debit and at least one account as a credit.

It is all about finding a credit for every debit. In other words, a decrease in one debit account will offset an increase in another debit account, or a decrease in one credit account to offset an increase in another credit account. For each transaction, the off-setting amounts must be equal, which means that the books will balance if everything is recorded accurately. In the end, the total of all entries should be zero.

A "debit" is an increase in assets and expenses and a decrease in liabilities, equity and income. Conversely, a "credit" is an increase in liabilities, equity and income and a decrease in assets and expenses.

Assets, liabilities, owner's equity, expense, and income are the five different categories into which accounting transaction can fall. So, for example, if you receive trust funds and deposit them in a financial institution, this transaction results in:

- an increase in the trust account is an asset, so it's a debit; and
- an increase in the amount you owe your client is a liability, so it's a credit.

Another example: if you receive a payment of $1,000 in fees from a client and deposit it in your general account, this transaction results in:

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- an increase in your general bank account is an asset, so it's a debit; and
- a decrease in your accounts receivable is an asset, so it's an off-setting debit that has the effect of a credit.

The money you deposit into your bank account is a debit because the bank owes you the money. In other words, the balance in your bank account is a debit balance in your accounting records. If you can remember this as a starting premise, then all your other entries will begin to make sense to you.

1.1-3 - An Accounting Scenario

Having difficulty visualizing ledgers and debits and credits?

It might be helpful to go through a visual presentation of how accounting records track the flow of money through a lawyer's file.

This Accounting Scenario begins with a client, Mr. A., arriving with a $5,000 retainer cheque made out to the lawyer in trust, and shows the ledger entries and trust accounting practices that apply as the file unfolds.

1.1-4 - Choosing an Accounting System

Many of you will purchase accounting software. If you have minimal transactions, you may find that a manual system, such as the traditional bound accounting books, are sufficient. But whatever system you use, it must be capable of handling your office transactions, allow for the traceability of transactions, clearly legible, and printable on demand.

While all good accounting systems follow the basic structure described in this accounting module, some systems use different terminology to name records. Beware of generic business accounting packages that cannot deal with lawyers' trust accounting functions or easily accommodate trust ledgers.

Some accounting software offers trust accounting functions only. Although these systems are cheap and easy, they have no general accounting capability and you will still require a system for doing your regular office accounting.

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Other systems (such as QuickBooks and QuickBooks Pro, MYOB, Quicken, Simply Accounting, Peachtree, Microsoft's Great Plains Accounting) provide generic accounting software packages. Check to make sure they are capable of providing the trust accounting features that you require and are compatible with the trust accounting software that you intend to buy.

If you have a busy practice, consider one of the integrated systems (such as PCLAW and PCLAW PRO, ESILAW, LawStream, SmartWeal, PracticeMaster, Brief Accounting, Tabs III) created to address the needs of the legal market. They feature general accounting systems, and can incorporate conflict checking, calendaring and bring forward systems, and management reports specific to lawyers and law offices.

Ideally your system should also handle all necessary deductions and filings, including income tax, GST, PST, CPP, E.I., and WCB.

Before choosing a new accounting system, consider consulting an accountant or skilled bookkeeper. Each year you, or your firm on your behalf, must make a Trust Report filing. If your proposed system cannot fulfill the filing requirements, you may incur additional accounting or bookkeeping fees in the long term

For further details about different accounting systems, see the following sections of this module:

- ***1.3 - Manual Accounting Systems***
- ***1.4 - Computerized Accounting Software Systems***

1.2 - Working with a Bookkeeper

1.2-1 - The Bookkeeper's Role

A bookkeeper’s role can range from simple data entry to being responsible for posting the day-to-day transactions for your trust and general accounts and conducting month end procedures, including the preparation of monthly trust bank reconciliations.

Some lawyers have only a vague notion of what the bookkeeper does. They may hire a friend or relative for this job without carefully reviewing their qualifications. Often, the Law Society becomes involved in a practice where the bookkeeper has failed in their duties and was not properly supervised by the lawyer. As many lawyers have found, getting the books in order after an underqualified or improperly supervised bookkeeper can be expensive, time-consuming, and may even lead to disciplinary action if the books and records do not comply with the Rules.

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It is the lawyer's personal responsibility to ensure the books and records comply with the Rules, whether or not any duties are delegated to a bookkeeper.

Every practising lawyer must have a working knowledge of Part 3, Division 7 (Trust Accounts and Other Client Property) of the Law Society Rules.

1.2-2 - Full-time v. Part-time Bookkeeper

You can hire either a full-time person or a free-lance bookkeeper who comes to your office on an as-needed basis.

Whether you hire full-time or part-time bookkeeper depends on the number of financial transactions that occur each month, the timelines in which financial transactions must be entered to comply with the Rules, the size of your practice as well as the area of law that you practice.

For example, a small law firm of three lawyers that deals with a high volume of conveyancing transactions would probably be best served by a full-time bookkeeper to keep on top of all the trust transactions.

If your practice is involved only in low-volume corporate work, a part-time bookkeeper may suffice to meet your needs.

1.2-3 - Expectations & Qualifications

Define Your Expectations

In hiring a bookkeeper, you must define your expectations from the outset. Consider the following functions that are normally done by a legal bookkeeper:

- Daily recording of all trust and general account transactions;
- Reconciling and balancing monthly trust and general bank accounts;
- Preparing and posting fee billings;
- Maintaining client trust ledgers, accounts receivable subledger and accounts payable accounts;
- Preparing payroll;
- Preparing necessary government remittances such as GST, PST, WCB and payroll deduction remittances;
- Preparing periodic financial statements;

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- Organizing and maintaining accurate records for the required retention periods; and
- Preparing Trust Administration Fee remittances.

Qualifications

- It is extremely important that the bookkeeper possess a good working knowledge of law firm processes and procedures. Candidates from another business sector, such as retail or industry, will not be familiar with the unique processes of trust bookkeeping in a law firm and will not be able to anticipate the types and amounts of disbursements typical of a law practice.
- If your practice utilizes legal accounting software instead of a more generic accounting package, the successful candidate must be familiar with your type of software. If not, you may need to provide the necessary training.
- Good bookkeepers should possess above-average analytical skills as they are often required to identify and rectify account discrepancies. They should possess good communication and people skills as they need to work with members of your staff, other members of the profession, clients, and banking staff. They must be able to communicate about any trust or general account transaction arising in your practice.
- A competent bookkeeper will even anticipate the year-end requirements of your business to prepare year-end financials. This in turn may save you external accounting fees.
- Lastly, the successful candidate should receive some training in Law Society Rules.

1.2-4 - Hiring a Bookkeeper

Write a Job Description

Once you have defined your expectations, write a proper job description and communicate all your expectations to the potential candidate.

Where to Look

Naturally, you will want to hire the best candidate available that you can afford.

Online employment sites and old-fashioned newspaper ads might be your best search tool.

Employment agencies can be expensive. If you intend to use an employment agency, check to be sure that they do not simply refer all those who respond to ads.

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It may be worthwhile to check with employment referral services from the accounting profession.

Interview Questions

If you are going to hire a bookkeeper, here are some questions to ask in an interview:

- ***References:*** Has the candidate worked with a lawyer before? If so, with the candidate's consent, call the lawyer and ask about the bookkeeper's abilities. Trust accounting for lawyers can be more complex than accounting for many businesses. Experience is not everything, but it counts for a lot.
- ***Match Availability with Needs:*** Before the interview, determine how much assistance you will need from the bookkeeper. If you have a busy practice with many trust transactions, you will probably need someone who is available more than once a month as trust transactions should be recorded within seven days.
- ***Experience:*** The following questions will help assess whether the candidate has experience working with a lawyer:
    - *Do lawyers charge GST?* The candidate should know that GST is chargeable; see ***Module 6: Goods & Services Tax (GST)*****.**
    - *How often must a lawyer's accounting records be reconciled?* They must be reconciled at least once a month.
    - *What is the difference between a pooled and a separate trust account?*
    - *What is the correct procedure if a shortage is discovered in a trust account?* You must immediately eliminate the shortage and report it when necessary; refer to Law Society Rule 3-74 (Trust shortage) for further requirements.
    - *Do you know where to find the latest trust accounting rules online?* Look on the Trust Assurance Program area of the Law Society of British Columbia website.
    - *Are you familiar with lawyer accounting software packages such as ESILAW or PCLAW?*

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1.3 - Manual Accounting Systems

1.3-1 - Traditional Bound Accounting Books

Bound accounting books can be purchased at any stationery or office supply store. They are inexpensive and generally easy to keep - provided that the initial journals and accounts have been set up properly in the first place.

It is VERY useful to engage an accountant or bookkeeper to set-up the accounts.

If you are not going to engage a bookkeeper, it's a good idea to spend some time with the accountant or bookkeeper to understand how the system works and how to make proper postings.

Users must be diligent in making the entries.

Initial cost: Inexpensive

Benefits:

- Easy and simple to use, if familiar with its operation
- Suitable for low-volume practices

Drawbacks:

- Requires knowledge of accounting
- Rarely used these days
- Difficult to reconcile compared to a computerized system
- No benefit of ancillary systems like conflict checking, limitation systems, accounts receivable reminders that a computerized product provides
- No automatic production of management reports like cash flow statements, billings by lawyer per period, disbursements on a file
- Not linked to other office systems

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1.3-2 - Spreadsheet Application

Like the bound accounting books, a spreadsheet application such as Microsoft Excel is inexpensive and generally easy to keep. However, unlike the bound books, it is a software that has the capability to allow you to link cells and add functions to reduce the number of manual entries and to check for mistakes.

Initial cost: Inexpensive

Benefits:

- Software based
- Ability to link cells and reduce the number of manual entries
- Easy to use

Drawbacks:

- Requires knowledge of accounting
- Limited computerized accounting system

1.4 - Computerized Accounting Software

1.4-1 - Integrated Legal Accounting System

Examples: PCLAW and PCLAW PRO, ESILAW, Brief Accounting, Tabs III.

These packages take the features of a general accounting and financial statement package and apply them to the specific needs of the legal market. As well as offering all the features of the general accounting systems, they can incorporate conflict checking, calendaring and bring forward systems, and management reports specific to lawyers and law offices. They are usually available from local distributors, from sales offices or on the Internet.

Initial cost: Mid-range

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Benefits:

- Full computerized accounting system
- Some integrated legal systems such as conflict checking, calendaring, and bring-forward systems
- Integrated time and billing

Drawbacks:

- Require training to use the component parts effectively
- Usually require a trained or experienced bookkeeper or accounting department

1.4-2 - Fully Integrated Accounting & Law Practice Management Software

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Examples: ProLaw, Integra Office System, CMS Open, Javelan, Elite Information Systems, Gryphon99, Juris, etc.

These packages offer all the features of the integrated legal accounting systems, including modules for case and file management, time and billing, and office management reporting.

Initial cost: Most expensive

Benefits:

- One-stop shop
- Usually offer a full line of modules that extend the accounting system into a full accounting and case management system
- Can integrate multiple offices

Drawbacks:

- Some may be more suited for larger law firms or firms otherwise requiring a fully integrated office solution
- Requires training
- Dedicated staff may be required to manage and run the system
- More expensive than other systems

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1 - References & Resources

Law Society of BC materials

- Law Society Rules
    - Part 3 - Protection of the Public
        - Division 7 - Trust Accounts and Other Client Property
            - Rule 3-54 (Personal responsibility)
            - Rule 3-74 (Trust shortage)
- Accounting Scenario provides a visualization of ledgers and debits and credits
- Trust Assurance Program area of the Law Society of British Columbia website

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Registration and Licensee Services: registration@lsbc.org
- Trust Assurance: trustaccounting@lsbc.org

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MODULE 2 – TRUST ACCOUNTING

2 - Introduction to the Trust Accounting Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***2 - References & Resources*** at the end of this module.

IMPORTANT

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2.1 - Trust Account Basics

2.1-1 - Top Ten Things to Know About Trust Accounting

The following list sets out the bare bones of trust accounting. Whether you use a paper or electronic method of accounting, the principles are the same. This list will introduce the main topics and further details are provided within the module.

1. **You will likely need at least two bank accounts:**
   (a) a general account for money belonging to your practice; and
   (b) a trust account, if you will hold money belonging to your clients.
   You will have more than two bank accounts if you have any separate trust accounts.

2. **Trust accounts are either:**
   (a) pooled — for holding funds for more than one client; or
   (b) separate — for holding funds for one client on written instructions from that client.

3. **Pooled trust accounts must be held in a "designated savings institution."**
   (a) The savings institution must be insured by the Canada Deposit Insurance Corporation ("CDIC") or the Credit Union Deposit Insurance Corporation of British Columbia (“CUDIC”) (see Law Society Rule 3-56).
   (b) You must instruct this institution, in writing, to forward all interest earned on the pooled account to the Law Foundation of BC.

4. **Separate trust accounts are kept in the name of the lawyer, the firm or the trust.**
   (a) The earned interest belongs to your client.

5. **Pooled trust accounts and separate trust accounts must be marked as a trust account on the records of the savings institution and in your records.**

6. **The basic statutory provisions relating to trust accounting are:**
   (a) **Law Society Rules**
      (i) Part 2 (Membership and Authority to Practise Law), Division 3 (Fees and Assessments)
      (ii) Part 3 (Protection of the Public), especially Division 7 (Trust Accounts and Other Client Property) and Division 8 (Unclaimed Trust Money)
   (b) *BC Code* section 3.5 (Preservation of clients' property)
   (c) *Legal Profession Act*, Part 7 (Law Foundation)

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7. **The Rules set out the minimum accounting records you must maintain, but you will probably have many more if you have a busy practice (Rules 3-67 to 3-71 and 3-73).**

8. **The statutory provisions and the Law Society's trust accounting Rules do not tell you how to run a basic accounting system, so don't look there for answers on that topic.**
   (a) ***Module 1: Accounting*** and some of the additional resources will give you a good start.

9. **Double entry bookkeeping is difficult, but *Module 1: Accounting* will give you a basic introduction.**
   (a) A good bookkeeper or accountant familiar with lawyers' trust accounting is well worth hiring unless you enjoy recording source documents in books of original entry and then into subsidiary ledgers and the general ledger.

10. **Every year you, or your firm on your behalf, must file a Trust Report with the Law Society within 3 months of the last day of your reporting period (Rule 3-79) unless you did not operate a trust account in that quarter or the only funds received intro trust that quarter were for fees and/or retainers.**
    (a) You should receive a Trust Report Filing Notice from the Law Society.

11. **You must pay a $15 Trust Administration Fee ("TAF") to the Law Society for each distinct client matter in which you received trust funds (Rules 2-109 to 2-113).**
    (a) TAF is not a trust transaction fee that is collected every time a trust account is used.
    (b) TAF is remitted quarterly, and the forms are online.
    (c) TAF is dealt with in more detail in ***Module 3: Trust Filings & Trust Applications***.

12. **But we wanted you to know that if you can't find your client after two years you can rid yourself of trust obligations for unclaimed trust funds by paying them to the Law Society under Rule 3-89.**

More information about what to do with unclaimed trust funds can be found in section ***3.3 - Unclaimed Trust Funds Application***, in ***Module 3: Trust Filing & Trust Applications***, and in the Unclaimed Trust Money area of the Law Society's website.

The Trust Assurance auditors and Law Society practice advisors are friendly and knowledgeable people.

You can contact the trust auditors by e-mail at trustaccounting@lsbc.org and see the Law Society website for various ways to connect with a practice advisor.

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The Law Society Trust Accounting Handbook is an excellent resource for a more in-depth discussion of Trust Accounting.

2.1-2 - Definitions & Introductory Issues

Definitions

"client" includes any beneficial owner of funds or valuables received by you in connection with your practice (Rule 3-53).

"general funds" are funds received by you in relation to your practice (Rule 1).

"trust funds" are essentially funds directly related to legal services received in trust by you acting in the capacity of a lawyer, including funds received from a client for services to be performed or disbursements to be incurred, or belonging partly to the client and partly to you in a form that can't easily be split (Rule 1).

"fiduciary property" means funds, other than trust funds, and valuables for which a lawyer is responsible in a representative capacity or as a trustee, if the lawyer's appointment is derived from a solicitor-client relationship. It does not include any funds and valuables that are subject to a power of attorney granted to the lawyer if the lawyer has not taken control or otherwise dealt with the funds or valuables (Rule 1).

Introductory Issues

The expanded definition of "client" may be widely interpreted to include, for example, the payor of funds who may be someone other than the person you consider your client. It could also include all the beneficiaries of an estate, many or all of whom may not be your client in the traditional sense.

In some instances, you may be in a dilemma as to whom you can receive instructions from as to the use of the money. In extreme cases, you may need to apply to court to settle the question.

Think about the issues that might arise before you agree to accept funds from anyone other than your client. If possible, have your "clients" agree who will give you instructions. In appropriate circumstances, consider advising other beneficial owners of funds that you are not protecting their interests. Confirm that understanding in writing.

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Ultimately, these situations can become very complicated, particularly if they are not set up appropriately. You are encouraged to contact a Law Society practice advisor to discuss how to do so.

If you are receiving funds that you must pay out immediately, get the cheque certified or a bank draft, or ask that the funds be wire-transferred into your trust account. It is appropriate to ask another lawyer for a certified cheque.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resource under the heading *Financial / Accounting / Tax:*

- Did you know that banks can place holds on trust cheques, certified cheques and bank drafts? (September 2018)

Tips on trust accounting pitfalls are covered section ***2.4-4 - Avoiding Pitfalls*** and in the Trust Accounting area of the Law Society's website.

2.1-3 - Basics for General and Trust Accounts

Pursuant to Rule 3-67 (Accounting records) your records must be:

- legible, meaning handwritten in ink rather than pencil, printed, or an electronic form that can be readily transferred to print on demand;
- chronological; and
- easily traceable with appropriate cross-referencing.

The minimum accounting records that you must maintain are set out in Rules 3-67 to 3-71 and 3-73 (Monthly trust reconciliation).

See Appendix A: Required Accounting Records Mandated Under the Rules of the Law Society for a checklist of the required accounting records mandated under those Rules.

Some of these items are reviewed in greater detail in the next section of this learning module.

Rule 3-72(1) (Recording transactions) provides that you must record all transactions promptly, and no more than:

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- **7 days** after a **trust account transaction**, except for receipt of interest on a separate account which can be recorded within 30 days; and
- **30 days** after a **general account transaction**.

The Executive Director of the Law Society may at any time order a compliance audit of your books, records and accounts to ensure they are properly maintained; Rule 3-85 (Compliance audit of books, records and accounts). If you are being audited, you must immediately produce and permit the copying of all your files and provide any required explanations.

The Law Society discipline committee may also order the investigation of your books and records if it is apparent you have committed a discipline violation; see Rule 4-55 (Investigation of books and accounts). See also Rule 3-86 (Failure to produce records on compliance audit) regarding suspension pending the production of records.

Note that Rule 3-58 (Deposit of trust funds) says that as soon as it is practicable, you must withdraw the portion of the funds that are yours from the trust account. Another important rule to consider is Rule 3-58.1 (Trust account only for legal services); see the Trust Accounting Handbook (page 7) for more information.

2.2 - Types of Trust Accounts

2.2-1 - Pooled Trust Accounts

As soon as practicable, you must deposit all trust funds that you receive into a **pooled trust account** (Rule 3-58(1) (Deposit of trust funds)) except for funds on client instruction to be put into a separate trust account in accordance with s. 62(5) of the *Legal Profession Act* and Rule 3-61 (Separate trust account) pursuant to Rule 3-58(3).

Rule 3-58.1 (Trust account only for legal services) restricts the payment and withdrawal of funds into and out of trust to those funds that are directly related to legal services provided by the lawyer or law firm.

Pooled trust accounts must be held at a **"designated savings institution"** (Rule 3-60(1)(a) (Pooled trust account)).

- Designated savings institutions are those that have an office in British Columbia and are insured by the CDIC, or the Credit Union Deposit Insurance Corporation of British Columbia (Rule 3-56 (Designated savings institution)).

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- You must give a written letter of instruction to the designated savings institution to forward all the interest earned on the pooled trust account to the Law Foundation (Rule 3-60(3)).

Give yourself some lead-time before you expect to use your pooled trust account for the first transaction. It's not as simple as opening a bank account and issuing a trust cheque that same morning. In addition to the letter of instruction that you must give to the designated savings institution, you must set up records and client trust ledgers in advance.

If it is the first time you are opening a pooled trust account, or if you have any questions, contact the **Trust Assurance** department at the Law Society trustaccounting@lsbc.org.

As well, you may want to inquire about having a new firm visit in which a Law Society auditor comes out to look over your accounting system and answer your questions about the trust accounting rules. New firm visits usually take no more than a couple of hours and they are free of charge.

Pursuant to Rule 3-60 (Pooled trust accounts), all pooled trust accounts must:

- be designated as a **"trust"** containing funds of more than one client, and the word "trust" must appear on both your bank statements and cheques;
- be readily available for you to draw on;
- provide you periodically with cancelled cheques or cheque images and bank statements. Some financial institutions now store cancelled cheques at a data centre. This is not sufficient. You must instruct the institution to return cancelled cheques, or acceptable electronic versions of the front and back of the cheques, to you. Note that it is acceptable to receive electronic bank statements, as long as they are easily printable on demand and are in your possession. Do not rely on the bank's website to store these records for you;
- be kept in your name or your firm's name; and
- hold only up to $300 of your own money, except as required to make up a shortfall under Rule 3-74 (Trust shortage). It is a good idea to leave a small amount of your money in your trust account because Rule 3-64(1) (Withdrawal from trust) lists the only acceptable withdrawals from trust, and bank charges are not one of them — yet accidents do happen. Instruct the institution to take all bank charges for the pooled account from your general account and use the $300 only as a fallback.

For every pooled account you hold with the designated savings institution, other than a credit union, you must file with that institution an annual CDIC report by May 30th of each year for the balances held as of April 30th (Rule 3-77 (Canada Deposit Insurance Corporation) and the *Canada Deposit Insurance Corporation Act*). This is so that each of your client's funds, and

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not just the pooled account itself, is insured up to the $100,000 limit of CDIC insurance. When filing your report, be sure that you don't use client names. It is best to use file numbers or some other confidential identifier. You must not disclose information that is subject to solicitor and client privilege or confidentiality without the consent of your client (Rule 3-77(2) (Canada Deposit Insurance Corporation).

If you have deposited funds in a pooled trust account in expectation of an early payout, consider seeking your client's written instructions to open a separate interest-bearing trust account if the payout is delayed. There have been claims against lawyers for failing to recommend a separate interest-bearing trust account in appropriate circumstances.

If you fail to open a separate interest-bearing trust account after committing to the client to do so, report the matter to the Lawyers Indemnity Fund.

In appropriate circumstances, a Fund lawyer may be able to help you obtain a rebate from the Law Foundation for the interest earned on that portion of your pooled account.

Appendix B: New Firm Checklist for Setting Up Trust Accounting System

Appendix C: Sample Letter to Designated Savings Institution

Appendix D: Sample Report to Savings Institution Re: Canada Deposit Insurance Corporation

2.2-2 - Separate Trust Accounts

Your client can instruct you to place their funds into a separate trust account (Rule 3-58(2) (Deposit of trust funds) and Rule 3-61 (Separate trust account)).

To ensure the return will outweigh the cost of setting up a separate trust account, consider the amount of the deposit, the time you expect to hold it, and the applicable interest rate.

If the net return does not warrant the expense of setting up a separate account, advise your client and seek contrary instructions.

Your client is entitled to the interest made on money held in a separate trust account (*Legal Profession Act*, s. 62(5)).

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If your client ***instructs in writing***, the account need not be held at a designated savings institution (Rule 3-58(3)) but it must be held in an interest-bearing trust account, or similar form of account, in a savings institution in British Columbia (Rule 3-61(1)(a)).

Rule 3-61 (Separate trust account) provides that all separate trust accounts must:

- be in your name or your firm's name, in the name of the trust, or identified in your books by the number that identifies the client;
- be designated as a "trust" account in the records of the savings institution; and
- exclusively hold trust funds, except as required to make up a shortfall under Rule 3-74 (Trust shortage).

Visit the **Lawyers Indemnity Fund** website for reporting guidelines and contact information.

2.3 - Using a Trust Account

2.3-1 - Withdrawing Trust Funds

Rule 3-64 (Withdrawal from trust) provides that you may withdraw from a trust account only those funds that:

- are properly required for payment to or on behalf of a client, or to satisfy a court order;
- belong to you;
- were deposited by mistake;
- are paid to you to pay a debt that the client owes;
- are being transferred between trust accounts;
- are due to the Law Foundation;
- are remitted to the Law Society as unclaimed trust funds; or
- are authorized by the Executive Director for a purpose not otherwise specified.

You must not withdraw trust funds unless your records are up to date and you hold sufficient funds to the credit of the client on whose behalf you are withdrawing (Rule 3-64(3)). This means that you have to look at the particular client's trust ledger to ensure there are sufficient funds held for the client. Without the client's express consent, you cannot withdraw trust funds impressed with a specific purpose, unless the purpose has been met or the client has consented (Rule 3-65(7) (Payment of fees from trust)). Remember the broad definition of "client" before concluding that you have all the consents you require.

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Signing Authority

Funds must be withdrawn by a cheque marked "trust," and **signed by a practising lawyer** (Rule 3-64(2)). The cheque may be co-signed by a non-lawyer if you decide you want a second signature.

If you are practising alone, you can arrange with your bank for **another member of the Law Society** to have temporary signing authority if you must be absent. However, you must ensure client confidentiality is maintained, which in turn may require your client's consent to the new signing authority depending on the nature of the cheques to be signed in your absence.

If you don't already have a trusted co-signor for your trust cheques, this may be a good thing to put in place prior to an absence. Remember that your annual Trust Report requires you to list all the persons who have had signing authority on your trust accounts.

Exceptions to withdrawal from trust by cheque

The only exceptions to withdrawal from trust by cheque are:

- electronic withdrawal of funds subject to the requirements of Rule 3-64.1 (Electronic transfers from trust);
- bank draft subject to the requirements of Rule 3-64.3 (Withdrawal from trust by bank draft);
- savings institutions paying interest earned on pooled trust accounts to the Law Foundation (Rule 3-64(4));
- the client authorizing a transfer from a pooled trust account to a separate trust account (Rule 3-64(10)); and
- cash withdrawals as required by Rule 3-59(5) (Cash transactions).

You cannot withdraw directly from a separate trust account that does not give you monthly statements and cancelled cheques. In such instances, to ensure a proper paper trail, you must first transfer the funds to your pooled account (Rule 3-66 (Withdrawal from separate trust account)).

Also, it is important to note that the **only** way to move your fees from the trust account to your general account is by trust cheque. ***Online web transfers are not permitted.***

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2.3-2 - Paying Your Fees from a Trust Account

Law Society Rule 3-65 (Payment of fees from trust) provides that before you pay your fees from a trust account, you must:

- do the legal work;
- prepare the bill; and
- immediately deliver the bill to the client, unless the client has instructed you in writing that you need not deliver a bill.

The Rule further provides that you can deliver the bill by:

- regular or registered mail to the client's last known address;
- personal delivery;
- faxing it to client's last known fax number; or
- emailing it to the client's last known electronic address.

When you withdraw funds to pay your fees, make the trust cheque payable to your general account.

You **cannot** draw trust cheques payable to "cash" or "bearer" (Rule 3-64(5)(b) (Withdrawal from trust)).

As well, remember that you **cannot** use online web transfers to move your fees from the trust account to the general account. ***Some financial institutions may tell you that this is okay, but it doesn't comply with Law Society rules.***

2.3-3 - Trust Balances & Shortages

You must always maintain enough money on deposit to meet your client's obligations in each pooled or separate trust account (Rule 3-63 (Trust account balance)).

Make sure that:

- funds have actually been deposited or wired, and that they have cleared;
- the withdrawal is coming from the same account in which the deposit was made;
- the funds on deposit are sufficient to cover the withdrawal;

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- the trust funds can be used for the purpose of the withdrawal, such as the funds are not impressed with a trust for a different purpose, there is no court order, contractual obligation or other charge prohibiting withdrawal; and
- the withdrawal will not breach an undertaking.

Always review the individual client trust ledger before issuing the trust cheque.

The individual client trust ledger **must** show sufficient funds to cover your cheque.

You will have a shortage if there are not sufficient funds to the credit of that particular client, or if funds deposited to your client's credit have not cleared.

Note that, even if the overall pooled trust account has enough money to cover the cheque, you will create a "shortage" if that particular client does not have sufficient funds in the pooled account.

You ***must*** have enough funds on hand to cover all trust liabilities (Rule 3-63 (Trust account balance)).

2.3-4 - Trust Shortage - Next Steps

I Have a Trust Shortage - Now What?

If you discover a trust shortage, look to Rule 3-74 (Trust shortage).

First, if you can't do anything else to resolve the problem, you must immediately deposit enough money into the trust account to eliminate the shortage. Consider that, if at the last minute the bank pulled its mortgage advance, you must seek an extension of the closing date on your transaction and call back the trust cheque.

Note that service charges, credit card discounts, and bank errors are considered trust shortages.

Now you see how the $300 deposit of your own money into a pooled trust account might save you some problems (Rule 3-60(5) (Pooled trust account)).

You are encouraged to consider contacting the Law Society's Trust Assurance department. They are available for advice on how to correct these problems and the best course of action.

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Second, whether you have corrected the problem or not, you must immediately make a written report to the Executive Director, including all relevant facts and circumstances, if:

- the trust shortage is greater than $2,500; or
- you are unable to deliver up, when due, any trust funds.

To make a report to the Executive Director, email trustaccounting@lsbc.org.

If the circumstances of the shortage may give rise to a claim against you, whether or not you believe your client will ultimately suffer damages, report the matter to the Lawyers Indemnity Fund promptly.

Consult *BC Code* rules 7.8-1 (Informing client of errors or omissions) and 7.8-2 (Notice of claim) about errors and omissions, informing the client, and complying with the professional liability indemnity policy.

2.3-5 - Trust Reconciliations

A reconciliation is the accounting procedure that proves your trust transactions have been recorded accurately.

As long as any trust account remains open, reconciliation must occur monthly, whether there have been any trust transactions in that month or not (Rule 3-73(1) (Monthly trust reconciliation)).

How to reconcile

There are four stages to proper trust reconciliation for both pooled and separate trust accounts:

1. Reconcile the financial institution balance for the account with the statement and with your records for the account.
2. Reconcile the reconciled financial institution account balance with the total of the detailed monthly listing of individual clients.
3. Ascertain your total trust liability by adding together each reconciled pooled and separate bank account balance and agreeing to the total "gross trust liability," which is the total trust balance as shown in your general ledger.
4. Correct any unreconciled items.

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Gross trust liability

The "gross trust liability" of your firm must include the amounts held in clients' separate trust accounts. It is not just the amount in your pooled trust account. Some lawyers make the mistake of removing the trust liability from the accounting records at the time a client's funds are transferred from a pooled account to a separate trust account. **Your "gross trust liability" is unaffected by a transfer from one trust account to another.**

The **wrong way** to show a transfer from a pooled account to a separate account is:

DEBIT: trust liability account

CREDIT: pooled trust account

The **right way** to show the transfer is:

DEBIT: client's separate trust account

CREDIT: pooled trust account

In this way the trust liability is unaffected, but the amount of the client's trust funds is segregated to a separate trust account.

Reconciliation records

Rule 3-73(2) requires that your reconciliation include:

- a detailed monthly listing showing the unexpended balance of trust funds held for each client, and identifying each client for whom trust funds are held;
- a detailed monthly financial institution reconciliation for each pooled trust account;
- a listing of balances of each separate trust account, or similar form of account, identifying the client for whom each account is held;
- a listing of balances of all other trust funds received pursuant to Rule 3-58(2), being all funds placed in a separate account in accordance with s. 62(5) of the *Legal Profession Act*; and
- a listing of any other valuables received from a client.

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Reconcile all trust funds

In effect, Rule 3-73(2) calls for a reconciliation of all trust funds (see Rule 1 "trust funds") held by you no matter how derived. This would include any trust accounts where you acted as a custodian, or in any of the following capacities if the appointment was derived from a solicitor-client relationship:

- an executor or administrator of a will;
- an administrator of an estate;
- a committee;
- a representative authorized under a representation agreement to make financial or legal decisions;
- an attorney under any power of attorney; or
- a trustee.

Office procedures

Your internal office procedures regarding trust reconciliations should include:

- diarizing the date when trust account statements are due from your savings institution, and a system of follow-up to ensure statements are received promptly;
- diarizing the date of the monthly reconciliation; and
- a policy that all staff members know that any errors or differences must be brought to your attention immediately, so that you can correct or reimburse trust balances as necessary.

2.4 - Tips & Pitfalls

2.4-1 - Practical Information on Banking

Think carefully when choosing a financial institution. It can be costly and time-consuming to relocate trust accounts. Little things like the type of cheque your accounting system requires can be problematic if you choose a financial institution that cannot accommodate your requirements.

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At a minimum, you must instruct the financial institution about the type of cheques your system requires. For example, some accounting software requires continuous stationery cheques. Others, such as the one-write accounting system, use cheques that are only available from the system supplier.

It is <u>strongly recommended</u> by the Law Society Trust Assurance department that you maintain only one, or at the most two, pooled trust accounts. Experience shows that where numerous pooled accounts are held, there are more errors and shortfalls, and increased bookkeeping costs.

Many trust account errors arise because the general account and pooled trust accounts get mixed up. These suggestions will decrease your chance of error:

- Use trust cheques distinctly different in colour from general account cheques.
- Ensure "TRUST" is marked in bold on trust cheques.
- Ensure the account numbers between the two types of accounts are different.
- Maintain the trust and general accounts at two different institutions, if possible. However, this precludes you from instructing your financial institution to charge your general account with pooled trust account service charges. This can also be difficult because the financial institution that handles your trust accounts may also want to handle your general business accounts.
- Find out about your financial institution's clearing and data rules. For example:
- What is the cut-off time for same day deposits?
- When are cheques deposited at another branch of your financial institution credited back to your account?
- If your bank allows you or your clients to use remote branch banking, make sure that all deposits at other branches will still provide you with a copy of both sides of the cheque. You are required to keep a copy of all cheques received for deposit to your trust account.
- Make sure your financial institution will provide sufficient details of wire transfers, including the source.
- Make sure the financial institution knows you require all cancelled cheques to be returned. If that data is provided to you electronically, be sure you can print out the information and keep it in a secure place.

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2.4-2 - Avoiding Pitfalls

Here are some suggestions to help avoid common trust accounting pitfalls:

- **Agree with your client on payment from trust funds.** Confirm in the retainer letter that you are authorized to take funds from trust to satisfy your bill.
- **Before issuing a trust cheque, review the individual client trust ledger** to ensure there are sufficient funds held for that client.
- **Do not rely on the client file for evidence of funds in trust.** You risk a shortfall if you pay out trust funds on the strength of a mortgagee's letter that funds will be advanced. Mortgagees do not always pay as and when they have committed.
- **Do not allow a mortgagee to credit your trust account directly.** Such transactions can occur if you use the same bank branch. If your pay-out cheque clears the account before the mortgagee actually credits the mortgage proceeds, your account will be overdrawn, and you will have a shortfall. You may also have a shortfall if the financial institution claims that an amount was advanced in error and reverses the deposit through a debit memo. These situations cannot occur if you insist on payment by cheque instead of through internal credit.
- **Operating too many trust accounts causes confusion.** Too many trust accounts leads to errors where funds are deposited to Account A, but cheques are issued on Account B.
- **Balance the statement of adjustment twice.** Arithmetical errors on statements of adjustments, leading to over-disbursement, are easily avoided if you add and balance the statement twice, once in draft and again before finalized. Prepare a separate in/out analysis on the cash actually coming in and being paid out of your trust account.
- **Do not delay in depositing cheques. Do not keep cheques in the client file.** Cheques can get lost, or payouts made on the strength of the lawyer's memory of receiving the funds. A shortfall will result if the cheques have not actually been deposited.
- **Photocopy the front and back of cheques for deposit.** It may be necessary to review details about a receipt, either to verify an endorsement, or get information about the drawer. Since this information is lost when you deposit the cheque, you should keep these photocopies as part of your receipt record.
- **Do not pay out of a pooled account when you hold a term deposit for a client.** In this case the client benefits from the use of other clients' funds. The pooled account will be overdrawn, and the client continues to collect term deposit interest.
- **Request funds in the form of money order, certified cheque, or a bank wire directly into your trust account if you have to pay out before a cheque has time to clear the**

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bank. In Vancouver: allow 3-5 days; outside Vancouver: 7-10 days; out of BC: 14-21 days. Alternatively, get the money in early enough so that it has time to clear.

- **Be aware of processing times for cheques.** Cheques presented for payment are processed on the same date, but deposits made after a certain time, usually 3 pm, may not be credited until the next day. Cheques drawn on US banks take time to clear. Cheques drawn on US banks may be credited to the bank statement but then charged back for a 3 to 4-week period before being cleared and permanently credited to your account.
- **A cheque deposited at a different bank branch may not be credited immediately.** Cheques deposited at one bank to the credit of an account at another branch may not be credited for several days if the savings institution uses a courier system instead of online facilities.
- **Establish a policy as to when a certified cheque will be required for deposit to trust.** If an uncertified cheque is returned NSF, you will be responsible to cover any deficiency until the funds can be recovered.
- **Telephone instructions to hold funds are not a substitute for certification.** Your bank may telephone another savings institution to ask that funds be held to cover a cheque. This is not foolproof as an NSF cheque is still your responsibility.
- **Encourage your staff to ask questions about a trust account.** Your staff should ask questions when in doubt about a trust account. Be sure they know you would much rather they ask the question than guess the answer.
- **Do not allow staff to take trust ledgers out of your office.** Many bookkeepers work off site. If you need to disburse funds from trust and the client trust ledger is not in the office, you can't be sure the funds are there.
- **Be aware that "stop payments" may be ineffective to prevent cashing a cheque deposited at an ATM.** Fully investigate the circumstances before issuing a replacement cheque and, if possible, have the client pick up a trust cheque. Always get the client to confirm a safe address for mailing a trust cheque.
- **Always get the client to confirm a safe address for mailing a trust cheque.**

2 - References & Resources

Statutes

- *Legal Profession Act*
  - Part 7 - Law Foundation
    - section 62 (Trust account — interest rate and related matters)
- *Canada Deposit Insurance Corporation Act*

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Law Society of BC materials

- Law Society Rules
  - Part 2 - Membership and Authority to Practise Law
    - Division 3 - Fees and Assessments
      - Rules 2-109 to 2-113 (Trust administration)
  - Part 3 - Protection of the Public
    - Division 7 - Trust Accounts and Other Client Property
      - Rule 3-53 (Definitions)
      - Rule 3-56 (Designated savings institutions)
      - Rule 3-58 (Deposit of trust funds)
      - Rule 3-58.1 (Trust account only for legal services)
      - Rule 3-59 (Cash transactions)
      - Rule 3-60 (Pooled trust account)
      - Rule 3-61 (Separate trust account)
      - Rule 3-63 (Trust account balance)
      - Rule 3-64 (Withdrawal from trust)
      - Rule 3-64.1 (Electronic transfers from trust)
      - Rule 3-65 (Payment of fees from trust)
      - Rule 3-66 (Withdrawal from separate trust account)
      - Rules 3-67 (Accounting records) to 3-71 (Billing records)
      - Rule 3-72 (Recording transactions)
      - Rule 3-73 (Monthly trust reconciliation)
      - Rule 3-74 (Trust shortage)
      - Rule 3-77 (Canada Deposit Insurance Corporation)
      - Rule 3-79 (Trust report)
      - Rule 3-85 (Compliance audit of books, records and accounts)
      - Rule 3-86 (Failure to produce records on compliance audit)
    - Division 8 - Unclaimed Trust Money
      - Rule 3-89 (Payment of unclaimed trust money to the Society)
  - Part 4 - Discipline
    - Division 4 - Investigation
      - Rule 4-55 (Investigation of books and accounts)
- Code of Professional Conduct for British Columbia (*BC Code*)
  - section 3.5 (Preservation of clients' property)
  - rules 7.8-1 (Informing client of errors or omissions) and 7.8-2 (Notice of claim)
- Support and Resources for Lawyers > Practice Resources area of the Law Society's website includes the following resource under the heading *Financial / Accounting / Tax:*

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    - Did you know that banks can place holds on trust cheques, certified cheques and bank drafts? (September 2018)
- Trust Accounting
    - Trust Accounting Handbook
- Unclaimed Trust Money area of the Law Society website

Appendices

- Appendix A: Required Accounting Records Mandated Under the Rules of the Law Society
- Appendix B: New Firm Checklist for Setting Up Trust Accounting System
- Appendix C: Sample Letter to Designated Savings Institution
- Appendix D: Sample Report to Savings Institution Re: Canada Deposit Insurance Corporation

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Registration and Licensee Services: registration@lsbc.org
- Trust Assurance: trustaccounting@lsbc.org

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MODULE 3 – TRUST FILING & TRUST APPLICATIONS

3 - Introduction to the Trust Filing & Trust Applications Module

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References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***3 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions have been in 2023, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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3.1 - Trust Report & Practice Declaration

Every year, you (under Rule 3-79 (Trust report)) or your firm on your behalf (under Rule 3-54(2)), must make a Trust Report filing with the Law Society, whether you have received money in trust during that year or not. The individual Lawyer's Practice Declaration is included as Schedule 2 of the Trust Report and is filed online at the same time.

The Trust Assurance department notifies law firms via their annual Trust Report Filing Notice whether they are required to file a Self Report or an Accountant's Report. Law firms are not able to self-report unless they have been selected to do so. The Executive Director of the Law Society has the discretion to require any lawyer to deliver a Trust Report with an Accountant's Report. Some firms must continue to file an Accountant's Report, especially new firms who have filed fewer than two Trust Reports with an external accountant's report.

In most cases, one Trust Report is filed for a law practice to satisfy the requirements for all its partner and associate lawyers. However, for the Trust Report filing to be accepted by the Law Society, all the lawyers in the practice must also have individually filed online their individual Lawyer's Practice Declaration.

If you contract your services to one or more law firms, the Trust Report filing by the firms may not be enough.

If you are uncertain about this or any other aspect of the Trust Report filing, contact the Trust Assurance department at trustaccounting@lsbc.org.

Reporting Period

You must file the Trust Report with the Law Society within three months of the end of your reporting period (Rule 3-79(3)). For example, if your period ends January 31, you must file by April 30.

When starting a new practice, you may choose your trust reporting period. It does not need to coincide with your year-end for tax purposes. In most cases, if you do not choose another reporting period, the period will coincide with the date of registering your firm with the Law Society. The last reporting period ends on the day your firm ceases to practise, and you must make a final filing within three months of winding up. This final trust report filing must be in the form of an Accountant’s Report.

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If you are late filing, the penalty is $200 for the first 30 days. After that, it is $400 for every month or part month. If you don't file within 60 days, you may be suspended until you deliver the Trust Report (Rules 3-80 (Late filing of trust report) and 3-81 (Failure to file trust report).

Contents of Trust Reports (Self Report or Accountant's Report)

Whether you file a Self-Report or an Accountant's Report, Sections A and B are the same.

Section C is the only difference between the two Trust Reports.

The Trust Report is set up as follows:

Section A - Description of Practice

- Completed by you or your firm, whether or not your firm had trust accounts during the year.

Section B - Financial Profile

- Completed by you or your firm, if the firm held or received or withdrew any trust funds.

Section C - Summary of Accountant's Specified Procedures (Accountant's Report)

- The accountant must be a chartered professional accountant licensed for audit or review in B.C. (Rule 3-82 (Accountant's report)), and must be independent from, and not in a conflict of interest with, your firm;
- The accountant must confirm that specific tests as outlined in the Trust Report have been performed, and must report any exceptions found to the Rules or any mistakes found in Sections A and B; and
- The accountant must also report on the balance of your trust assets and liabilities at the end of your reporting period, which confirms you have sufficient funds to meet all your trust obligations.

Section C - Accounting Procedures (Self Report)

- A set of accounting related questions completed by you or your firm. An external accountant is not required.

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Section D - Lawyer's Declaration

- Completed by you or your firm, confirming that all books and records have been provided to the accountant.

Schedule 2 - Lawyer's Practice Declaration

- Completed by each lawyer in the firm.
- The Trust Report is one of the tools the Law Society uses to carry out its statutory obligation to protect the public by ensuring that:
    - your practice has an adequate system for recording financial transactions; and
    - your system is working properly.

See Appendix A: Common Exceptions Reported for a list of some examples.

3.2 - Trust Administration Fee (TAF)

All lawyers who maintain one or more trust accounts are required to remit to the Law Society a $15 trust administration fee (TAF) for each trust transaction in which the lawyer receives money in trust relating to a distinct client matter (Rules 2-109 to 2-113). The TAF does not apply to trust funds that are received solely to pay legal fees or to be held as a fee retainer.

When does the TAF apply?

If you are handling several matters for a client, the TAF will apply to each distinct matter. On the other hand, if one matter has several components that each require payment into trust, TAF may only be attracted once.

Remember, TAF is not a trust transaction fee that has to be collected every time a trust account is used.

For example, if a client pays money into trust to pay out a settlement, rather than for a retainer or legal fees, it will attract one $15 fee. If later that same client conveys the matrimonial home as a result of a divorce, and pays further money into trust, that will attract a further fee. These are two separate client matters.

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In another example, you act for the purchaser of a single-family home ***and*** the purchaser's lender. You receive one payment into trust from the purchaser for the deposit on the purchase price. You receive a second payment into trust from the lender for a mortgage advance. You receive a third payment into trust from the purchaser for the balance due. The TAF is incurred once only, when the first deposit is made into trust. It is irrelevant if two different lawyers in the firm took care of the conveyance and the mortgage aspects of the file.

Only one TAF is payable in respect of a single client matter in which a lawyer represents joint clients, or when more than one lawyer in the firm acts (Rule 2-110 (Trust administration fee)).

If you have any doubt as to whether a new matter taken on for a client constitutes a "client matter" under the Rules, contact the Trust Assurance department at the Law Society at trustaccounting@lsbc.org.

The initial deposit of trust funds on a new client matter into a pooled trust account or directly into a separate trust account attracts one TAF. A subsequent transfer between trust accounts, so long as it is still for the same matter, does not attract another fee.

It is irrelevant whether the money that comes into trust comes from your client. For example, if you are a criminal lawyer and money is returned to your client from a law enforcement agency by way of a bank draft in trust, the TAF applies. On the other hand, if no money is received into a trust account, even if a transaction is recorded as a trust transaction in your trust ledgers, there will be no TAF. An example would be where you endorse a trust cheque, without recourse, over to a third party.

When is the TAF due?

The TAF is due upon the receipt of funds into trust (not when a bill is created, or the file is closed).

GST and the TAF

GST is payable on the TAF. When you make your remittance to the Law Society, include the GST in the total TAF collected. You can handle the GST and TAF in one of three ways:

- As a disbursement on your bill, where both the TAF and the GST are charged to the client.
- Included in your fee. The TAF is still charged to the client, but GST will apply as it is now part of your fee.
- You can pay the TAF, but then you must still remit the GST to the Law Society.

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The first two methods, where GST is collected from the client, allow you an offset.

Remittance

The time for remittance is fixed for all lawyers. Diarize the due dates, as the Law Society may not send you a reminder and ultimately you are responsible for ensuring timely remittance. The only time you do not need to file a return is if you did not receive any trust funds that were subject to TAF in the quarter.

Period Covered	**Remittance Due**
October 1 to December 31	January 30
January 1 to March 31	April 30
April 1 to June 30	July 30
July 1 to September 30	October 30

Remittance from General Account

You should handle the TAF the same way you handle GST. In other words, the TAF is not remitted out of the trust account; it should be transferred to your general account, along with the fees associated with the client matter if they have been properly billed. TAF is paid from your general account. If you have not yet billed your client, you cannot transfer TAF, yet still you must pay the TAF when due upon payment into trust. This is another incentive to bill regularly.

If you are late with your remittance, a single 5% charge is applied to the entire value of the quarterly payment due. Your remittance will be considered late if it is neither postmarked by the due date, nor delivered to the Law Society offices by the due date. As with any breach of the Rules, you may be subject to disciplinary action.

Important Tips about the TAF

TAF does not apply if:

- The money paid into trust is solely for fees; or
- The money paid into trust is held as a fee retainer.

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TAF does apply if:

- Funds are paid into trust for a mixed purpose, such as partly for fees and partly for a fixed purpose; or
- Funds are paid into trust for a non-fee or non-retainer purpose.

Triggering Event: TAF is triggered on receipt of funds into trust.

How often do you charge TAF? The $15 TAF is charged once per distinct client transaction, not once per client.

Three ways to charge TAF:

- As a disbursement: the client pays the TAF as well as GST on the TAF;
- As a fee: the client pays the TAF and the TAF now attracts GST; and
- The lawyer pays the TAF and remits the GST to the Law Society.

When do you remit TAF? See above, under the heading *Remittance*, for the Law Society's fixed schedule.

Procedural issues in remitting TAF:

- TAF is not remitted directly from Trust, it must first be transferred to the general account.
- You cannot transfer TAF without first billing your client. However, you will still have an obligation to pay TAF when due.

TAF and separate trust accounts:

- TAF is attracted on the initial deposit into either the pooled trust account or separate trust account.
- A subsequent transfer between trust accounts, so long as it is for the same matter, does not attract another fee.

For more information about the TAF, see the Trust Administration Fee materials on the Law Society website.

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3.3 - Unclaimed Trust Funds Application

If you have been holding client trust funds on behalf of a person you have been unable to locate for two years, you may apply to the Executive Director to pay those funds to the Law Society under the provisions of Rule 3-89 and section 34 of the *Legal Profession Act*.

The Application to Pay Unclaimed Trust Funds requires you to specify the efforts you have made to locate the person and any unfulfilled undertakings in relation to the funds. For the purposes of the application, a "person" is defined by the *Interpretation Act* and includes a corporation, partnership or party, and the personal or other legal representatives of a person.

Upon acceptance of your application, you will be notified to submit the payment of the unclaimed trust funds to the Law Society. Once this payment is made, your liability to pay the money to the person on whose behalf it was held, or to that person's legal representative, is extinguished. The Law Society must maintain the money as required by the *Act*.

For more information, see the Unclaimed Trust Money area of the Law Society's website.

3.4 - Compliance Audits

In addition to the annual trust report, the Trust Assurance department also conducts Compliance Audits. All law firms, regardless of whether trust funds are held, will be subject to a Law Society compliance audit to ensure their books, records and accounts comply with the requirements of the *Legal Profession Act*, the Law Society Rules and the *BC Code*.

Audits are selected at random unless prompted by an indicator such as: failure to file a trust report, information on a trust report that indicates non-compliance with the trust accounting rules and procedures, referral from other departments of the Law Society, inadequacies that were identified during a previous compliance audit, or a compliance level that raises concerns about the lawyer’s trust accounting practices.

See the Trust Assurance Program area of the Law Society website for further information including Compliance Audits and Trust Reports (such as the *Self Report Filing Instructions*).

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3 - References & Resources

Statutes

- *Legal Profession Act*
  - section 34 (Unclaimed trust money)
  - section 62 (Trust account — interest rate and related matters)
- *Canada Deposit Insurance Corporation Act*

Law Society of BC materials

- Law Society Rules
  - Part 2 - Membership and Authority to Practise Law
    - Division 3 - Fees and Assessments
      - Rules 2-109 to 2-113
      - Rule 2-110 (Trust administration fee)
  - Part 3 - Protection of the Public
    - Division 7 - Trust Accounts and Other Client Property
      - Rule 3-54 (Personal responsibility)
      - Rule 3-79 (Trust report)
      - Rule 3-80.1 (Late filing of trust report)
      - Rule 3-82 (Accountant's report)
    - Division 8 - Unclaimed Trust Money
      - Rule 3-89 (Payment of unclaimed trust money to the Society)
- Code of Professional Conduct of British Columbia (*BC Code*)
- Trust Assurance Program area of the Law Society website has further information including:
  - Compliance Audits
  - Trust Reports (such as the *Self Report Filing Instructions*)
  - Trust Administration Fee
- Unclaimed Trust Money area of the Law Society's website, including the Application to Pay Unclaimed Trust Funds

Appendices

- Appendix A: Common Exceptions Reported

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Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Registration and Licensee Services: registration@lsbc.org
- Trust Assurance: trustaccounting@lsbc.org

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MODULE 4 – TAXATION & EMPLOYEE DEDUCTIONS

4 - Introduction to the Taxation & Employee Deductions Module

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IMPORTANT - PLEASE READ

As of October 24, 2022, the BC Registries and Online Services OneStop was deactivated and replaced with the new BC Business Registry application. For more information, visit BC Registries and Online Services.

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***4 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2017.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

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Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

4.1 - Obtaining a Business Number

IMPORTANT - PLEASE READ

As of October 24, 2022, the BC Registries and Online Services OneStop was deactivated and replaced with the new BC Business Registry application. For more information, visit BC Registries and Online Services.

At this time, these learning materials have not been updated to reflect the changes associated with these amendments.

You will need to obtain a Business Number (BN) when you open your new law office.

A BN is assigned the first time you register with any participating program in British Columbia.

The participating programs that most BC law offices will register with are:

- Canada Revenue Agency (CRA) for:
  - payroll account for employee deductions for income tax, CPP and EI;
  - Goods and Services Tax (GST); and
  - corporate income tax account if you practise through a law corporation.
- WorkSafeBC

The first program that you register with will provide you with a BN. The BN is a unique government numbering system that identifies your business and the various accounts you maintain.

The BN consists of:

- a nine-digit registration number that identifies your business. This number will stay the same for all the programs with which you register;
- two letters for the type of account. For example, the letters RP will be used when you register for the CRA payroll accounts, and RT when you register with GST; and

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- four numbers for the specific account reference. For example, if you have two payroll accounts, the BNs will end with 0001 and 0002.

For example, a BN for a firm that is registered once with GST would be 123456789 RT 0001. The same firm that is registered twice for Federal payroll deductions would have two accounts: 123456789 RP 0001 and 123456789 RP 0002.

The Canada Revenue Agency website contains useful information on many income tax, GST, CPP and EI topics, as well as details on who must register and how to register.

This module does not address any of the tax issues related to the individual lawyer's personal income or law corporation income.

See the Law Society's Practice Checklists Manual for the ***Incorporation — Business Corporations Act Procedure*** checklist on incorporating your legal practice to ensure it is recognized for tax purposes.

The WorkSafeBC website has useful information on the WorkSafeBC insurance program and how to register.

4.2 - How Federal Payroll Deductions Work

4.2-1 - Payroll Steps

These are the steps to follow to set up your payroll and to understand how federal payroll deductions work:

- Determine whether you are an **employer**.
- If so, **open a payroll account**.
- **Hire your employees**.
- Calculate the **CPP contributions**, **EI premiums**, and **income tax deductions** based on what you pay your employees. You will also calculate **your share** of the CPP and EI.
- **Remit** the deductions along with your share of the CPP and EI.
- Report the income and deductions on the appropriate **information return**.
- Keep proper **records**.

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4.2-2 - Opening a Payroll Account

If you already have a nine-digit BN, you only need to add a payroll account to your existing BN.

If you do not have a BN, register for a BN and a Canada Revenue Agency My Account. You can register for a BN by phone, mail, fax or online through BC Registries and Online Services, where you can:

- request a business name, register or incorporate a business and maintain a business;
- register for all the CRA programs including payroll deductions, GST, and, if you are practising through a law corporation, corporate income tax accounts; and
- register for the British Columbia WorkSafeBC account.

Register for your payroll account **before the first remittance due date**. In most cases the first remittance due date will be the 15th day of the month following the month in which you began withholding deductions from an employee's pay. For example, if you hire your first employee on March 16 and pay on the 15th and the 30th of every month, the first pay is on March 30 Therefore, your first remittance is due April 15. You should open your payroll account prior to April 15.

If you don't open your account before the due date, you are still responsible to calculate the deductions and remit. There is a penalty for failure to deduct and remit amounts.

4.2-3 - Nature of the Employment Relationship

It is essential that you determine whether you are an employer because, if you are not, payroll deductions will ***not*** apply to you.

An employer/employee relationship usually exists if you have the right to control and direct the person who performs services for you. It is your right to exercise ***control*** that is relevant, not whether you actually exercise your right. In general, those who pay wages or salaries to others for performance of services are considered to be employers by CRA.

The first step is to determine whether the relationship you have with those who work for you is a contract of employment, as opposed to an independent service contract. Determining an employment relationship is essentially a question of fact. The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 stated at 47:

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> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

No single factor is determinative. If you have any doubts about whether an employer/employee relationship exists, you can request a ruling from CRA.

4.3 - Federal Payroll Accounts

4.3-1 - Hiring an Employee

When you hire an employee, you must:

- get their social insurance number; and
- have them complete a Form TD1 Personal Tax Credits Return.

You will use the TD1 form to determine the amount of federal and provincial tax to be deducted from an individual's employment income. You keep the TD1 and are not required to send it to CRA.

All individuals who have a new employer must complete the form.

If the employee claims more than the basic personal amount, they must also complete the British Columbia TD1.

The form does not have to be completed every year, but if there is a change in entitlement to either the federal or provincial credit entitlement, complete a new form within seven days of the change.

Even if you cannot get a social insurance number or TD1, you are still responsible for calculating payroll deductions once the employee starts to work for you, allowing the basic personal amount only.

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The Canada Revenue Agency website has information about all the forms and the tax tables needed to complete them.

4.3-2 - Calculating Deductions & Contributions

Calculate the deductions based on the amounts you pay your employees.

Take deductions for:

- income tax
- CPP contributions
- EI premiums

In addition to the deductions taken from an employee's remuneration, you must calculate and set aside your share of CPP and EI. No employer contribution is required for income tax.

You hold the amounts deducted from your employees' remuneration, plus your employer contribution to CPP and EI, in trust for the Receiver General.

There are commercial payroll businesses that will calculate the proper deductions and contributions as part of their services.

Employees who are paid commissions and claim expenses may choose to complete a Form TD1X.

The Canada Revenue Agency website includes the following:

- Payroll Deductions Online Calculator
- information on requesting a ruling as to the status of a worker, see the "Employee or Self-employed?" page
- Business Registration Online - Register

For an expanded discussion of this topic see Vern Krishna, *The Fundamentals of Canadian Income Tax*, 9th ed.

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4.3-3 - Income Tax Deductions

Income tax must be deducted from your employees' pay regardless of the age of the employee.

Types of remuneration from which you must withhold income tax at source are:

- salary and wages, including retroactive payments and wages in lieu of termination notice;
- payments under supplementary unemployment benefit plans such as for maternity and paternity top-up;
- fees and commissions;
- special payments such as bonuses and retroactive pay;
- retiring allowances; and
- benefits and allowances for some items such as medical, educational, automobiles, and lodging.

To help you determine how much to deduct, the employee must complete one of the personal tax credit returns, which is most often the TD1 form outlined above. Once completed, the TD1 will give the employee a claim amount. You use this amount to determine the claim code and calculate the income tax deduction by using either a manual calculation method or the payroll deduction tables.

The payroll deduction tables are updated as tax rates change and there are tables for the most common pay periods, including weekly, biweekly, semi-monthly, and monthly. Supplementary payroll deduction tables are available on the CRA website for hourly, daily or 10, 13 or 22 pay periods a year (see below).

The payroll deduction tables have information to help you calculate the amount you must withhold for federal and provincial income tax.

Determining which benefits and allowances are taxable can be difficult.

For more information, see the following sections of the CRA website:

- Learn about taxable benefits
- Methods of calculating deductions - CPP, EI and income tax
- T4008 Payroll Deductions Supplementary Tables

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4.3-4 - CPP Deductions & Contributions

You must deduct CPP contributions from an employee's pay if that employee is:

- 18 years or older, but younger than 70;
- is in pensionable employment during the year;
- is not considered to be disabled under CPP; and
- does not receive a CPP retirement or disability pension.

You also must contribute the same amount of CPP that is deducted from your employee. For example:

CPP contributions deducted from employee in the month	$240.40
Your share of the CPP contributions	$240.40
Total amount you remit for CPP	**$480.80**

You generally deduct CPP contributions from the following amounts:

- salary, wages, commissions, including advances and wages in lieu of termination;
- any share of profits or other incentive payments; and
- remuneration received while retired, on vacation, sabbatical, sick leave, or any supplementary unemployment benefit plans such as maternity and paternity top-up.

Each year the government sets a maximum pensionable earning amount and a rate to calculate the CPP deduction. You can also use the payroll deduction tables to calculate the CPP deduction.

For more information, see the CRA website for the T4001 Employers' Guide - Payroll Deductions and Remittances.

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4.3-5 - EI Premiums

You must deduct EI premiums from your employees' **insurable earnings** on every dollar until you reach the **yearly maximum insurable earnings** or the **maximum employee premium for the year**. There is no age limit for deducting EI premiums.

You also must contribute 1.4 times the EI premium withheld for each employee. For example:

EI premiums deducted from employee in the month	$400
Your share of EI ($400 x 1.4 times)	$560
Total amount you remit for EI premiums	**$960**

You may qualify to reduce your 1.4 times employer contribution if you provide your employees with a short-term disability plan.[1]

Certain types of employment **may not be insurable**, for example employment situations where you and your employee do not deal at arm's length, including those to whom you are related by blood, marriage, common-law or adoption. This is so if you practise as a law corporation, so long as the employee is related to the person who controls the corporation. Whether you deal at arm's length with your employee is a question of fact, and that includes determining whether you are related to the employee.

The courts have generally used the following criteria to determine whether one is not dealing at arm's length with another:

- Is there a common mind which directs the bargaining for both parties to a transaction?
- Are the parties acting in concert without separate interests?

[1] The annual maximum insurable earnings apply to each job the employee holds with different employers. Therefore, if an employee leaves one employer and starts a new job with a different employer, the second employer must deduct EI premiums without factoring in the amount the previous employer paid, even if the employee has paid the maximum premium at the first job. Any overpayments will be refunded to the employee when they file their income tax, but the employer does not get a refund.

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- Was there de facto control?

An employee who does not deal at arm's length, including one that is related, can be insurable:

- if it is reasonable to conclude that you would have hired a person who deals at arm's length under a similar agreement. If you are unsure whether you should deduct EI premiums, you can request a ruling up until June 30 of the year following the year of employment;
- when a corporation employs a person who controls more than 40% of the corporation;
- when the employment is an exchange of work or services; or
- when the employee is a non-resident person, if the laws of that person's country require someone to pay employment insurance premiums in that country.

Most earnings, benefits, and allowances attract EI premiums, with certain exceptions, including:

- contributions to an employees' group RRSP if the employees are not permitted to withdraw until they retire or cease employment;
- a retiring allowance; and
- certain automobile and travel expense allowances.

You can use the payroll deduction tables to calculate the EI deduction.

See the CRA's EI Premium Reduction Program: For employers guide for information about the types of plans that qualify.

You must register with the EI Premium Reduction Program and submit a copy of your short-term plan.

4.3-6 - Remitting Deductions & Contributions

You must remit the CPP contributions, EI premiums, and income tax deducted from your employees' pay along with your share of the CPP and EI on or before your remittance due dates.

The due dates will vary depending on the type of remitter that you are.

See the How and when to pay (remit) source deductions area of the CRA website for more information about the types of remitters and the due dates.

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Generally, if you are a new or a regular remitter, CRA must receive your remittance by the 15th day of the month after the month in which you made the deductions.

If you are eligible to be a quarterly remitter, CRA must receive your deductions by the 15th day of the month immediately following the end of each quarter. The quarters end March 31, June 30, September 30, and December 31.

The deductions and contributions are remitted along with your remittance form.

If you are a new employer or have never remitted contributions and deductions before, you must apply for the BN if you don't already have one and register for a payroll deduction account. New employers are considered to be regular remitters.

When you make your first payment, send a cheque or money order, payable to the Receiver General to any tax centre. Your BN should be on the back of the cheque or money order. Your first remittance should be accompanied with a letter stating:

- you are a new remitter;
- the period your remittance covers;
- your complete employer name, address, and business phone number; and
- your BN.

After your first remittance, CRA will send you a remittance form in the mail for your next remittance and will continue to send you one for each remittance period. If you do not receive the remittance form in the mail, you must still make the remittance on time. You should accompany the remittance with a letter that sets out the information described above and indicate that you did not receive a remittance form.

All late remittances are subject to penalty. Repeated failures to remit will lead to increased penalties.

Keep copies of all your remittance forms. CRA also provides for electronic remittance.

4.4 - Information Returns & Record-keeping

4.4-1 - Information Returns

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Your employer information return consists of both a summary and a slip. Depending on the type of income you pay to your employees, you may have to file one or more types of returns. However, the most common information return is the T4.

Your summary and copies of all the individual slips are due to CRA by the last day of February following the calendar year to which they apply. The summary shows all the amounts you paid to each employee, deductions made and employer contributions. The summary also requires you to calculate the proper amount of deductions and contributions. Remit any shortfall in the amount paid when you file the information return. Attach to your summary copies of all T4 slips for each employee. Depending on the number of employees you have, you may not be able to paper file, and may be required to file online.

The T4 slip also must be given to each employee before the last day of February following the calendar year to which they apply. You can deliver the slip by mail, hand, or email. Failure to file on time may result in a penalty.

Keep copies of all information returns, including copies of all individual slips.

For more information, see the following areas of the CRA website:

- Employers' Guide - Filing the T4 Slip and Summary Form
- Send your payroll information returns

4.4-2 - Keeping Records

You need to keep all the records to support your income tax return when filed. The records must allow you to determine how much tax you owe, and the amounts you have collected, withheld, deducted, and remitted. You must also maintain employee records that include summaries of wages paid and remittances made to CRA, as well as copies of CRA information returns and all provincial payments, such as WCB. It is beyond the scope of this module to detail all the other records that you must maintain.

For CRA purposes, all records must be kept in Canada and must be available on request. When you register for your BN, you will be asked for the address where your business records are to be kept. You must keep all your business records for six years from the end of the last tax year to which they apply. If you become embroiled in an objection or an appeal, be sure to keep all your records until the process is finished.

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See ***Module 8: File Retention & Disposal*** for additional requirements of the Law Society as to the location of law office records and the period of file retention.

4.5 - Worker's Compensation

4.5-1 - Registration

IMPORTANT - PLEASE READ

As of October 24, 2022, the BC Registries and Online Services OneStop was deactivated and replaced with the new BC Business Registry application. For more information, visit BC Registries and Online Services.

All law firms that employ any **worker**, which includes all full-time, part-time and casual associate lawyers, articled students, paralegals, legal assistants, and other support staff, must register with WorkSafeBC as an **employer**. All workers, including children of an employer, are automatically covered under the *Workers Compensation Act*, and cannot register independently for WorkSafeBC insurance.

If you are practising as an unincorporated sole proprietor or partner, or as an independent contractor, you are not considered to be a worker of the firm for WorkSafeBC purposes, but you may voluntarily apply for optional personal protection. If you are incorporated, however, you are considered to be a worker and your law corporation is considered to be an employer. Accordingly, your law corporation must register. A 1995 decision of the Workers' Compensation Board Appeal Division denied the Law Society's argument that incorporated sole practitioners and partners should not be subject to mandatory WCB coverage (11 WCR 327, 95-0320).

You may register by phone, online, or you may use an Employer's Registration Application available at WCB Employer Service Centres. To register you will need the full legal name, birth date, and contact information of the proprietor, partners or active shareholders. If the employer is a limited company, you need the incorporation number, date and jurisdiction of incorporation, and an estimate of payroll. The online registration process takes about 20 minutes to complete. Once registration is complete, you will be assigned a classification and an assessment rate that you will use to calculate how much is due to WorkSafeBC.

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See the Register Your Business/Firm with WorkSafeBC section of the WorkSafeBC website for the online registration.

The same process can be accessed through the Business Registration On-Line service described earlier in this module, in section ***4.2-2 - Opening a Payroll Account***.

4.5-2 - Benefits of Coverage

As an employer, you are generally protected from a successful suit for the costs of work-related injury or disease. A worker whose claim is accepted will receive benefits for:

- wage loss: generally, 90% of the worker's net annual earnings (estimated CPP, EI, and income tax deductions are taken from the annual earnings) up to an annual limit and a weekly minimum payment for very low salaried employees;
- health benefits: coverage for medical services and supplies required for the worker to recover; and
- permanent disability and death benefits.

4.5-3 - Employer's Obligations

WorkSafeBC sets a rate assessment each year for you, calculated as an amount per hundred dollars of payroll. Your payroll is subject to audit by WorkSafeBC. Once your assessment rate is set, WorkSafeBC will advise you of how much is due and when it is due. Your assessment rate will be set each year and your premiums may be raised or lowered depending on your "experience rated assessment." High-risk, high-claim employers pay higher assessments, as the program is meant to be an employer-funded system.

Your obligations include reporting your payroll and making your assessed payments. You can report your payroll, make your assessed payments and manage your account online.

See the Reporting payroll & pay premiums section of the WorkSafeBC website, which includes an account management feature, which allows you to customize your payments.

If your assessment is less than $500, you may only be required to pay annually. Larger assessments must be paid quarterly. You will be advised once you are registered about when to make your WCB payments.

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Failure to remit by the applicable due date, even if the remittance is nil is subject to penalty.

In addition to financial obligations, employers are required to:

- report and administer all compensation claims;
- provide education to employees on safety in the workplace;
- implement procedures for responding to reports or incidents of bullying and harassment; and
- comply with the Occupational First Aid and other safety requirements as regulated under the Act. These requirements differ according to the number of employees in the firm.

The *Occupational Health and Safety Regulation* is on the WorkSafeBC website.

4 - References & Resources

Statutes

- *Workers Compensation Act*
  - *Occupational Health and Safety Regulation*

Law Society of BC materials

- See the Law Society's Practice Checklists Manual for the *Incorporation — Business Corporations Act Procedure* checklist on incorporating your legal practice to ensure it is recognized for tax purposes.

External resources

As of October 24, 2022, the BC Registries and Online Services OneStop was deactivated and replaced with the new BC Business Registry application. For more information, visit BC Registries and Online Services.

Canada Revenue Agency

- The Canada Revenue Agency website contains useful information on many income tax, GST, CPP and EI topics, as well as details on who must register and how to register.
  - Business Registration Online - Register
  - EI Premium Reduction Program: For employers

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  - "Employee or Self-employed?" (information on requesting a ruling as to the status of a worker)
  - Employers' Guide - Filing the T4 Slip and Summary Form
  - How and when to pay (remit) source deductions
  - Learn about taxable benefits
  - Methods of calculating deductions - CPP, EI and income tax
  - Payroll Deductions Online Calculator
  - Send your payroll information returns
  - T4008 Payroll Deductions Supplementary Tables
  - T4001 Employers' Guide - Payroll Deductions and Remittances

WorkSafe BC

- The WorkSafeBC website has useful information on the WorkSafeBC insurance program and how to register.
  - Register Your Business/Firm with WorkSafeBC
  - Reporting payroll & pay premiums
- Vern Krishna, *the Fundamentals of Canadian Income Tax*, 9th ed.

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MODULE 5 – PROVINCIAL SALES TAX (PST)

5 - Introduction to the Provincial Sales Tax (PST) Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***5 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2017.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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5.1 - Registering for PST

The PST/GST taxation system applies in British Columbia.

If you are a regular supplier of legal services, you must register for PST in addition to registering for GST.

If you are a member of a law firm, then the law firm or partnership (as opposed to individual law corporations or partners) are considered to be providing the legal services. It is the law firm or partnership that registers for PST.

You can register online through eTaxBC, at any Service BC Centre by using their computers, or at the Ministry of Finance office in Victoria.

For further information, see the following BC government's Provincial Sales Tax (PST) Bulletin:

- Bulletin PST 001, Registering to Collect PST (*Provincial Sales Tax Act*)

5.2 - Collecting & Remitting PST

All collectors, including out of province collectors, must charge, collect and remit PST on legal services in BC.

You must report and remit to the Ministry any PST you charge, whether or not you have actually collected it from your customer. You must remit all PST charged within a reporting period no later than the last day of the month following the reporting period. For example, if you are reporting for a period ending June 30, you must file your return and remit the PST charged in that period no later than July 31.

Your reporting frequency will be determined at the time of registration based on how much PST you are estimated to collect per reporting period on sales and leases in BC. Reporting periods may be monthly, quarterly, semi-annual or annual.

If you've signed up for an eTaxBC account, you'll receive an email from the ministry when your returns are ready instead of a paper return. You can log in to eTaxBC to complete the report and pay process.

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If you report and pay tax in person or by mail, you will receive a paper return from the ministry when it's time to file and pay your taxes. If you don't receive your return in time, you can complete a blank form.

You may file your tax returns and make payments online, through a participating financial institution, by mail or in person.

You must file a tax return even if you have no PST to report during the reporting period. In such a case, you would enter "NIL" in the appropriate space on the form.

You may file the tax return and make payments through the following methods:

- **Online:** You are be able to file your PST returns including NIL returns, make payments, manage your accounts, and more through eTaxBC.
- **Internet Banking:** Check with your financial institution to see if you can file your tax returns and make payments online through online banking or through their payment and filing service.
- **Electronic Funds Transfer** through your financial institution.
- **Mail:** Send the remittance coupon, your payment and any required documentation to: The Director, Provincial Sales Tax, PO Box 9443 Stn Prov Govt, Victoria BC V8W 9W7
- **In person:** You can file and pay PST in person at most financial institutions, or your local Service BC Centre.

Do not remit PST out of the firm's trust account. It should be transferred to your general account along with the fees associated with the client matter if they have been properly billed. Then pay the PST from your general account.

Note that small sellers are exempt from filing PST. A small seller would be someone who conducts less than $10,000 in gross business revenue in the prior 12 months. However, the small seller PST exemption is not available to anyone who conducts business from a commercial or leased premise or designated space in their home set aside for the purpose of that business.

For further information, see the following BC government's Provincial Sales Tax (PST) Bulletins:

- Bulletin PST 002, When to Charge and Collect PST
- Bulletin PST 003, Small Sellers
- Bulletin PST 106, Legal Services

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5.3 - PST & Legal Fees

You are required to charge and collect the 7% PST on all fees charged for legal services except for in exceptional circumstances such as those set out below.

For more information, see the BC government's Provincial Sales Tax (PST) Bulletin PST 106, Legal Services

Legal Aid

Legal services provided to an individual are exempt from PST if they are at least partly paid for by the Legal Services Society or by a funded agency within the meaning of the *Legal Services Society Act*.

Legal Services Provided Under Contract

Legal services are exempt from PST if the legal services are provided to a law firm or notary firm if all the following criteria are met:

1. The legal services are provided by:
   (a) an individual who is employed solely by the law firm or notary firm under a contract for services or as an associate, but who is not an employee for the purposes of the *Income Tax Act* (Canada), or
   (b) a corporation that is providing services solely to the law firm or notary firm under a contract for services, and
2. The purchase price of the legal services to the law firm or notary firm is recovered directly in its sale price of the legal services to their client, in respect of whom the legal services are provided.

Legal Services Provided to First Nations

This topic is complex and beyond the purview of this course. Independent research is required.

For more information, see Bulletin PST 314, Exemptions for First Nations and PST on sales to First Nations - Province of British Columbia.

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Legal Services Provided to a Related Corporation

Corporations are exempt from PST in relation to legal services provided to that corporation by an employee of a related corporation.

For more information, see Bulletin PST 210, Related Party Asset Transfers.

Legal Services Provided to Members of the Diplomatic and Consular Corps

Legal services purchased by certain members of the diplomatic and consular corps are exempt from PST if the purchaser holds a valid diplomatic or consular identity card issued by Global Affairs Canada.

For more information, see Ministry of Finance Tax Bulletin: Exemption for Members of the Diplomatic and Consular Corps

Legal Services Provided to Clients not Resident in BC

If you provide legal services in British Columbia to a client who neither resides nor carries on business in British Columbia, then **you may still need to charge PST if the services relate to British Columbia**. The most common examples would include legal services that relate to real property located in British Columbia or legal services related to litigation commenced in British Columbia. There must be a connection to British Columbia for PST to apply.

5.4 - PST & Disbursements

The question, when it comes to disbursements, is whether the disbursement becomes part of the purchase price of legal services. If it is, PST is charged, if it isn't, no PST is charged.

A disbursement can be a request for reimbursement of an out-of-pocket expense that was paid by the lawyer on behalf of a client as a result of billing from a third party. In these cases, they are not part of the purchase price and PST is not charged. PST has already been charged by the third party, and if you as the lawyer charge PST on the total fee, there would be double taxation. Provincial PST Bulletin 106 on Legal Services says:

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> Out of pocket expenses (e.g., airfare and hotel costs) incurred on behalf of a particular client and billed to that client for the precise recovery of the actual cost of the expenses do not form the purchase price of legal service.

For example, if clinical records cost $100, and you're charged $107, the cost you would pass onto your client is $107, rather than $114.49.

Conversely, if the disbursement is NOT a recovery of an out-of-pocket expense incurred as a result of billing from a third party, then it DOES become part of the purchase price of legal services and is subject to PST. Some examples are paralegal time, travel time, in-house photocopying, faxes and telephone calls.

When it comes to faxing, printing and copying documents, there is an exception. If the fees charged for these services reasonably reflect the cost of these services, then they are PST exempt. If there is a "mark-up", they cease to be reasonable costs, so PST is chargeable.

The following illustrates one acceptable example of how to show PST and GST on an account for fees and disbursements. Note that PST is not charged on GST, and vice versa.

To our fee for services rendered in connection with... (including in-house staff time)	$5,000.00
Goods and Services Tax (5%)	*$250.00*
Provincial Sales Tax (7%)	*$350.00*
GST Taxable Disbursements	
Mileage	$20.00
Photocopies (deemed reasonable; no markup)	$50.00
Hotel (one night stay)	$141.90
Courier charges	$50.00
Sub-total	$261.90
Goods and Services Tax (5%)	*$13.10*
Provincial Sales Tax (7%)	*$1.40*
GST Exempt Disbursements	
Court Registry Fees	$100.00
TOTAL	**$5,976.40**
GST Registration # 123456789 RT 0001	

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Of the four items listed under taxable disbursements, the only one that has PST charged to it by the lawyer is the Mileage. The courier and hotel charges are a recuperation of out-of-pocket expenses, so there is no PST attracted by it, although PST did apply to the hotel charge when the lawyer paid the hotel for a room. The photocopies, as noted, are deemed reasonable with no markup, so no PST is charged on them either. The mileage isn't a recuperation of out-of-pocket expenses, so it constitutes part of the purchase price of legal services, so PST is charged by the lawyer. The lawyer would have paid $2.50 in GST on the courier charges and PST is not charged on courier fees. You do not show the courier charge as $52.50, including the GST. Rather, you show the courier charge as $50.00, net of GST allowing the lawyer to claim the $2.50 as a GST input tax credit. The lawyer collects the $2.50 from the client by showing the courier charge as disbursement subject to GST and charging 5% on that disbursement.

Here is another example of how you would treat an out-of-pocket expense.

In this example, the room charge was $129.

In addition, the lawyer paid to the hotel: $6.45 in GST, $10.32 in PST, and $2.58 in municipal room tax, for a total of $148.35. You do not show the $6.45 in GST as part of the disbursement itself. Rather you show the hotel charges net of GST ($148.35 minus $6.45 equals $141.90), allowing you to claim the $6.45 input tax credit.

The PST and municipal room tax are included in the $141.90 claimed for reimbursement, because the lawyer wishes to receive reimbursement from the client for these two sales taxes; unlike for GST, tax credits are not available for PST or municipal taxes.

You then collect $7.10 from your client in GST, by including the $141.90 (inclusive of PST and municipal tax) in the total disbursements subject to GST.

This seems like an odd tax result, because in effect, the lawyer is charging GST on PST and municipal tax embedded in the hotel charges. The lawyer paid only $6.45 in GST to the hotel, but the lawyer is charging the client $7.10 on essentially the same transaction.

However, CRA takes the position that these two sales taxes lose their personality as sales taxes when they form part of a lawyer's charges for legal services, and hence GST is calculated as described in this example.

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5 - References & Resources

Statutes

- *Income Tax Act* (Canada)
- *Indian Act* (Canada)
- *Legal Services Society Act*
- *Provincial Sales Tax Act*, SBC 2012, c 35

External resources

- Register for PST online through eTaxBC, at any Service BC Centre by using their computers, or at the Ministry of Finance office in Victoria.
- Ministry of Finance Tax Bulletin: Exemption for Members of the Diplomatic and Consular Corps

Provincial Sales (PST) Bulletins

- Bulletin PST 001, Registering to Collect PST
- Bulletin PST 002, When to Charge and Collect PST
- Bulletin PST 003, Small Sellers
- Bulletin PST 106, Legal Services
- Bulletin PST 210, Related Party Asset Transfers
- Bulletin PST 314, Exemptions for First Nations

Ministry of Finance Tax Bulletin

- Exemption for Members of the Diplomatic and Consular Corps

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MODULE 6 – GOODS & SERVICES TAX (GST)

6 - Introduction to the Goods & Services Tax (GST) Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***6 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made in late 2023, this module was last reviewed *en masse* for update in 2017.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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6.1 - Registering for GST

The PST/GST taxation system applies in British Columbia.

When your total taxable revenue before expenses from all your businesses exceeds the small supplier limit of $30,000 in a single quarter or twelve-month period, you are no longer a small supplier and must register for GST using the same Business Number you have for the other registrations discussed in ***Module 4: Taxation & Employee Deductions***.

If you exceed the threshold amount in one calendar quarter, you are considered an effective GST registrant from the day you make the supply that causes you to exceed the threshold. You also must collect GST on that supply. You also have 29 days from that day to apply for GST registration.

For example, assume in the calendar quarter July to September you have charged $28,000 for legal services, and then on September 29 you send out a further bill that includes a $5,000 fee for legal services. You must charge GST on the whole of that $5,000 fee. You have 29 days from the day you sent that bill to actually register with GST. In other words, you are an effective registrant from September 29 and must in fact register by October 27.

If you do not exceed the threshold amount in one quarter, but you do so over four consecutive quarters, you will be considered a small supplier for the four quarters and one month following those quarters. You are considered an effective registrant on the first day you supply services after you cease to be a small supplier. It is on that day that you begin to charge GST. You will have a further 29 days from the day you are deemed to be an effective registrant to register for GST.

For example, assume you open your practice on July 1. In the year from July to the following June, you have charged $28,000 for legal services. On June 29 you send out a further $5,000 bill for legal services. You do not charge GST on that $5,000 fee. You would have a further month from the end of the four consecutive quarters to begin charging GST, so during the month of the following July, you do not charge GST either, unless in that month of July you have an exceptional billing period and can see that you will be supplying legal services in excess of $30,000 in that quarter.

You would begin to charge GST on all legal services beginning August 1, and you have 29 days from the day you make your first supply after August 1 to actually register with GST. In other

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words, assuming you supply legal services on August 1, you are an effective registrant from August 1 and must in fact register by August 29.

If you are a sole practitioner or you practice through a personal law corporation, you or your corporation must register once the threshold is passed.

If you are a partner in a firm, do not register individually as the partnership is the entity carrying on the commercial activity for GST purposes and so the partnership must register. For the purposes of calculating the $30,000 small supplier threshold for partnerships, the total taxable supply of legal services provided by the entire partnership is used.

If you are not registered for GST, you may not charge GST to your clients, nor can you claim the GST input tax credit paid for goods and services you have purchased for your practice. But if you voluntarily register, even though you are not yet legally required to do so as a small supplier, you do have to charge and remit GST, and you can claim input tax credits.

6.2 - Collecting & Remitting GST

When you register you will be assigned a GST reporting period, which will be monthly, quarterly, or annually depending upon your level of billings. You are entitled to remit more frequently than your assigned reporting period, which many lawyers do as it entitles them to claim input tax credits more frequently.

The assigned and optional reporting periods are:

Annual Taxable Supplies	**Assigned Reporting Period**	**Optional Reporting Period**
$1,500,000 or less	Annual	Monthly or Quarterly
More than $1,500,000 and up to $6,000,000	Quarterly	Monthly
More than $6,000,000	Monthly	NIL

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- **The calendar quarters are the three-month periods ending March 31, June 30, September 30 and December 31.** If your reporting period is monthly or quarterly, you must file your GST return and remit any amount owing not later than one month after the end of the reporting period.
- **If your reporting period is annual, you must file your return and remit any amount owing not later than three months after the end of your fiscal year.** The fiscal year is the financial year of your business. Your fiscal year for GST purposes is generally the same as your taxation year for income purposes. If you are practising as a corporation, you can elect either to use your taxation year or a calendar year for GST purposes.
- **If you are an annual filer who is required to make quarterly installments, calculated on the previous year's net tax, they are due no later than one month after the end of the fiscal quarter**.
- **You must file a GST return every reporting period, even if you have no GST to remit and are not expecting a refund.** Even if you have no business transactions in the reporting period, you still have to file. You will be charged a penalty for failure to file on time, and you may experience delays in receiving future refunds.
- **If you are expecting a refund or rebate after filing a GST return, you will not receive it until you have filed all returns for all of your applicable business program accounts with CRA, including income tax accounts.** If you are expecting refund and you owe amounts under any of your CRA GST or income tax accounts the refund will be used automatically to offset the other account debts.
- **For any given reporting period, the amount of tax collected is calculated as the total of all tax on services that have been paid for or on which payment is due, whichever is the earlier date.** Therefore, if you have billed your client but not yet been paid, the GST is deemed to have been collected by you within that reporting period for the purposes of calculating the net GST to be remitted.
- **The amounts you have collected for GST are deemed to be held in trust for the federal government.** However, you have authority to deduct the amount of your input tax credits from the GST trust funds, and it is only the net tax that must be remitted at the appropriate interval.
- **Do not remit GST out of your trust account.** It should be transferred to your general account, along with the fees associated with the client matter if they have been properly billed. Then pay GST from your general account.

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6.3 - GST & Legal Fees

You must charge and collect the 5% GST on all legal fees, except for the circumstances set out below.

Generally, if you do not intend to charge GST for legal services, you will need some sort of documentation from the recipient to support the exemption (e.g., to establish they are indeed non-resident) in case of an audit.

Exempt supplies, which includes legal services that are wholly provided outside Canada

A supply is deemed to be made in Canada if the service is performed in whole or in part in Canada.

You are not entitled to claim an input tax credit for any GST paid by you on purchases that relate to an exempt supply.

'Exports' of Services that are Zero-rated

Zero-rated means that the service is taxable, but at a 0% rate. Input tax credits can still be claimed for any GST you paid on purchases that relate to making zero-rated legal services. Legal services supplied to a client who is non-resident and, if an individual, who remains outside Canada throughout the time the service is performed, will be zero-rated except if the service is:

- provided by the lawyer as the agent of the non-resident. There are no clear guidelines on when a lawyer is acting as an agent; consider an advance ruling if there is any doubt;
- in respect of tangible personal property ordinarily situated or to be delivered in Canada;
- in respect of a criminal civil or administrative litigation already commenced; or
- in respect of real property situated in Canada.

Services Rendered to Certain Provincial Governments

All provincial and territorial governments except Alberta, Manitoba, Saskatchewan, Northwest Territories and Yukon have agreed to pay GST/HST on their taxable purchases.

If you provide legal services to any other provincial government or provincial Crown agency you must charge GST on your legal services.

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You do not charge GST if the other governments or territories provide you with certification signed by an authorized official of the provincial government entity certifying that the purchase is made by the provincial government entity with Crown funds.

You must keep this certification for audit purposes.

You can claim an input tax credit for any GST paid on purchases you made to supply the legal services.

In summary, you do charge GST on legal services provided to the federal government and municipalities.

For more information see the GST/HST and information for governments and diplomats page of the Canada Revenue Agency's website, specifically the section addressing supplies made to provincial and territorial governments.

Some criminal files for the Legal Services Society

GST is charged for services provided to the Legal Services Society for criminal files that exceed $50,000 in fees, after the LSS holdback of 10%.

Generally, the services you provide under the Legal Aid plan are subject to GST, which means you collect GST from the Legal Services Society and may claim input tax credits. However, once the fee for a criminal trial exceeds $50,000, funding is by way of a Rowbotham application and the accounts are paid directly by the Attorney General.

Contact the Legal Services Society directly for more details.

First Nations peoples

This topic is complex and beyond the purview of this course. Independent research is required.

For more information, see the Canada Revenue Agency's website including information about GST/HST and First Nations peoples and the First Nations Goods and Services Tax.

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Indicating the GST Portion

Your accounts must clearly indicate the GST portion of the total amount.

Here is one example of how to show GST on an account for fees only:

To our fee for legal advice re: validity of lien	*$500.00*
Goods and Services Tax (5%)	*$25.00*
Total	***$525.00***

GST Registration # 123456789 RT 0001

No GST is imposed on interest charged on overdue accounts for either fees or disbursements, because interest is a 'financial service' and therefore exempt from GST.

6.4 - GST & Disbursements

The application of GST to disbursements is a bit more complicated. Part of the complication comes from the fact that some lawyers include within disbursements items that are really allocated overhead costs.

See Canada Revenue Agency's GST/HST Policy Statement P-209R - Lawyer's Disbursements for a more complete discussion of the disbursements on which GST is charged and those which are exempt. The Policy Statement is particularly useful in that it breaks down the discussion into disbursements incurred in different practice areas.

Some items, such as secretarial services, legal assistant services and other in-house staff services, should not be allocated as disbursements at all, but rather should be part of the fee that attracts GST. Other examples of disbursements, which are really allocated overhead costs, are fax and photocopying charges. Generally, allocated overhead costs attract GST. There are also several items for which lawyers often pay that are exempt from GST. The exempt category consists primarily of fees paid to public sector bodies.

Your account to your client must distinguish tax-exempt disbursements from the disbursements on which tax is charged.

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Some typical disbursements and their tax treatment follow:

Exempt Disbursements	**Taxable Disbursements**	
• Land registry fees • Corporate registry fees • Court registry fees • Fines, penalties • Bail • Witness conduct money • Generally, most public sector or service fees • Interest charged on overdue disbursements	**Examples of Allocated Costs** • Fax charges • Photocopy charges • Secretarial & word processing costs (part of fees) • Overtime costs for staff (part of fees) • In-house courier or search agent costs (part of fees) • Generally, all in-house staff time or fees (part of fees)	**Out-of-Pocket Expenses** • Outside office services • Computer research • Courier charges • Air travel (in Canada & continental USA) • Court reporter accounts • Real estate commissions • Experts' fees • Witness fees • Taxi fares • Meals & entertainment (in Canada) • Accommodation (in Canada) • Telephone charges • Court reporter fees • Transcript fees

When you pay the out-of-pocket expenses, you will pay GST on them. However, when you bill your client for these expenses, they will be shown on the account as net of GST.

You will then charge GST on the total of fees and disbursements. This method allows you to claim an input tax credit for the tax portion of the out-of-pocket expenses.

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Here is one example of how to show GST on an account for fees and disbursements:

To our fee for services rendered in connection with... (including in-house staff time)	$5,000.00
Goods and Services Tax (5%)	*$250.00*
GST Taxable Disbursements	
Photocopies (deemed reasonable; no markup)	$50.00
Courier charges	$50.00
Hotel (one night stay)	$141.90
Sub-total	$241.90
Goods and Services Tax (5%)	*$13.10*
GST Exempt Disbursements	
Court Registry Fees	$100.00
TOTAL	**$5,604.04**
GST Registration # 123456789 RT 0001	

Here is an example of how you would treat an out-of-pocket expense for an external courier.

You will have paid $2.50 in GST for this $50 courier charge, but you do not show the $2.50 GST as part of the disbursement itself.

Rather you show the courier charge net of GST, allowing you to claim the $2.50 input tax credit.

You then collect the $2.50 from your client by including the $2.50 in the total $255 charged for GST.

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Note that the courier charge was PST exempt, in the first instance; the lawyer did not pay the courier company any PST.

Here is another example of how you would treat an out-of-pocket expense.

In this example, the room charge was $129. In addition, the lawyer paid to the hotel: $6.45 in GST, $10.32 in PST, and $2.58 in municipal room tax, for a total of $148.35.

You do not show the $6.45 in GST as part of the disbursement itself. Rather you show the hotel charges net of GST ($148.35 minus $6.45 equals $141.90), allowing you to claim the $6.45 input tax credit.

The PST and municipal room tax are included in the $141.90 claimed for reimbursement, because the lawyer wishes to receive reimbursement from the client for these two sales taxes; unlike for GST, tax credits are not available for PST or municipal taxes.

You then collect $7.10 from your client in GST, by including the $141.90 (inclusive of PST and municipal tax) in the total disbursements subject to GST.

This seems like an odd tax result, because in effect, the lawyer is charging GST on PST and municipal tax embedded in the hotel charges. The lawyer paid only $6.45 in GST to the hotel, but the lawyer is charging the client $7.10 on essentially the same transaction.

However, CRA takes the position that these two sales taxes lose their personality as sales taxes when they form part of a lawyer's charges for legal services, and hence GST is calculated as described here.

6 - References & Resources

Statutes

- *First Nations Goods and Services Tax Act*
- *Indian Act* (Canada)

External resources

- Legal Services Society
- Canada Revenue Agency
  - First Nations Goods and Services Tax

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- GST/HST Policy Statement P-209R - Lawyer's Disbursements
- GST/HST and information for governments and diplomats, specifically the section addressing supplies made to provincial and territorial governments

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MODULE 7 – RETAINERS

7 - Introduction to the Retainers Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***7 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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7.1 - Retainers & Retainer Letters

What is a Retainer?

The word "retainer" has several meanings. For the purposes of this learning module "retainer" can mean:

- a client's act of engaging or "retaining" a lawyer to provide professional services;
- the document that sets out the terms of engagement between the lawyer and the client for professional services, known as a "retainer letter" or "retainer agreement"; or
- funds paid by the client to the lawyer in trust in order to secure the lawyer's professional services, also known as a "money retainer".

This module will focus on the second and third definitions.

Retainer Letters

In general, a retainer letter or agreement confirms the terms of engagement of your professional services. It sets out the scope of services to be performed, billing matters, and your authority to act.

Discuss the topics to be covered in the retainer letter or agreement early in the relationship, preferably at the first meeting. If you decide to accept the client's case, you should send the client a retainer letter or agreement detailing what was discussed at the initial meeting and setting out the essential terms of the relationship.

Instruct the client to read the retainer letter or agreement before signing it. In some situations, such as a contingent fee agreement, you should inform the client that they may want another lawyer to review the agreement.

Cautions

If you decide not to represent a prospective client, send a non-engagement letter.

The purpose of a non-engagement letter is to dispel any notion in the mind of the prospective client that you represent them. Be sure to re-affirm any potential limitations that you brought to the individual's attention, so they are not disadvantaged.

Always put the scope and amount of the retainer in writing.

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The Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following:

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

7.2 - Purposes of Retainer Letters

In most cases, your client will engage your services for the purpose of performing a specific task. A retainer letter serves a number of valuable purposes:

- It turns the client's mind to the issue of fees and specifically, that the services you perform are professional services that require payment. It is essential to discuss fees with clients. You should issue timely and sufficiently detailed bills in order to manage the relationship and your client's expectations, to get paid, and to reduce the chance of client complaints.
- It sets out what services you will and will not perform.
- It confirms your authority to act on the client's behalf.
- It outlines how your services will be billed, including frequency of billing, disbursements, tax issues, and so on.
- It confirms crucial information you discussed with your client at the first meeting.
- It lets the potential client know that you are not representing them until they sign the retainer letter or agreement and return it to you.
- It provides a mechanism for replenishing a money retainer and alerts the client to the methods by which the lawyer-client relationship may or will be terminated.
- If there is a dispute about the scope of your services, a retainer letter or agreement provides valuable evidence about the intended terms of your relationship. Remember that in the absence of a written agreement, uncertainty about the scope of the retainer will be construed in the client's favour.

The following resources provide additional guidance:

- **Communications Toolkit**, Law Society of BC (see Brightspace homepage)
- Client Service and Communication Practice Management Guideline, Law Society of Ontario

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7.3 - Content of Retainer Letters

When drafting a retainer letter or agreement, keep in mind that it should be short, clear, easy to understand, and flexible enough to address the particulars of the client's situation.

Although it is not wise to try to apply a single retainer template to all types of situations, the retainer letter or agreement should include this information:

- The retainer does not begin until the letter or agreement is executed, returned to the lawyer, and a money retainer is paid. Remember however that you have an obligation to act to preserve a client's interests.
- The client's instructions.
- The authority to act, including authority for agents and experts and other parties where required.
- The scope of services to be performed, or not performed, as applicable.
- An explanation for how fees are calculated, what disbursements will be charged, and that taxes will be added to fees and disbursements.
- Bill timing and your expectation for payment.
- Where appropriate, timelines for when events will likely occur.
- The method and frequency of communication with the client, for example, you will try to return phone calls promptly, but the nature of your practice means you will not necessarily be able to return calls the same day.
- If interest is charged on overdue bills, explain how it is calculated. Make sure your interest provisions don't trigger the criminal rate of interest section of the Criminal Code and that any interest charged is expressed as an annualized rate to comply with the Canada Interest Act.
- Confirm critical instructions provided to the client at the initial meeting as well as crucial steps that need to be taken and by whom. Don't let your client think you are going to take certain steps if you are not.
- Terms under which the entire retainer will be terminated. Note the rules regarding withdrawal of services in the BC Code.
- Law Society client identification and verification requirements.

The Client ID & Verification area of the Law Society's website has extensive resources on the topic.

The Law Society has **sample retainer letters** in the Support and Resources for Lawyers > Practice Resources area of the website.

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7.4 - Contingent Fee Agreements (CFA)

What is a Contingent Fee Agreement?

A contingent fee agreement is a type of retainer agreement that provides that payment to the lawyer or law firm for services provided depends, at least in part, on the happening of an event. For example, it can be structured to allow for your fee to be based on a portion of the amount recovered.

It is not permissible to receive a fee based on both a portion of the amount recovered and a portion of the amount awarded as costs (*Legal Profession Act*, s. 67(2)).

At the time you enter into a contingent agreement, you must ensure the agreement is fair, and the amount of your proposed remuneration is reasonable (Law Society Rule 8-1(1)(a) and (b)).

Restrictions

A contingent fee must be in writing (Law Society Rule 8-3(a)), and must include specific information. Be aware of the following requirements of the *Legal Profession Act*, ss. 66–68, as well as Part 8 - Lawyers' Fees of the Law Society Rules, such as:

- **Contingent fee agreements relating to personal injury or wrongful death arising from the use or operation of a motor vehicle allow for a maximum charge of 33 1/3% of the total amount recovered**. Rule 8-4(1) sets out text that must appear in such agreements.
- **Contingent fee agreements relating to personal injury or wrongful death arising in circumstances other than by use or operation of a motor vehicle allow for a maximum charge of 40% of the total amount recovered. Rule 8-4(2)** sets out text that must appear in such agreements.
- **If the lawyer and the client agree that a greater fee than the maximum is reasonable, the lawyer may apply to the Supreme Court to have a greater fee approved prior to entering into the agreement.** The lawyer must serve the client with at least five days' notice of the application. The court has the discretion to approve the higher fee if it is satisfied that the lawyer and client have agreed to the proposed fee and that the proposed fee is reasonable under Rule 8-2(1), and *Legal Profession Act*, s. 66(6) and (7).
- **A contingent fee that exceeds the limits allowed by the Law Society Rules is void unless it has been approved pursuant to s. 66(6) of the *Legal Profession Act*.** If the agreement is rendered void for these reasons, a lawyer is entitled to charge fees that could have been charged had there been no contingent fee agreement, but only if the event that

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would have allowed payment under the void agreement occurs (*Legal Profession Act*, s. 66(5)).

- **Contingent fee agreements for services related to child custody or access are void** (*Legal Profession Act*, s. 67(3)).
- **Contingent fee agreements for services relating to matrimonial disputes are void unless approved by the court** (*Legal Profession Act*, s. 67(4)). The procedure for applying for approval in these situations requires an understanding of the *Legal Profession Act*, s. 66(7) to (9).

Disbursements

It is important that you consider the issues that can arise in a contingent fee agreement, such as how disbursements will be billed and paid, and craft the retainer accordingly.

Disbursements are usually charged as the file proceeds, so you should create a mechanism that allows for this practice. Examples of disbursements on a personal injury contingency file include invoices for clinical records or police files. Before drafting a contingent agreement, review the precedents available on the Law Society's website.

Time Tracking

You should keep accurate records of your time spent on a file even in a contingent fee arrangement because the reasonableness of your fee may still be challenged. For example, you have taken on a client on a contingent fee basis and have conducted the file through examinations for discovery. Your client becomes displeased with you and decides to change lawyers. You have released the file to the new lawyer on her undertaking to pay your fees for work you performed to date out of the eventual settlement or award in the case. If you have not tracked any of your time on the file you will be in a difficult position if there is a review of your bill before a Registrar. If it were to proceed to a review and you kept little to no record of the work you did on the file and the time spent, it would be very difficult to provide evidence. Keeping accurate and detailed records of your time gives you the best chance to recover a reasonable fee for your services.

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7.5 - Limited Scope Retainers

Lawyers are increasingly considering providing unbundled legal services under a limited scope retainer.

BC Code rule 3.2-1.1 (Limited scope retainers) provides:

A lawyer who acts for a client only in a limited capacity must promptly disclose the limited retainer to the court and to any other interested person in the proceeding, if failure to disclose would mislead the court or that other person.

Be aware of the risks of limited retainers. You cannot contract out of negligence, and a provision in an agreement that purports to exempt you from liability for negligence or relieve you from regular responsibilities is void (*Legal Profession Act*, s. 65(3)).

If you are entering into a limited retainer, make sure it is carefully worded and that your client:

- appreciates the limited nature of the retainer;
- understands the risks involved; and
- enters into the limited scope retainer with informed consent.

The commentaries to *BC Code* rule 3.2-1.1 provide further guidance in regard to limited scope retainers including:

- Reduce your to writing the discussions and agreement with the client about the limited scope retainer, as it assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.
- Be careful to avoid acting in a way that suggests that you are providing full services to the client.
- When appearing before a court or tribunal, be careful not to mislead the tribunal as to the scope of the retainer and consider whether disclosure of the limited nature of your retainer is required by the rules of practice or the circumstances.

The Law Society has **sample retainer letters** in the Support and Resources for Lawyers > Practice Resources area of the website.

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7 - References & Resources

Statutes

- *Legal Profession Act*
  - Part 8 - Lawyers' Fees
    - section 65 (Agreement for legal services)
    - section 66 (Contingent fee agreement)
    - section 67 (Restrictions on contingent fee agreements)
    - section 68 (Examination of an agreement)

Law Society of BC materials

- Law Society Rules
  - Part 8 - Lawyers' Fees
    - Rule 8-1 (Reasonable remuneration)
    - Rule 8-2 (Maximum remuneration in personal injury actions)
    - Rule 8-4 (Statement of rules in contingent fee agreements)
- Code of Professional Conduct of British Columbia (*BC Code*)
  - Chapter 3 - Relationship to Clients
    - rule 3.2-1.1 (Limited scope retainers)
- Client ID & Verification
- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:
  - Sample retainer letters (including a general retainer agreement and a joint retainer) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
  - Sample non-engagement letters under the heading *Client files*
- Communications Toolkit, Law Society of BC (see Brightspace homepage)

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Trust Assurance: trustaccounting@lsbc.org

External resources

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- Client Service and Communication Practice Management Guideline, Law Society of Ontario

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MODULE 8 – FILE RETENTION & DISPOSAL

8 - Introduction to the File Retention & Disposal Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***8 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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8.1 - Purposes of File Retention

8.1-1 - Regulatory Requirements

Be familiar with the regulatory provisions on file retention by lawyers.

Law Society Rule 3-75 (Retention of records) provides that trust and non-trust books, records, and accounts listed in Rule 3-68 (Trust account records), Rule 3-69 (General account records), Rule 3-70 (Records of cash transactions), and Rule 3-71 (Billing records) must be retained for at least ten years, the first three of which must be at your chief place of practice.

If you leave a firm in British Columbia, Rule 3-87 (Disposition of files, trust money and other documents and valuables) requires that before you leave, you inform the Executive Director of the Law Society about how you intend to dispose of your files and other papers connected to your practice. Within 30 days after withdrawing from practice, you must confirm with the Executive Director how you have disposed of your documents and property.

To notify the Executive Director, email registration@lsbc.org

8.1-2 - Defending Against Negligence Claims

A negligence claim can be brought against you long after an alleged negligence occurred.

The initial retainer letter, notes of instructions and conversations, telephone records, copies of correspondence, drafts of documents, and final documents can be particularly important in defending a negligence claim.

If you turn over a file to a subsequent lawyer or the client, it is in your best interests to note what file materials belong to you and need not be provided to your client, and to keep a copy at your own expense of the file contents that belong to the client.

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8.1-3 - Defending Against Complaints

Another reason to retain your files is to enable you to defend against potential complaints against you, not only during your active work on the file, or when your client decides to change lawyers, but also long after you have closed your file.

8.1-4 - Statutory Requirements

Several statutory provisions relate to the retention of documents, and you should return to your client any original documents your client is required to retain.

Include with any returned documents a letter advising of the relevant statutory requirements.

If you have accepted instructions from your client to retain documents until the statutory requirements are fulfilled, confirm that agreement in writing and address issues such as the cost of retaining the file documents.

8.1-5 - Future Needs of Lawyer or Client

When creating your file closing policy, consider the types of files at hand and the practical future needs of you and your client.

Remember that your files contain valuable precedents and original documents.

8.2 - Closing & Retaining Files

8.2-1 - Closing Files

It is difficult to decide when it is appropriate to close a file and the topic is explored in more depth in ***Module 14: File Management & Diary Systems***.

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At a minimum, you must determine that all the work required on the file was completed and reported upon, and that no potential future updates are required, other than possible file destruction reminders.

Once you have decided it is appropriate to close a file and remove it from your active records, you can strip certain documents from the file before it goes to storage. You must however be systematic.

8.2-2 - Stripping the File

In general, return original documents to the client, with a copy, as appropriate, for the file.

Include with these documents a letter to your client indicating that the file is being closed, clearly describing the enclosed documents and any statutory obligations the client has to retain them and advising the client when the balance of the file will be destroyed.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources under the heading *Client files*:

- **Closed Files Retention and Disposition Practice Resource** provides guidance on determining file destruction dates, as well as how to strip a file (pp. 10-11).
- **Ownership of Documents on a Client's File** provides guidance on how to determine what belongs to you vs. the client.

8.2-3 - Organizing Closed Files

You should establish a method of numbering and organizing the closed files.

The information should be maintained in a database, and perhaps in a hard copy file closing book that lists sequentially the file name, original file number, closed file number, storage box number, storage location and file destruction date.

The complexity of your cataloguing system will depend on the number of files to be closed and the type of storage facilities to be utilized.

The system should be detailed in your firm manual, so that regardless when the file is closed, there is consistency in the method.

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Keep in mind that a subsequent issue may arise that will require you to pull the closed file from storage urgently. If your cataloguing system fails to accurately describe where the file is located, the ability to pull files urgently will be difficult.

In some cases, you may have a difficult time establishing a file destruction date at the time a file is put into storage. You will need a system for calling up these files for reconsideration of the destruction date.

Review the requirements of Rule 10-3 (Records) and Rule 10-4 (Security of records) to ensure you comply with the requirements for the storage and retrieval of closed files, whether electronic or physical.

8.2-4 - Digital Data

As many of your files will have electronic content, consider that digital data formats may change with advances in technology. Take care to ensure that the data is stored in a form that will be accessible over the life of the retention period.

Review the requirements of Rule 10-3 (Records) and Rule 10-4 (Security of records) to ensure you comply with the requirements for the storage and retrieval of closed files, whether electronic or physical.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources under the heading *Technology*:

- **Cloud computing checklist**
- **Cloud computing due diligence guidelines**

You need to decide how to retain e-mail communication, which may be a crucial part of your file. Some practitioners print out all e-mails; others create e-folders for individual clients. Whatever system you choose, ensure that your staff know the system for all forms of communication at file closing.

Make sure naming and filing the e-material is just as meticulous as for paper copies of documents.

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8.2-5 - File Retention Periods

There is no universal agreement on how long files should be retained. The Law Society of British Columbia has not set policy requirements or guidelines. Lawyers need to consider their circumstances and use their own judgement.

In order to decide on a file retention policy, consider:

- statutory requirements, some of which are set out above;
- the areas of law practised by you and others in your firm;
- the applicable limitation period;
- your client's potential needs; and
- your potential needs.

You may have to keep files for a long period of time if the legal matter is complex or there is a possibility of an extended limitation period.

Take time to check for specific limitations periods based on your specific areas of practice in the *Limitation Act*.

You need to keep records to defend against complaints, or civil suits, but keep in mind that Law Society Rules may require that you keep specific records for longer periods of time. For example, Rule 3-75 (Retention of records) requires lawyers to keep certain records for at least ten years from the final accounting transaction or disposition of valuables in respect of a client matter, including:

- trust account records (Rule 3-68);
- general account records (Rule 3-69)
- records of cash transactions (Rule 3-70); and
- billing records (Rule 3-71).

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resource under the heading *Client files*:

- **Closed Files: Retention and Disposition Practice Resource** (August 2017) provides guidance on determining file destruction dates, including suggested minimum retention and disposition periods for specific records and files, as well as how to strip a file (pp. 10-11).

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8.3 - File Destruction & Disposal

8.3-1 - Client Confidentiality

Client confidentiality should be a major concern when you finally decide to dispose of a file.

BC Code rule 3.3-1 requires you to hold all of your client's information in strict confidence, unless otherwise permitted or required by that rule.

Create firm policies for the disposal of materials within the office and review them with any outside shredding or recycling suppliers that you retain. Remind all lawyers and firm staff regularly of the obligation to safeguard client information and the applicable firm policies.

8.3-2 - Paper Files

The predominant destruction method is paper shredding.

If you are buying a paper shredder, cross-cut shredders are best.

Alternatively, you may hire a paper shredding company, but if you do so, someone should monitor the work and ensure the documents are in fact destroyed. Many companies will provide certificates of destruction.

The provincial government offers a low-cost shredding service for which you may qualify.

In some rural areas, burning may be an option.

It is never acceptable to throw unshredded files and documents into the trash, a dumpster, a recycling bin, or a public landfill.

8.3-3 - Electronic Files

You also need to think about how to delete and destroy computer files and hard drives.

Don't save highly sensitive information to a computer unless it is encrypted.

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Computer hard drives should not simply be dumped into public trash receptacles, donated, or sold without being completely stripped of data.

Be sure to erase documents stored on USB drives, which can be easily misplaced.

Even if documents appear to be deleted on a hard drive, skilled individuals may be able to reconstruct information.

Programs are available for reformatting hard drives, but you need to take care that the job has been done successfully.

The provincial government does offer multi-media shredding that you may be able to access.

Smashing the platters in the hard drives with a hammer may not ultimately destroy the data, but it may destroy your entire computer if not done properly.

8 - References & Resources

Statutes

- *Limitation Act*

Law Society of BC materials

- Law Society Rules
    - Part 3 - Protection of the Public
        - Division 7 - Trust Accounts and Other Client Property
            - Rule 3-68 (Trust account records)
            - Rule 3-69 (General account records)
            - Rule 3-70 (Records of cash transactions)
            - Rule 3-71 (Billing records)
            - Rule 3-75 (Retention of records)
            - Rule 3-87 (Disposition of files, trust money and other documents and valuables)
        - Division 10 - General
            - Rule 10-3 (Records)
            - Rule 10-4 (Security of records)

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- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:
    - Closed Files Retention and Disposition Practice Resource provides guidance on determining file destruction dates, as well as how to strip a file (pp. 10-11) under the heading *Client files*
    - Ownership of Documents on a Client's File provides guidance on how to determine what belongs to you vs. the client under the heading *Client files*
    - Cloud computing checklist under the heading *Technology*
    - Cloud computing due diligence guidelines under the heading *Technology*

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Registration and Licensee Services: registration@lsbc.org
- Trust Assurance: trustaccounting@lsbc.org

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MODULE 9 – COVERAGE DURING ABSENCE

9 - Introduction to the Coverage during Absence Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***9 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

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9.1 - Planning for Coverage

9.1-1 - Professional Obligations

Prepare by Developing a Plan

Lawyers deal in information, rules, procedures, and timelines. This reality does not cease to exist when you go on vacation, fall ill, or when unexpected disaster like a fire occurs.

Planning for absence or loss, rather than merely reacting to it, is essential. You must meet your clients' needs.

Tailor your plan to the realities of your practice. What is required for a large national firm would likely be overkill for a sole practitioner; but some large firm practices might still be of use, such as establishing policies for backing up electronic data, and creating office manuals.

Your Coverage and Succession Plan

Think about developing a relationship with another lawyer with expertise in the area of law you practise, to provide coverage for each other when needed.

It is critical to understand that an absence from work, long-term illness, or retirement, go beyond your personal life. It affects your practice and more importantly, your clients. You should plan for how your business will operate in the event a short-term or long-term absence, as opposed to retiring or winding up your practice.

The annual Trust Report form you submit to Law Society asks whether you have designated a person or firm to act as the Winding up Caretaker in the event of your death or disability and to provide that lawyer's name. Keep in mind that winding up a practice is distinct from having someone oversee a practice for maintenance purposes. Consider whether you could ask your Winding up Caretaker if they would be willing to cover your practice in the event of your absence.

Some things to consider respecting coverage include:

- Arrange for a lawyer, including one with whom you may have a space sharing arrangement, to act as a contact in your absence. Space sharing is dealt with in ***Module 11: Conflicts***.

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- Ensure that your voicemail and email autoreply are updated and provide information such as:
    - who to contact if the matter is urgent;
    - when you plan to return; and
    - whether you will be checking and responding to messages while absent.

- If you arrange for a lawyer to oversee your practice during your absence, ensure that they can contact you.
- Consider establishing a power of attorney with financial institutions to enable your replacement to access general accounts as well as trust accounts and have the authority to continue the practice.
- If you use your computers for personal communications or documents, develop a system such as a different password protected logon ID to safeguard your personal information.

For more information, see the Benchers' Bulletin article "When Personal Information Is On a Work Computer".

- Contact opposing counsel on files to let them know you will be away, and who they can contact in your absence. This is a matter of professional courtesy and ensures that there is no gap in your client's representation. It may also minimize the likelihood that you receive time-sensitive documents from opposing counsel while you are away.

9.1-2 - Realities & Risks of Practice

Where to Start

First you need to understand how your business operates.

Do you have a plan for the steps to take in the event of an absence or catastrophic event?

The scope of some of the steps will be different depending on whether you are ill for a week, or a fire destroys all of your on-site files.

A plan to deal with one eventuality will not be sufficient to deal with all others.

Keep a copy of your plan off-site in a secure location so it remains intact and accessible.

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Risk Assessment

To perform a risk assessment, you must analyze:

- the likelihood of the risk; and
- the cost and consequences to the firm should the risk manifest.

Some risks might be so remote that the only practical way of dealing with them is to purchase insurance against the risk.

Other risks might be more common, but their impact on the practice might be negligible, so an assessment should be made as to the amount of effort needed to protect against the risk.

Still other risks fall into the "no-brainer" category, such as installing and updating virus protection software on your computers.

Ongoing Review of Risks

Remember that just because you have formulated a plan, risk management does not stop there. It is an ongoing process. You should continually be evaluating:

- what your practice risks are; and
- how to minimize both the likelihood of these risks occurring and the consequences if they do occur.

Appendix A: Closed File Retention and Disposition
Appendix B: What to do Before and After Disaster Strikes
Appendix C: Disaster Preparation Checklist
Appendix D: After a Disaster Strikes Checklist

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:

- **Succession Planning & Practice Coverage**
- **Locum Registry** under the heading *Locums*

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9.1-3 - General Cautions

Here are some things to consider when making your succession or coverage plan:

- **It is essential that you comply with all the ethical requirements governing practice.** You must ensure that your clients' confidences are protected, and you obtain consent from your clients when someone oversees your practice or you oversee another lawyer's practice.
- **Familiarize yourself with your obligations under the *BC Code* which require you to report to Law Society;** see rule 7.1-3 (Duty to report):
    - a breach of undertaking or trust condition that has not been consented to or waived;
    - a shortage of trust monies;
    - the abandonment of a law practice;
    - participation in criminal activity related to a lawyer's practice;
    - conduct that raises a substantial question as to the honesty, trustworthiness, or competency of a lawyer; and
    - any other situation in which a lawyer's clients are likely to be materially prejudiced.
- **Never sign blank cheques to be used during your absence.** If funds need to be disbursed from trust during your absence, consider whether to contact the Law Society's Custodianship department before you leave in order to be familiar with the applicable rules and put a plan in place to make sure of compliance.
- **Clients are entitled to expect their files will be covered.** If something urgent occurs that requires immediate legal action, your client's interest needs to be preserved, even in your absence.
- **Create an effective coverage plan and maintain an organized practice** so the person stepping into your shoes can deal with matters promptly and accurately.
- **Contact the Lawyers Indemnity Fund to find out the liability issues surrounding having someone oversee your practice.** Recognize that if one lawyer makes a mistake in a file and another perpetuates it and makes matters worse, there may be two lawyers who are liable to the client.
- **Make sure that the lawyer you ask to cover for you is competent to practise in the areas of law in which you practice and is not subject to any practice restrictions that could impede their ability to act in your absence.** Practice restrictions are noted on each lawyer's profile in the Law Society's Lawyer Directory.

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Consider the Risks of Failing to Plan

Imagine that there is a family emergency and you must leave immediately without telling anyone where you will be or when you'll return.

While you are away, a client dies. Since the will is stored at your office, the family comes looking for you. They can't get in touch with you, so they contact the Law Society.

The Law Society follows up and can't locate you, because due to an act of cosmic congruence, everyone you know is unavailable or doesn't know anything.

Concerned that you have disappeared, are neglecting, or have abandoned your practice, the Law Society applies to the court for an order appointing a custodian to take possession of all or part of your property, and to manage your practice pursuant to the *Legal Profession Act*, s. 50(1), (2) and (3)(d).

You return from the family emergency, only to find your practice is in the control of a custodian.

After a long and embarrassing process, you may have to pay to the Law Society's fees, expenses, and disbursements incurred in investigating your disappearance and taking over your practice, including fees for the custodian, (*Legal Profession Act*, s. 56(3)).

If, for whatever reason, you are unable to take care of your practice, contact the Law Society's Custodianship department for information and assistance.

9.2 - Knowledge Management & Continuity

9.2-1 - Office Operations

Your practice is likely to have a combination of digital and analog material. Aside from records, your practice will also have equipment such as computers, storage media, and other tools that can be harmed by catastrophic events.

Hazards such as fire, flooding, theft or careless disposal of material can be equally devastating to on-site computers as they can to on-site paper files. Computer data is also susceptible to viruses, hackers, spyware, and other malicious agents.

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Key Considerations

In determining how to plan for coverage, consider:

- Whether your practice requires connecting computers to a centralized server for client/server storage and retrieval of electronic files, and centralized applications.
- What type of hardware and software is required, such as accounting and case management software, and what type of training is necessary to effectively use the software?
- What data file protection for backup and disaster recovery is in place.
- Whether you have access to reliable technical support.
- Network security. You must consider both the physical security of the computers and equipment in your office, as well as the security from the risks inherent in connecting to the Internet.

Staff Training and Changes

Ensure your staff understand and follow your policy for risk management of information and technology use. If staff leave, update passwords on your system to protect your confidential information and intellectual property.

Office Alternatives

Take the time to consider how you will continue providing legal services if something happens to you or your primary place of business.

- If your office equipment is stolen or stops working, are you and your staff prepared to work from home?
- Are you equipped to work from home?

Information Back-up

You must develop practical solutions to minimize loss of equipment or data, such as installing sprinkler systems, using fireproof cabinets, burglar alarms, firewalls and antivirus software. You should also develop methods to recover from an equipment loss, like storing copies of critical information and backing up data off-site.

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Keep in mind that some safeguards may pose their own risks. For example, a sprinkler system might stop a fire but damage paper files or computers.

9.2-2 - Policies, Procedures & Protocols

Be aware that information critical to the operation of your practice resides not only in files, but also in your head and in the minds of staff.

- **Create checklists for all aspects of your practice** so the absence of you or your staff does not stop your firm from operating. Checklists aid in consistency in the work product, regardless of which staff member handles the tasks.
- Include your **policies and procedures about catastrophic loss and continuity** in the absence of you or staff in a readily accessible manual.
- Include a list of **passwords for all computers, systems and accounts,** keep it in a safe place and update it regularly.
- **Have new staff read the manual and advise all staff about updates** so that they can keep up with new policies and procedures.

Double-Entry Protocols

If you are a sole practitioner, it may not be sufficient to rely on a policy manual, it would not include particular deadlines in a given file. This is why it is important to have orderly files and bring forward or limitation systems that make it clear to anyone who is asked to step in and monitor your practice during an absence or emergency what has been done and what is to be done next on the file. Using multiple calendars for important dates will minimize the risk of missing a deadline if something happens to one copy of your calendar. To be effective, you must use a diligent entry protocol, so the calendars have identical information. Computerized “bring forward” systems are crucial to avoid missed deadlines on files.

9.2-3 - Sample Checklist

Technology

Consider these technology issues:

- Determine what type of computers you need, and how many, as well as what peripheral devices are required such as printers.

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- Determine whether you need a centralized server.
- Determine what software programs best suit the needs of your practice.
- Consider taking courses or tutorials to learn how to use the software effectively.
- Make sure you have firewall and antivirus software installed.
- Use unique passwords and keep them secure and remind your staff to do the same.
- Update your security software regularly. Don't let your security software become obsolete.
- Ensure that you use an operating system that is sufficiently current to provide robust security features.
- Protect laptops with passwords or store confidential information in a removable storage device.
- Seek professional help if you don't have the technological skills to ensure the security of your equipment and information.

Systems for Responsible Use

Establish a system for ensuring you and your staff use technology responsibly:

- Create a policy for using computers and technology, including remote work, and make sure staff are familiar with the policies.
- Ensure that passwords and policies protect data access on phones.
- Make sure staff are sufficiently trained to use the software you have installed.
- When staff leave, ensure their access rights are terminated.
- Establish a policy for staff to use your computer equipment for non-work purposes to reduce the risk of viruses, Trojans, key stroke counters, and malware.

Proactive Information Management

Engage in proactive information management:

- Establish a system for regular backup of information, whether off-site, to a digital storage media kept off-site, or locked in a fire-proof cabinet.
- If you have critical information in paper form, store copies at a secure facility outside office.
- Establish a system for file retention and destruction and integrate reminders into your computer system.
- Arrange technical support from a professional who is familiar with the special issues lawyers face regarding confidentiality and trust rules.

Visit the **Lawyers Indemnity Fund**'s website for more information about Coalition's proactive risk management platform dashboard.

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9.3 - Additional Considerations

9.3-1 - Insurance Options to Consider

Where to Start

Start by taking stock of your entire practice and considering the coverage options that are best for you. This is an ongoing process. Plan to review your insurance coverage at regular intervals when you review plans for continuity and disaster.

Consult a knowledgeable commercial insurance broker to find out more about the types of insurance available. An insurance broker acts on behalf of the insured to negotiate and obtain the best coverage.

Some Additional Types of Insurance

Consider several types of insurance beyond your mandatory practice indemnification (e.g., through the Lawyers Indemnity Fund). For example, something might happen to you personally, as opposed to your premises or property.

Consider investing in **life insurance** to help pay for winding-up or selling your practice.

Consider also **disability insurance** in the event you are unable to work or need to pay someone to carry on your practice during a disability. What would happen if you injured yourself on vacation and had to take time off work?

Also consider whether you need **property insurance for business premises, business interruption, general commercial liability insurance for injury to people or property, and insurance for the contents of your premises**, including riders for equipment like laptops.

9.3-2 - Emergency Funds

Consider how you would access funds in an emergency.

In addition to insurance, arranging a line of credit can assist you if disaster strikes and disrupts your normal billing cycle. It may take longer than anticipated to get your practice back up to speed if, for instance, the building where your office is located is severely damaged by flooding,

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and the insurer is not able to process your claim immediately. You may need cash faster than anticipated. A line of credit will help.

9 - References & Resources

Statutes

- *Legal Profession Act*
  - section 50 (Appointment of custodian)
  - section 56 (Liability and costs)

Law Society of BC materials

- Code of Professional Conduct of British Columbia (*BC Code*)
  - rule 7.1-3 (Duty to report)
- Law Society's Custodianship department
- Law Society's Lawyer Directory
- "When Personal Information Is On a Work Computer", Bencher Bulletin, 2005
- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:
  - *Succession Planning & Practice Coverage*
  - *Locums*, includes a Locum Registry
- Appendices
  - Appendix A: Closed File Retention and Disposition
  - Appendix B: What to do Before and After Disaster Strikes
  - Appendix C: Disaster Preparation Checklist
  - Appendix D: After a Disaster Strikes Checklist

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Registration and Licensee Services: registration@lsbc.org
- Trust Assurance: trustaccounting@lsbc.org

External resources

- Lawyers Indemnity Fund
  - Coalition's proactive risk management platform dashboard

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MODULE 10 – WITHDRAWAL OF SERVICES

10 - Introduction to the Withdrawal of Services Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***10 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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10.1 - Preliminary Considerations

Guiding Principle: Treat your client fairly

As a guiding principle, you must ensure your client is treated fairly. While it is fair for your client to withdraw from the relationship with you at any time, the converse is not true. You must respect your client's right to terminate the agreement. As the relationship is contractual, your entitlement to fees will be determined by the terms of the retainer agreement and the case law that aids in the interpretation of those terms.

Sources of professional guidance

Obligations, including those set out in the *BC Code*, case law, and the rules of the applicable court or tribunal, govern when and how you would withdraw your services.

There are limited circumstances where a lawyer may be forced to continue acting for an accused in a criminal matter, where allowing the withdrawal of services would seriously harm the administration of justice. These limited circumstances were set out by the Supreme Court in *R v. Cunningham*, 2010 SCC 10.

Withdrawing in criminal matters has unique requirements that are addressed separately in the subsequent sections of this module.

Professional Responsibility

The decision to withdraw is a matter of professional responsibility.

To withdraw contrary to the provisions of *BC Code* Chapter 3 may expose you to complaints and subsequent disciplinary proceedings before the Law Society.

10.2 - Obligatory Withdrawal

Pursuant to the *BC Code* rule 3.7-7 (Obligatory withdrawal) and rule 3.4-1 (Duty to avoid conflicts of interest), you must withdraw your legal services when:

- Your client discharges you.
- Your client persists in instructing you to act in a manner contrary to your professional ethics.

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- Your continued representation of the client puts you in a conflict of interest.
- You are not competent to handle the matter.

You have an obligation to the state, courts and tribunals, other lawyers, your client, and yourself as articulated in the *BC Code* Chapter 2 (Standards of the Legal Profession).

You must work within, and not outside, the bounds of the law and no client has the right to demand that you violate the law or act in a fraudulent manner (rule 2.1-3(e) (To the client)).

You must not aid, counsel, or assist a person to act in any way contrary to the law (rule 2.1-1(a) (To the state)).

Moreover, you must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud (rule 3.2-7 (Dishonesty, fraud by client)).

BC Code rule 3.2-8 (Dishonesty, fraud when clients an organization) sets out additional obligations when the client is an organization and that organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, to escalate the issue within the organization before withdrawing as counsel. This provision applies to counsel in private practice retained by the organization, and in-house counsel.

10.3 - Discretionary Withdrawal

10.3-1 - Good Reason & Reasonable Notice

BC Code rule 3.7-1 (Withdrawal from representation) explains that you may withdraw your services with good reason and reasonable notice to the client. Your reason for withdraw cannot be capricious or arbitrary.

What constitutes reasonable notice depends on the circumstances of the case; Commentary [2] to rule 3.7-1 explains:

An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When 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

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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. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See rule 3.7-8 (Manner of withdrawal).

10.3-2 - Serious Loss of Confidence

You also **may** withdraw your services without reasonable notice (see EC July 2013, item 8) if there has been a serious loss of confidence between you and your client (*BC Code* rule 3.7-2 (Optional withdrawal)).

This can arise where the client deceives you, refuses to provide you with adequate instructions, the client is persistently unreasonable or uncooperative in a material respect, or refuses to accept and act upon your advice on a significant point. Commentary [1] warns that the threat of withdrawal should not be used to force a hasty decision by the client on a difficult question (for example, to induce a client to accept a settlement; see EC July 1995, item 8).

10.3-3 - Discretionary Withdrawal under a Contingency Fee Agreement (CFA)

If you are providing services pursuant to a contingency fee agreement, consider commentary [2] to *BC Code* rule 3.6-2 (Contingent fees and contingent fee agreements) carefully, as it curtails the liberty to withdraw set out in *BC Code* rule 3.7-1 (Withdrawal from representation) and rule 3.7-2 (Optional withdrawal):

Although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in rule 3.7-1, special circumstances apply when the retainer is pursuant to a contingency agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in rule 3.7-7 (Obligatory withdrawal) unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur.

Accordingly, it is important to address withdrawal specifically in your contingency fee agreement if you want to preserve the right of withdrawal for reasons similar to rules 3.7-1 and 3.7-2.

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Be sure to review the following Discipline Advisory: Withdrawal under a contingency fee agreement (August 13, 2020).

10.3-4 - Non-Payment of Fees

You are not required to act on a client's behalf unless you have been sufficiently retained (*Farris, Vaughan, Wills & Murphy v. Wong*, 2002 BCSC 4, at paragraph 18). However, before you withdraw on this basis, be sure to carefully review *BC Code* rule 3.7-3 (Non-payment of fees).

You ***may*** withdraw your services for non-payment of fees under rule 3.7-3 upon the provision of reasonable notice. This requires you to provide reasonable notice of your intention to withdraw for non-payment, and also to ensure your client has sufficient time to obtain the services of another lawyer and for that lawyer to prepare adequately for a hearing or trial. Think of it as building out the timeline from the withdrawal date in two directions – you want to give the client reasonable notice in advance of the withdrawal date if they do not pay, and also provide sufficient time after the withdrawal date to secure and prepare new counsel.

You ***cannot*** withdraw at the last minute on this basis, so think through when you will require payment early and clearly communicate your expectations to your client. Indeed, it is good practice to establish your right to withdraw services for non-payment in the retainer letter; see the Retainers learning module. Moreover, rule 3.6-9 (Payment and appropriation of funds) provides:

If a lawyer and client agree that the lawyer will act only if the lawyer's retainer is paid in advance, the lawyer must confirm that agreement in writing with the client and specify a payment date.

That said, it is not prudent to rely on the retainer language alone; see *Re A.L.* 2003 ABQB 905 at paragraphs 49-51, where the court recognized a strict ethical obligation to notify a client regarding withdrawal of services, even in the face of a clear contractual right to withdraw services unilaterally.

Communicate your expectations to your client early and often.

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10.4 - Procedure for Withdrawing Services

10.4-1 - Notice

BC Code rule 3.7-9 sets out the steps you need to take as soon as practicable when you withdraw as counsel or are discharged by your client, including:

- notify the client in writing, stating:
  - the fact that you are no longer acting;
  - the reasons, if any, for the withdrawal; and
  - in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;
- notify in writing all other parties, including the Crown where appropriate, that you are no longer acting;
- subject to your right to a lien, deliver to the client all papers and property to which the client is entitled;
- subject to any applicable trust conditions, give the client all relevant information 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;
- co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and
- notify in writing the court registry where your name appears as counsel for the client that the lawyer is no longer acting and comply with the applicable rules of court and any other requirements of the tribunal.

10.4-2 - Confidentiality of the Reason for Withdrawal

Remember that you have an obligation to preserve client confidentiality and, absent client consent, you may not disclose the reasons for your withdrawal in circumstances where the reason for withdrawal arose from confidential client communications (*BC Code* rule 3.7-9.1 (Confidentiality)). This means that you cannot tell the opposing party, opposing counsel, interested third parties, or your client's new lawyer without client consent.

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If your client or the opposing party objects to your withdrawal as counsel, you may have to speak to the matter before the court or tribunal.

If you are withdrawing for ethical reasons, phrases like withdrawing for "ethical reasons" or "professional reasons", can be used to provide some context without breaching solicitor-client privilege.

In *R. v. Cunningham*, 2010 SCC 10 [*Cunningham*], Rothstein J. for the Court explained at para. 48:

> Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g., workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations (see, e.g., Law Society of Upper Canada, r. 2.09(7)(b), (d); Law Society of Alberta, c. 14, r. 2; Law Society of British Columbia, c. 10, r. 1), or if the accused refuses to accept counsel's advice on an important trial issue (see, e.g., Law Society of Upper Canada, r. 2.09(2); Law Society of Alberta, c. 14, r. 1; Law Society of British Columbia, c. 10, r. 2). If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.

You'll recall from a previous section that in *Cunningham* the Supreme Court of Canada found that, in some circumstances, withdrawal for non-payment of fees is not the subject of solicitor-client privilege. Rothstein J. explained at para. 31:

> Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *McClure* and *Smith v. Jones*). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. **However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.**

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> [emphasis added]
>
> The bolded sentence above is of utmost importance – whether withdrawal for non-payment of fees is privileged is dependent on the type of case, the context, and the individual circumstances. Rothstein J. gave an example of where withdrawal for non-payment of fees would be the subject of solicitor-client privilege in para 30:
>
> […] However, in other legal contexts, payment or non-payment of fees may be relevant to the merits of the case, for example, in a family law dispute where support payments are at issue and a client is alleging inability to pay. Or disclosure of non-payment of fees may cause prejudice to the client, for example, where the opposing party may be prompted to bring a motion for security for costs after finding out that the other party is unable to pay its legal fees. Where payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may cause prejudice to the client, solicitor-client privilege may attach.

The purpose of the above is to introduce the issue for your review and consideration. Privilege, in the context of withdrawal or otherwise, is a complicated issue deserving of individual consideration in every case.

10.4-3 - Transferring a Former Client's File

When you withdraw as counsel, you must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer (*BC Code* rule 3.7-8 (Manner of withdrawal)).

The contents of the client's file will have to be transferred to the new lawyer. When the retainer is terminated, subject to a solicitor's lien you must deliver to the client or any new lawyer the contents of the file that belong to the client, and at no charge, assuming no outstanding accounts exist. It is appropriate to charge for photocopying where the contents were already provided to the client. Confirm in writing the client's permission for you to communicate with new counsel and transfer the file to them.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resource under the heading *Solicitors' Liens*:

- **Solicitors' Liens and Charging Orders – Your fees and Your Clients**

If there is a dispute as to ownership of the contents of the client's file, take time to research the law to determine which documents you are entitled to keep.

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For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources under the heading *Client files*:

- **Closed Files: Retention and Disposition Practice Resource** (August 2017) provides guidance on determining file destruction dates, including suggested minimum retention and disposition periods for specific records and files, as well as how to strip a file (pp. 10-11).
- **Ownership of Documents on a Client's File** (July 2017) provides guidance on how to determine what belongs to you vs. the client.
- **Closing a file: What documents to keep and for how long**, Benchers' Bulletin, Winter 2017 (pp. 9-10, 19)

Take time to consult document retention requirements in ***Module 8: File Retention & Disposal*** to ensure you are keeping all documents that you are required to retain, such as trust accounting records.

It is very important to also keep documents that might help you defend against an action for professional misconduct or negligence. Note the important limitation periods for such actions.

10 - References & Resources

Law Society of BC materials

- Code of Professional Conduct of British Columbia (*BC Code*)
    - Chapter 2 - Standards of the Legal Profession
        - rule 2.1-1 (To the state)
        - rule 2.1-3 (To the client)
    - Chapter 3 - Relationship to Clients
        - rule 3.2-7 (Dishonesty, fraud by client)
        - rule 3.2-8 (Dishonesty, fraud when clients an organization)
        - rule 3.4-1 (Duty to avoid conflicts of interest)
        - rule 3.6-2 (Contingent fees and contingent fee agreements)
        - rule 3.6-9 (Payment and appropriation of funds)
        - rule 3.7-1 (Withdrawal from representation)
        - rule 3.7-2 (Optional withdrawal)
            - Annotations
                - EC July 1995, item 8
                - EC July 2013, item 8
        - rule 3.7-3 (Non-payment of fees)
        - rule 3.7-7 (Obligatory withdrawal)

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        - rules 3.7-8 and 3.7-9 (Manner of withdrawal)
        - rule 3.7-9.1 (Confidentiality)
- Discipline Advisory: Withdrawal under a contingency fee agreement (August 13, 2020)
- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:
    - under the heading *Client files*:
        - Ownership of Documents in a Client's File (July 2017)
        - Closed Files: Retention and Disposition (August 2017)
        - Closing a file: What documents to keep and for how long, Benchers' Bulletin, Winter 2017 (pp. 9-10, 19)
    - under the heading *Solicitors' Liens*, Solicitors' Liens and Charging Orders – Your fees and Your Clients

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Registration and Licensee Services: registration@lsbc.org
- Trust Assurance: trustaccounting@lsbc.org

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MODULE 11 – CONFLICTS

11 - Introduction to the Conflicts Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***11 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

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11.1 - The Basics of Conflicts of Interest

11.1-1 - What is a Conflict of Interest?

Definition of a Conflict of Interest

"conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. *BC Code* rule 1.1-1

A conflict of interest is a situation that impedes your ability to provide your client with undivided loyalty. For example, you may represent, or have represented, a client of opposed interest, which makes it impossible to represent the new client without sacrificing the undivided loyalty you owe to the existing or former client.

Examples of Conflicts of Interest

The following are some examples of conflicts that may be identified before establishing a retainer:

Example 1:

You have helped set up a large number of asset structures for your client to minimize tax liabilities, and now their spouse wants you to represent them in the divorce proceeding.

Example 2:

You defended Smith in a criminal case related to an assault of Jones, and Jones wants to retain you to bring a civil suit over that same assault. In this situation, you would likely have learned confidential information while defending Smith that would be prejudicial to Smith if you were to represent Jones in bringing suit against Smith.

11.1-2 - When to Identify a Conflict of Interest

It is not enough to turn your mind to conflicts only at the start of the lawyer-client relationship. It is important to remember that a conflict can arise during the course of the relationship, and you should remain aware that potential or actual conflicts may arise.

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Examples of Conflicts of Interest

The following are some examples of conflicts that may arise during the course of a retainer:

Example 1:

You jointly represent business partners who subsequently have a falling-out regarding the direction of their enterprise.

Example 2:

In a motor vehicle accident case, you represent the driver and passenger of vehicle A. Your initial assessment was the driver was not liable and the other driver was going to admit liability, but 6 months into the representation the other driver takes the position that your driver is at fault.

Example 3:

Your firm ABC Law represents a spouse on a family file. The client's former partner is represented by XYZ Law. During the file, a lawyer from XYZ Law who was working on the former client's file joins your firm. The lawyer had been at ABC Law for a month before anyone noticed.

11.1-3 - Guiding Principles & Professional Obligations

A guiding principle for conflicts is set out in *BC Code* rule 2.1-3(b):

> A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the controversy, if any, which might influence whether the client selects or continues to retain the lawyer. A lawyer shall not act where there is a conflict of interests between the lawyer and a client or between clients.

BC Code rule 2.1-3(g) further provides as follows:

> A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject-matter of the litigation being conducted by the lawyer. A lawyer should scrupulously guard, and not divulge or use for personal benefit, a client's secrets or confidences. Having once acted for a client in a matter, a lawyer must not act against the client in the same or any related matter.

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These cannons lay the foundation for the following discussion about what a conflict of interest is, when it may arise and how to avoid conflicts.

11.1-4 - Risks & Consequences of a Conflict of Interest

In addition to harming your reputation, engaging in a conflict of interest can:

- lead to an investigation and regulatory sanction by the Law Society;
- lead to civil liability for malpractice. Even absent liability, defending such a claim takes time and costs money; and
- in litigation, lead to being removed as the solicitor of record by the court or tribunal.

Conflicts of interest are a frequent issue in professional regulation.

As the regulatory body of the legal profession, the Law Society establishes the rules regarding conflicts of interest. Violation of these rules can lead to censure by the Law Society in various forms, including a discipline citation for breaching the *Legal Profession Act* or the Law Society Rules, professional misconduct or conduct unbecoming.

11.1-5 - The Court's Duty

The role of the court in a conflict is different than that of the regulator of lawyers. In *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, McLachlan C.J.C. (as she then was) explained at paras. 13 and 16:

> Courts of inherent jurisdiction have supervisory power over litigation brought before them. Lawyers are officers of the court and are bound to conduct their business as the court directs. When issues arise as to whether a lawyer may act for a particular client in litigation, it falls to the court to resolve those issues. The courts' purpose in exercising their supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice, not to discipline or punish lawyers.
>
> […]
>
> Both the courts and law societies are involved in resolving issues relating to conflicts of interest — the courts from the perspective of the proper administration of justice, the law

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> societies from the perspective of good governance of the profession: see *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331. In exercising their respective powers, each may properly have regard for the other's views. Yet each must discharge its unique role. Law societies are not prevented from adopting stricter rules than those applied by the courts in their supervisory role. Nor are courts in their supervisory role bound by the letter of law society rules, although "an expression of a professional standard in a code of ethics . . . should be considered an important statement of public policy": *Martin*, at p. 1246.

In *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, the Supreme Court of Canada recognized that courts are not bound to apply codes of professional ethics in asserting their jurisdiction to remove a solicitor of record from the case where a conflict of interest exists. The court should consider expressions of professional standards set out in a code of ethics as an important statement of public policy. In that case, Sopinka J., writing for the majority, found that the Legislature has entrusted to the governing bodies the role of setting standards, including for assessing conflicts of interest, for the legal profession. The court's role is merely supervisory, extending to conflicts only where they arise in legal proceedings.

11.1-6 - "Who is the Client?"

Manage Potential Conflicts by Asking "Who is My Client?"

You must always ask yourself: "Who is my client?" Making it clear who you represent, and conversely who you do not represent, is an important part of establishing a retainer. It also helps you manage conflicts.

Scenario 1:

A prospective client comes to you to discuss a joint venture she is planning with a friend. The friend might think you represent them both, and if you don't take steps to disabuse the friend of the notion, problems can arise. This is one of the reasons you perform the conflicts check at the beginning of the relationship and before you receive confidential information.

Scenario 2:

You might be acting for a company and find yourself receiving instructions and information from a shareholder and from a director. If you haven't established who has capacity to instruct you regarding the company problems, a conflict scenario can easily arise.

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Always know who your client is.

You do not want non-clients to act under the misapprehension that you are protecting their interests and let them provide you with confidential information. It is essential to document communications clarifying the scope of your retainer. Where appropriate, provide a non-engagement letter to the prospective client or non-client. When dealing with self-represented parties, remember to review and comply with *BC Code* rule 7.2-9 to clarify your role and encourage them to get counsel.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

You may find yourself in a situation where your instructing client is also an unrepresented third party, so it is important to consider your role and retainer – for example, in Scenario 2 above, you may need to clarify with the shareholder that you do not represent them as an investor or that you cannot give advice to the director about their individual fiduciary obligations to the company. The company is your client, and they will have to seek advice on their individual circumstances from other counsel. If you fail to make these important clarifications, the client may think you "have their back" and make decisions based on your advice that are not in their best interests.

11.2 - Acting Against Clients

11.2-1 - Acting Against Current Clients

Parties in a Dispute

You cannot act for two clients who are opposing parties in a dispute, ever. Even if they consent.

Commentary [1] to *BC Code* rule 3.4-1 (Duty to avoid conflicts of interest) states:

> **[1]** Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright line rule as articulated by the Supreme Court of Canada. **The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate**

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> **legal interests of another client even if the matters are unrelated unless the clients consent.** However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary [6].
>
> [emphasis added]

Commentary [1] to *BC Code* rule 3.4-3 (Dispute) explains:

> A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

Parties not in Dispute

If the clients are not opposing parties in a dispute, you may act against the interests of current client:

- with the consent (express, fully informed, and voluntary in most cases and implied in some limited cases) of all parties, and
- only if you reasonably believe you would be able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

Lawyer belief in reasonableness of representation

To be satisfied that the one representation would not have a material adverse effect upon the other, you would need to be sure no decisions you make on either file would require you to "choose" one client over the other (Commentary [7] to rule 3.4-2). The matters would have to be substantially unrelated and you would have to be sure you had not possess confidential information from one representation that may reasonably affect the other; see *BC Code* rule 3.4-2 (Consent) and rule 3.4-3 (Dispute).

Obtain Express Consent to Act against Current Clients

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In the strong majority of cases, the consent you would need to act in a conflict of interest would need to be expressly provided.

Note that express consent must be *fully informed* and *voluntary* after *disclosure* (rule 3.4-2(a)).

Both "consent" and "disclosure" are defined terms in the *BC Code*, see section 1.1 (Definitions):

> **"consent"** means fully informed and voluntary consent after disclosure
>
> (a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or
> (b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable;
>
> **"disclosure"** means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

Further, commentary to rule 3.4-2 provides the following guidance:

> **[1]** Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.
>
> **[2]** The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.
>
> **[2.1]** While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated.
>
> **[3]** Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf 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

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experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

When Client Consent May be Implied

Absent contrary instructions, a client can provide implied consent to act against their interests if:

- the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
- the matters are unrelated;
- you have no relevant confidential information from one client that might reasonably affect the other; and
- the client has commonly consented to lawyers acting for and against it in unrelated matters.

See *BC Code* rule 3.4-2 (Consent).

Parties not in Dispute but with Competing Interests

Sometimes two clients may not be in dispute, but have competing interests and both wish to be represented by the same law firm. This can work if the firm complies with *BC Code* rule 3.4-4 (Concurrent representation with protection of confidential client information).

You'll see when you review that the requirements are extensive, including independent legal advice for the clients and ethical walls, but it may provide a valuable option in some circumstances.

11.2-2 - Acting Against Former Clients

A lawyer should not attack legal work done during a retainer, nor undermine a former client's position on a matter that was central to the retainer. It is not improper, however, for you to act against a former client in a matter wholly unrelated to any work you have previously done for that former client if the confidential information you obtained during the file is irrelevant to the new matter.

The Case Law

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In *MacDonald Estate*, the Court set out two key questions for it to consider when determining if a disqualifying former client conflict exists:

1. **Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?**

   The first step here if for the former client to establish that they had a previous relationship with the lawyer that is sufficiently related to the matter in which the lawyer is now acting against them.

   Once this relationship is established, the court will infer that confidential information was received by the lawyer unless the lawyer can satisfy the court that no information that was imparted could be relevant to the matter at hand. This is a difficult burden to discharge, as the lawyer will need to convince the court that a reasonably informed member of the public would be satisfied that no relevant information was received, but also do so without revealing the specifics of any privileged communication.

2. **Is there a risk the confidential information will be used to the prejudice of the client?**

   If the answer to the first question is yes, that lawyer cannot act. Disqualification is automatic. The lawyer cannot compartmentalize their mind and trying to do so would be to the detriment of both the former client and current client – it is a position of inherently divided loyalty in which a lawyer cannot be permitted to proceed.

   However, depending on the circumstances, another lawyer in the firm may be able to act in the matter. The firm need not be automatically determined to be a “hive-mind” in which the knowledge of one lawyer is automatically imputed to all lawyers in the firm; however, lawyers do talk to other lawyers in their firm about their files. To address this issue, the court starts from the inference that lawyers who work together share confidences (and therefore any lawyer in the firm would be disqualified from acting), but is open to having this inference rebutted by clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the lawyer(s) at the firm who act against the former client.

The BC Code

The *BC Code* rules regarding acting against former clients, rules 3.4-10 and 3.4-11, follow similar principles, preventing a lawyer from acting against a former client in the same matter, a related matter, or a matter in which the former client’s confidential information would be relevant without consent of that former client.

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Ethical Walls for Lawyers in the Same Firm and for Lawyers Transferring Firms

BC Code rule 3.4-11 sets out how a different lawyer at your firm may act in a new matter if you possess relevant confidential information if proper ethical walls are put in place.

Former client conflict issues can also arise in the context of a lawyer changing firms. *BC Code* rule 3.4-20 deals with law firm disqualification in that context.

For further guidance, see Commentary [3] to rule 3.4-20 which sets out **Guidelines: How to screen / measures to be taken.**

Be Cautious When Proposing to Act Against a Former Client

Exercise caution when you propose to act against a former client, and read the provisions of *BC Code* section 3.4 (Conflicts).

The prohibition in rule 3.4-10 is not simply acting against a former client, it is acting against the interests of a former client.

Consider the potential scope of this wording, and don't be too quick to dismiss a potential conflict.

Example

You represented your client ABC Co. in several complaints to the Workers' Compensation Board.

Loretta hires you to represent DEF Inc. in its hostile takeover bid for GHI Ltd., which is a subsidiary company of ABC Co.

If you do propose to act against GHI Ltd., do you need consent?

Consider:

- Would acting against GHI Ltd. be against the interests of former client ABC Co.?
- If so, would the takeover be considered the same or related matter to the WCB complaints?
- Even if it was not the same or a related matter, are you aware of relevant confidential information
- If I determine I need to consent from ABC Co. to act, can I go about it in a way that also honours my duties of confidentiality to ABC Co. and DEF Co.?

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Although you are not required to fetter your practice unreasonably, you owe a fiduciary duty to each client and practising law is more than running a business.

When in doubt, contact the Law Society's Practice Advisors for guidance.

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11.3 - Acting for Two or More Clients

11.3-1 - Joint Retainers

How to Avoid Conflicts when Jointly Representing Multiple Clients

According to *BC Code* rules 3.4-5 to 3.4-7 you may jointly represent multiple clients under a joint retainer provided that, before you are retained, you must advise the clients that:

- You have been asked to act for both or all of them;
- No information received in connection with the matter from one client 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.

You should also have the clients sign a joint retainer agreement.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

An important note – the rules around multi-party representation are different for real estate files:

If you are dealing with a real property conveyance, you must comply with the requirements set out in *BC Code* rule 3.4-1 and Appendix C - Real Property Transactions.

For more information, see ***Module 2: Real Estate*** in the **Practice Refresher Course**, on the Brightspace Homepage.

11.3-2 - If a Conflict Arises Between Clients

According to *BC Code* rules 3.4-8 and 3.4-9, if you are jointly representing clients and a conflict arises between them you must cease representing all the clients unless:

- all the clients provide their informed consent for your continued representation of one or more of them; or

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- the clients resolve the contentious issue between them, either directly or with the assistance other lawyers.

Before you take on a joint retainer, consider the potential issues carefully.

While everyone may be on the same page at the beginning, that can change quickly.

Consider whether the file is truly appropriate for a joint retainer, or whether the clients are better served by getting their own lawyers.

Situations when joint retainer clients are at odds can be very challenging to navigate. Don't hesitate to contact the Law Society's practice advisors for guidance.

11.4 - Clients with Clients

11.4-1 - Personal Conflicts of Interest

Sometimes lawyers may find themselves in a situation where there are in a personal conflict of interest.

In this case, a lawyer may have a personal interest or economic interest (other than payment of reasonable fees) that conflicts with the client's interest and impacts the lawyer's ability to provide unbiased counsel.

Professional Obligations

Commentary 11 to *BC Code* rule 3.4-1 provides a non-exhaustive list of examples of circumstances that may give rise to conflicts of interest, including situations involving colleagues, family members and other close personal relationships, and personal financial interests.

Further, *BC Code* rule 3.4-26.1 states:

A lawyer must not perform any legal services if there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's

(a) relationship with the client, or
(b) interest in the client or the subject matter of the legal services.

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The following are some examples of personal conflicts of interest:

- You own 15% of the shares of a privately held company. Your client intends to purchase the company to take it public and wants you to paper the deal.
- Your client wants to invest in your spouse's free-range llama farm and asks you to help negotiate the deal.
- Your long-term client is having financial difficulties and you decide to loan him money to see him through a rough spot.

Implications for Indemnification and Insurance

In addition to being contrary to *BC Code* rule 3.4-26.1, each of these personal interest examples may render your insurance void.

Visit the **Lawyers Indemnity Fund** website for more information about the BC Lawyers Professional Liability Indemnification Policy, including what claims are excluded, such as the **Benefit and Business Exclusion (Exclusion 6)**.

11.4-2 - Business & Financial Interests

Professional Obligations

Generally speaking, a lawyer may act as legal advisor or as a business associate to a client, but not both. Acting as both would likely result in a conflict of interest.

- See *BC Code* rules 3.4-27 to 3.4-41 (Doing business with a client).

Subject to the permitted exceptions, you must not perform legal services for a client if:

- you have a direct or indirect financial interest in the subject matter of the legal services; or
- anyone has a direct or indirect financial interest that would reasonably be expected to affect your professional judgment.

Implications for Indemnification and Insurance

Acting in certain circumstances may trigger the benefit and business Exclusion 6 in the BC Lawyers Professional Liability Indemnification Policy, which removes coverage for claims that arise from a lawyer's business activities or losses rather than professional services.

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Business activities could also trigger similar provisions in other insurance policies, so review your insurance policies to make sure you are not about to engage in activities that may negate your coverage.

Visit the **Lawyers Indemnity Fund** website for more information about the BC Lawyers Professional Liability Indemnification Policy, including what claims are excluded, such as the **Benefit and Business Exclusion (Exclusion 6)**.

When in doubt, contact the Lawyers Indemnity Fund for guidance.

Before doing business with a client

- Review and consider *BC Code* rules 3.4-27 to 3.4-41
- Review and consider *BC Code* rule 3.4-26.1
- Consider contacting the Lawyers Indemnity Fund for an advance ruling regarding indemnification coverage
- Contact a Law Society practice advisor if you have questions

11.5 - Sharing Office Space

11.5-1 - Sharing Space with Other Lawyers

Sharing Space with Other Lawyers Could Result in Conflicts

Professional Obligations

There can be conflict issues when you share office space with one or more lawyers but are not practising, or being held out to be practising, in partnership or association with them (see *BC Code* rules 3.4-42 and 3.4-43 (Space-sharing arrangements)).

If you merely share space with other lawyers, but don't make that status clear to clients and others, you will have the same professional responsibility for the actions of the other lawyers as you would have if practising in a partnership or association.

Be particularly conscious of your advertising and firm name.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes a **Lawyers sharing space** resource under the heading *Organizing your law office*.

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Implications for Indemnification and Insurance

The BC Lawyers Professional Liability Indemnification Policy defines a "law firm" to include an "apparent partnership." This can have ramifications, for example, on how broadly Exclusion 6 may apply to a situation.

Visit the **Lawyers Indemnity Fund** website for more information about the BC Lawyers Professional Liability Indemnification Policy, including what claims are excluded, such as the **Benefit and Business Exclusion (Exclusion 6)**.

When in doubt, contact the Lawyers Indemnity Fund for guidance.

11.5-2 - What to Tell Clients about a Shared Space

Space-sharing creates a situation where one lawyer in the shared space may act for clients who are adverse in interest to the clients of another lawyer sharing that space. As such, unless all lawyers sharing the space agree that they will not act for clients of adverse interest, **each lawyer in the shared space must disclose <u>in writing</u> to all their clients:**

- ✓ that a space-sharing arrangement exists;
- ✓ the identity of the lawyers who make up the firm acting for the client; and
- ✓ the identity of the lawyers sharing space with the firm that are free to act for clients adverse in interest to the firm's clients.

For further guidance, see *BC Code* rule 3.4-43.

Disclose that a Space-Sharing Arrangement Exists

It is good practice to disclose the existence of a space-sharing arrangement, even in circumstances where the lawyers have agreed not to act for clients adverse in interest.

Risk Exposure

Consider your potential exposure to risk depending on how your space-sharing arrangement is perceived, especially in light of the *BC Code*. It is important to avoid clients assuming you are operating as a firm by considering issues like:

- office signage,

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- letterhead,
- website, and
- other advertising when addressing space-sharing.

For further guidance regarding lawyers' professional obligations when advertising, be sure to review *BC Code* Chapter 4 (Marketing of Legal Services).

11.5-3 - Managing a Shared Space

The following are some of the ways that a shared space can be managed.

Establish a Conflicts Checking System

How can you ensure from the outset that neither you, nor the lawyers with whom you share space, are accepting retainers for clients adverse in interest to existing clients in circumstances where you have agreed not to take on such matters? **You need to establish a conflicts checking system that prevents conflicts from arising with space-sharing colleagues.**

For more information, see the next section of this module, ***11.6 - Conflict Check Systems***.

Obtain Express Consent BEFORE the Conflict Check

To ensure confidentiality and avoid conflicts, you must have the consent of each client before disclosing any information about the client for the space-sharing conflict check. Although implied consent is theoretically possible, the best course of action is to obtain express consent; see *BC Code* rule 3.4-43.

Do Not Share a Centralized Server or Computers

You may wish to share resources in a space-sharing arrangement to reduce overhead.

You shouldn't share computers or a centralized server with others in a space-sharing arrangement.

Issues about protection, security, and confidentiality of information on your computers will arise, and sharing these resources is risky.

Implications for Indemnification and Insurance

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If you enter a space-sharing agreement, make sure you advise your excess insurer of the relationship and ensure proper coverage is in place.

If you have questions about the indemnification ramifications of space-sharing, contact the Lawyers Indemnity Fund.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes a **Lawyers sharing space** resource under the heading *Organizing your law office*.

If you have questions about space-sharing, contact the Law Society's practice advisors.

11.6 - Conflict Check System

11.6-1 - Setting up a Conflict Check System

Definition

A Conflicts Check System is a manual or computerized procedure that requires a centralized index, book, or database, through which conflicts can be checked.

Although using a manual conflict checking system will work, there is tremendous value in using a centralized computer-based conflict checking system, especially as your practice grows.

For a conflicts system to work, it needs to be integrated into the other systems in your practice.

Never open a file or perform work on a file until the conflicts search is complete.

You need routine procedures to check for conflicts **before** opening a file, **before** you receive any confidential information from a potential client and on an **ongoing basis** as circumstances require (see ***11.6-2 - When to Perform Conflict Checks*** for more information).

For more information about setting up a conflict check system, see the following:

- **Model conflict of interest checklist** in the Support and Resources for Lawyers > Practice Resources area of the Law Society website under the heading *Confidentiality / Conflict of Interest*; and
- the following sections of this module ***11.6-2 - When to Perform Conflict Checks*** and ***11.6-3 - Contents of a Conflict Check System***

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11.6-2 - When to Perform Conflict Checks

You must be aware of conflicts throughout the life of the file.

Perform a conflict check:

- **when a potential client seeks to engage your firm;**
- **after your first meeting when you compile salient information; and**
- **on an ongoing basis every time there are new parties involved.**

Example

Midway through a real estate transaction your client informs you that she is planning on getting married.

In this case, you would add the fiancé's information to the conflicts checking system and run a fresh search for potential conflicts.

11.6-3 - Contents of a Conflict Check System

Your conflicts checking system can have many data identifiers. As a general principle, more information is better, but that information must also be relevant, and the data must be entered correctly.

Important Information

Each conflicts checking system should contain the following, provided the information exists:

- the client name, including alias;
- current and former clients;
- affiliates or partners of the client;
- directors or officers of the client;
- affiliated corporations and entities of a corporate client;
- adverse parties;
- co-plaintiffs or co-defendants;

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- known relatives of the client and other parties;
- common law spouses of the client and others;
- one-time consultations;
- counsel representing any party to the matter; and
- lawyers and staff in the firm.

Entering proper data will help you flag potential conflicts, but you must still turn your mind to whether a potential conflict exists or may arise.

Factors to Consider

Consider the following factors at a minimum:

- the various interests of the parties involved in the matter;
- whether more than one person is relying on your advice;
- whether more than one person believes you are protecting their interest (in circumstances where those involved in the matter have an apparently common interest, assess the equality of their bargaining positions); and
- how likely is the potential for falling out to occur between the parties?

For the system to work, everyone at the firm must understand how the system operates AND use it appropriately.

11.7 - Lawyer Transfers Between Firms

11.7-1 - Professional Obligations

If you are transferring into or operate a small firm or someone is transferring into it, be aware of the *BC Code* rules governing transfer between firms.

Lawyer's professional obligations when transferring between law firms are set out in *BC Code* rules 3.4-17 to 3.4-26 (Conflicts from transfer between law firms).

When are These Rules Engaged?

BC Code rule 3.4-18 sets out that the rules on transfer between law firms apply when a lawyer moves from one law firm to another and the lawyer or the new firm discover that:

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- It is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm's matter for its client; or
- If all three criteria below are met:
    - the new firm represents a client in a matter that is the same or related to a matter in which the former firm represents its own client;
    - the interests of those clients in that matter conflict; and
    - the transferring lawyer possesses relevant information respecting that matter.

Managing Conflicts when Transferring Between Law Firms

The definition of "law firm" in *BC Code* rules 3.4-17 to 3.4-26 is broad, and includes space sharing arrangements. When a lawyer transfers firms or into a space-sharing environment, review the provisions of the *BC Code* governing transfer between law firms.

Note that:

- a "lawyer" under the *BC Code* includes an articled student, per rule 1.1-1; and
- a "matter" refers to the case or client file, but not general know-how, per rule 3.4-17.

11.7-2 - Handling a Transferring Lawyer Conflict

When the Transferring Lawyer Possesses Confidential Information of a Former Client

If the transferring lawyer actually possesses confidential information relevant to the matter of a former client, that may prejudice the former client if disclosed to a member of the new firm, then **the new firm must cease representing its current client in the matter.** This is the case *unless*:

- the former client consents to the new law firm's continued representation of its client; or
- the new law firm has:
    - taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and
    - advised the lawyer's former client, if requested by the client, of the measures taken.

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Implementation of Reasonable Measures

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

- if the transferring lawyer actually possesses confidential information respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, and
- if the new law firm is not sure whether the transferring lawyer 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.

Actual or Imputed Knowledge?

Commentary [1] to *BC Code* rule 3.4-18 is important in determining whether actual knowledge includes knowledge that can be imputed to the transferring lawyer:

The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *Macdonald Estate v. Martin*, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

This commentary demonstrates why it is important to consider putting reasonable measures in place if you are not sure whether the transferring lawyer possesses confidential information. If the transferring lawyer even may have relevant confidential information, you can attempt to rebut the presumption the transferring lawyer could have any connection to the matter.

Consent to Act Against a Former Client

The transferring lawyer who actually possesses confidential information may only act in the new matter, disclose confidential information, or discuss the file in any way with the new firm only with the consent of the former client; see *BC Code* rules 3.4-21 and 3.4-22 (Law firm disqualification).

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It is critical to have a robust conflicts-checking system in place.

While it is possible the former client will consent to the new firm's continued representation of its client, it is possible they will not.

It is essential to deal with issues arising out of transfer between firms.

Failure to raise such issues promptly may prejudice clients.

11.8 - What if I'm Unsure if a Conflict Exists?

You might come across a situation where you just don't know whether the degree of relation between your client and another person might create a problem.

Conflicts are tough to navigate, so it is not surprising to have situations where you are unsure.

When in doubt, you can consult another lawyer at your firm (your firm may even have a lawyer designated to address conflicts issues) or contact a Law Society practice advisor.

11 - References & Resources

Statutes

- *Legal Profession Act*

Law Society of BC materials

- Law Society Rules
- Code of Professional Conduct of British Columbia (*BC Code*)
    - Chapter 1 - Interpretation and Definitions
        - section 1.1 (Definitions)
    - Chapter 2 - Standards of the Legal Profession
        - rule 2.1-3
    - Chapter 3 - Relationship to Clients

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    - rule 3.4-1 (Duty to avoid conflicts of interest)
    - rule 3.4-2 (Consent)
    - rule 3.4-3 (Dispute)
    - rule 3.4-4 (Concurrent representation with protection of confidential client information)
    - rules 3.4-5 to 3.4-9 (Joint retainers)
    - rules 3.4-10 and 3.4-11 (Acting against former clients)
    - rules 3.4-17 to 3.4-26 (Conflicts from transfer between law firms)
    - rule 3.4-18 (Conflicts from transfers between law firms)
    - rules 3.4-20 and 3.4-22 (Law firm disqualification)
    - rule 3.4-26.1 (Conflicts with clients)
    - rules 3.4-27 to 3.4-41 (Doing business with a client)
    - rules 3.4-42 and 3.4-43 (Space-sharing arrangements)
    - rule 7.2-9 (When a lawyer deals on a client's behalf with an unrepresented person)
    - Chapter 4 (Marketing of Legal Services)
    - Appendix C - Real Property Transactions
- Support and Resources for Lawyers > Practice Resources area of the Law Society website has the following resources:
    - Lawyers sharing space under the heading *Organizing your law office*
    - Model conflict of interest checklist under the heading *Confidentiality / Conflict of interest*
    - Sample retainer letters (including a general retainer agreement and a joint retainer) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
    - Sample non-engagement letters under the heading *Client files*

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Registration and Licensee Services: registration@lsbc.org
- Trust Assurance: trustaccounting@lsbc.org

External resources

- Lawyers Indemnity Fund
    - BC Lawyers Professional Liability Indemnification Policy, including what claims are excluded, such as the Benefit and Business Exclusion (Exclusion 6)

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MODULE 12 – CLIENT SCREENING

12 - Introduction to the Client Screening Module

References & Resources

This learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***12 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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12.1 - Client Screening Process

You do not have to take on every client who approaches you for representation. While it may be difficult to turn away business, you will benefit from screening potential clients to make sure the relationship will be a good fit and to determine that you can meet your professional obligations. Be familiar with the applicable human rights laws and language rights. A lawyer must not discriminate against any person, including potential clients (*BC Code* rule 6.3-5 and commentary [1]). See *BC Code* rules 3.2-2.1 to 3.2-2.2 regarding language rights.

Be careful to obtain information for the purpose of clearing conflicts (addressed in ***Module 11: Conflicts***) before seeking further information in regard to the client's matter. If you have details about the potential client's matter and then realize you are in a conflict of interest, you may lose multiple clients in the process.

After you have successfully confirmed that there is no conflict in acting for a potential client, consider providing the potential client with an initial intake form to use for client screening. Have a potential client fill out this form before the initial consultation. Prior screening makes the first meeting more efficient and allows you to consider an appropriate fee structure prior to first meeting.

Be familiar with and apply the Law Society Rules in Part 3 – Division 11 – Client Identification and Verification and *BC Code* rules 3.2-7 to 3.2-8 and commentaries. These rules are vital tools in combatting dishonesty, fraud, money laundering and other illegal activities.

Money laundering affects every aspect of our society and its institutions, including financial institutions, law enforcement agencies and professional regulators. Money laundering is not a victimless crime; it enables criminal activity in all walks of life and affects all Canadians. Lawyers may be at risk of being targeted by money launderers due to their roles in forming corporations and trusts, in dealing with real estate transactions, and in operating trust accounts. These areas of legal services are used every day for legitimate transactions, which is why lawyers must be vigilant to ensure that they are not used by sophisticated criminals looking to filter funds through transactions that make it appear as though the funds came from legitimate activities. If, during the screening process or at any time while retained by the client, a lawyer knows or ought to know that the lawyer would be assisting a client in dishonesty, fraud or other illegal conduct, the lawyer must withdraw from representation.

For more information about the Law Society's role in combatting money laundering, and complying with your professional obligations, please consult the resources available on the Anti-Money Laundering page on the Law Society website.

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Keep up to date with changes to the Division 11 rules

Changes effective in 2020 introduced more stringent requirements to verify a client's identity, provided more options for how to confirm a client's identity, and require lawyers in financial transactions to obtain additional information about a client's source of money, as well as periodic monitoring and recording of professional business relationships with clients.

See the Client ID & Verification page on the Law Society website for resources including:

- Anti-Money Laundering Measures webinar (eligible for two hours of CPD ethics credits);
- checklists;
- practice advice articles in the Benchers' Bulletins (particularly the articles from Fall 2019 to Summer 2021), including "Forming companies and other structures – managing the risk" (Spring 2021 Benchers' Bulletin, p. 8); and
- FAQs on source of money, use of agents, monitoring, lawyer or law firm clients and referrals.

It is perfectly acceptable to advise potential clients that you require a couple of days to think about their case after meeting with them. If you do take this approach, you must advise the client in writing whether you accept or decline representation. If you decide not to represent the client, do not let them think you are protecting their interests. Send a prompt and clear non-engagement letter. Make sure to send it within the time estimate you gave the client.

If you decline the representation, alert the client to applicable limitation periods and do not give an opinion as to the merit of the case. You cannot commence an action if you're not retained and have no instructions to do so. You might enter into a limited scope retainer to draft pleadings and help the client with filing them (without your name on the record.) This is a different circumstance that actually being retained but not being able to reach the client to obtain instructions about filing a claim when a limitation date is fast approaching. Misunderstandings about whether or not a lawyer is representing a client are a common source of claims and complaints to the Law Society.

If you decide to accept the client matter, confirm in writing. Be absolutely clear in the letter whether you accept the representation and set out the terms of retainer, including estimated fees and requiring the client to sign and return a retainer agreement. These agreements are essential to set out the terms of your representation and compensation, the client's obligations and expectations, and circumstances for terminating the relationship. Make note of any limitations periods and take steps to preserve them. Similarly, note any documents received and set up appropriate bring forward dates.

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For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

Retainers and non-engagement letters are covered in greater detail in ***Module 7: Retainers***.

Also see ***Module 13: Dealing with Difficult Clients*** for discussion of how to deal with clients who present challenges.

12.2 - Screening Clients & Cases

Reasons to screen

There are many reasons to screen a client, including:

- to avoid taking on difficult clients;
- to avoid taking on clients who are fraudsters;
- to ensure you are not taking on matters that are outside your area of practice or level of experience; and
- to ensure that you will be paid for your services, as set out in a retainer agreement.

What to look for...

Here are some things to look for when screening clients:

- the client has just left or fired their previous lawyer;
- the client's reasons for leaving their previous lawyer seem unreasonable;
- their litigation is overly lengthy and hotly contested;
- the client was aggressive or abusive when dealing with your staff;
- the client was let go by their previous lawyer; or
- the client has an outstanding account to their previous lawyer.

Questions to consider

Here are some questions for you to reflect on before deciding to take on a matter:

- Does the client's matter fit in with your area of practice?

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- Does the client have a case?
- Is the client asking you to break the law?
- Will the client's matter require more resources and time than you can commit?
- Will you have adequate time to prepare?
- Does the client have the ability and willingness to pay your fees?
- Will the matter require more fees, disbursements and expenses than it can potentially recoup?
- What do your instincts tell you about matter? Does this seem like a client with whom you could have a productive working relationship? Is past correspondence on the file repetitive, excessive, or negative in tone? Does the client have a clear and accurate understanding of the proceedings and results to date?
- Are you competent to take on the client matter? Before accepting a retainer you must be satisfied you have the ability and capacity to deal adequately with any legal matters to be undertaken (*BC Code* rule 3.1-2 (Competence)).
- Does the potential client have the capacity to instruct counsel? Client capacity and the procedures to follow are set out in *BC Code* rule 3.2-9 (Clients with diminished capacity).

This list is not exhaustive.

You need to screen clients to ensure you provide your clients the quality of service they are entitled to expect, as well as to minimize your exposure to risk by limiting the number of problem clients that you accept. Client screening is a skill you will develop over time, and you should adapt your screening procedures to account for your experience and come up with a model that works for you.

Contact a Law Society practice advisor if you have questions about client screening or the content of this module.

12 - References & Resources

Law Society of BC materials

- Law Society Rules
  - Part 3 – Division 11 – Client Identification and Verification
- Code of Professional Conduct of British Columbia (*BC Code*)
  - Chapter 3 - Relationship to Clients
    - rule 3.1-2 (Competence)

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        - rules 3.2-2.1 to 3.2-2.2 (regarding language rights)
        - rule 3.2-7 (Dishonesty, fraud by client)
        - rule 3.2-8 (Dishonesty, fraud when client is an organization)
        - rule 3.2-9 (Clients with diminished capacity)
    - Chapter 6 - Relationship to Students, Employees, and Others
        - section 6.3-5 (Harassment and discrimination)
- Anti-Money Laundering page on the Law Society website
- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:
    - Sample retainer letters (including a general retainer agreement and a joint retainer) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
    - Sample non-engagement letters under the heading *Client files*
- See the Client ID & Verification page on the Law Society website for resources including:
    - Anti-Money Laundering Measures webinar (eligible for two hours of CPD ethics credits);
    - checklists;
    - practice advice articles in the Benchers' Bulletins (particularly the articles from Fall 2019 to Summer 2021), including "Forming companies and other structures – managing the risk" (Spring 2021 Benchers' Bulletin, p. 8); and
    - FAQs on source of money, use of agents, monitoring, lawyer or law firm clients and referrals.

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- Trust Assurance: trustaccounting@lsbc.org

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MODULE 13 – DIFFICULT CLIENTS

13 - Introduction to the Difficult Clients Module

References & Resources

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For a summary of the key resources, see section ***13 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

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13.1 - The Difficult Client

A difficult client can be demanding of you and your staff, and there could be a greater chance of unpaid bills, complaints to the Law Society, or allegations of negligence.

Dealing with a difficult client highlights the importance of applying good practices with all clients, such as managing their expectations about communications and documenting instructions and advice.

This learning module stresses the importance of taking proactive steps with difficult clients. This does not mean, however, that you may adopt a cavalier attitude if your client is not difficult. Bad practices do not cease to be bad simply because a client is good-natured, nor do sound practices cease to be sound simply because a client is difficult.

13.2 - Must You Act for a Difficult Client?

Do you have to act for a difficult client? The short answer is "no", but it is sometimes difficult to apply in practice because you might:

- not immediately identify the client is difficult;
- worry that turning away any client is bad for business;
- feel passionate about the client's cause and fail to consider the consequences of acting for the client; or
- think you can handle a difficult client.

While it is sometimes difficult for these clients to find legal representation, remember that if the case has merit, someone will represent them, and it need not be you. As each client has different personality traits, so do lawyers. There may be others who are more tolerant, more experienced, or have different personality traits that make them better suited to represent the client. Keep this in mind when considering whether to act for a difficult client.

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13.3 - If You Refuse to Take on a Difficult Client

The best practice is to send a non-engagement letter when you decide not to represent someone.

This advice applies to all clients but is particularly relevant for difficult clients because they are more likely to have unreasonable expectations or misunderstandings, and to be unhappy with you.

Make sure:

- the letter is precisely worded;
- you inform the person that neither you nor your firm are representing them;
- you warn the person about issues such as impending limitation periods; and
- you return the person's file or documents and, if necessary, confirm you will not be responding to the person's communications in the future.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

13.4 - If You Decide to Take on a Difficult Client

If you decide to take on a difficult client, you should:

- be direct and clear about how the relationship is going to work, including your expectations from the client and what they can expect from you;
- put the structure of the relationship in writing, including how you will communicate with the client and on what time frame, and stick to those parameters;
- remember that you have an obligation to respond to clients promptly, and to keep them informed about their file;
- take a substantial retainer up front if you suspect the client's ability or willingness to pay may be a problem. The client should replenish the retainer as it is depleted and understand that you won't continue to work without a replenished retainer. See the Retainers learning module for more information about retainers. Bill clients regularly so

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they know that you are working for them and understand that their contacting your office costs money;

- as with all clients, and particularly with difficult clients, ensure you maintain proper communication channels. It is especially important to bill your client frequently, rather than waiting and sending a large bill later. The further you bill from the work you have performed, the less value your client is likely to place on that work and the more likely they will complain about your work or the fairness of your bill; and
- know when to end your solicitor-client relationship. If the client cannot be satisfied perhaps it is time to let another lawyer try.

These guidelines will help to manage difficult clients and prevent others from becoming difficult.

While you are free to take on a difficult client, take steps to ensure you don't become a cautionary tale.

13.5 - Types of Difficult Clients & How to Deal with Them

There are many types of difficult clients.

The following is a non-exhaustive list of nine categories of difficult clients and some suggestions for how to handle them:

1. ***The client who is angry or hostile.*** **They were angry before they retained you and likely will stay angry.**
   (a) Be careful not to let them mistreat you or your staff. If you tolerate abusive behavior from them, it will likely continue and increase.

2. ***The client who is out for vengeance or on a mission which has little to do with the legal issues.*** **If you are unable to achieve their goal, they will be unhappy and there could be trouble.**
   (a) Be careful the client does not involve you in inappropriate or illegal actions to achieve their goals.

3. ***The over-involved or obsessive client*****. This client may focus all their energy on the legal matter, to the exclusion of other parts of their life. They will need a lot of attention and are obsessed with their case, often presenting binders or boxes full of materials about their case. They will expect you to read all of it.**

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(a) Try to get them to narrow down the materials needing your attention, bill them regularly so they understand the cost of your time, and ensure they receive copies of all of your work for their records.

4. ***The dependent client who is unable or unwilling to take responsibility for their life.*** **They may try to convince you to make decisions for them, or simply be unwilling to make a decision. Do not do it. When the result is not to their liking, they will blame you.**
   (a) Encourage them to find an advisor, other than yourself, to accompany them to your meetings and help them consider your advice.

5. ***The secretive / deceitful / dishonest client.*** **This person may or may not understand the importance of openness and honesty in the lawyer-client relationship.**
   (a) However, if the client is deceitful or dishonest with you, consider whether to end the retainer.

6. ***The elusive client.*** **Sometimes, despite your repeated efforts, a client just won't return your calls or give you instructions.**
   (a) It is important to document this relationship, putting all your advice in writing and asking the client for written instructions.
   (b) If you cannot get written instructions, confirm the lack of instruction or their verbal instructions in writing.
   (c) Ultimately, if you cannot get sufficient instructions from them close the file and inform the client in writing.

7. ***The unpredictable client who can change their instructions regularly.***
   (a) Document this relationship at all stages.
   (b) You must also stay alert to questions of competence to instruct counsel. If you have indications that capacity may be a future issue, consider BC Code rule 3.2-9 (Clients with diminished capacity) and the need for a power of attorney.
   (c) Do not become personally involved in their situation. When you can, refer them to appropriate professionals.

8. ***The difficult client with a difficult case.*** **This person may have unrealistic expectations about the outcome of their case, including costs, time and result.**
   (a) Be clear, at the outset, about your advice as to these matters.

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9. ***The client who is won't accept or follow your advice.***
   (a) As above, be sure to document the relationship in writing, including advice, outcomes, cost and time frames.

A client might manifest multiple difficult characteristics, and you might encounter a client who is difficult in a unique way. For example, dealing with an over-involved client, will likely require a different approach than dealing with a depressed client. With the former you may need to draw boundaries so you can do your job; with the latter you may need to draw boundaries, so they do not place you in the role of therapist.

The fundamentals of dealing with difficult clients are:

- identify the problem or potential problem;
- establish parameters that allow you to control the relationship; and
- document all the steps you take in dealing with them. ***Proper documentation is a best practice in dealing with all clients but is most important when dealing with difficult clients.***

Mental Health & Capacity

Any time you take on a client, you must consider whether the client is capable of giving you instructions and you must remain aware of the capacity issue throughout the relationship. Just because a client might have mental health issues does not mean they are not capable of instructing counsel. Similarly, when considering whether to take on such a client, you cannot decide not to represent them merely because of their challenges. The BC *Human Rights Code* prohibits discrimination against those dealing with mental health issues. Be careful to assess your ability to represent the client, as you would with any client.

You cannot take on a new client who lacks the capacity to give you instructions unless appointed by a court or tribunal, operation of statute, or in a proceeding in which some aspect of the client's mental capacity is in issue (*BC Code* rule 3.2-9 (Clients with diminished capacity)).

You may, however, take on a client of marginal capacity if they are competent to give you instructions on some, if not all, matters. It is worth noting that your obligations are different if a client loses capacity during the representation – review the commentaries to the *BC Code* rule 3.2-9 carefully and, when in doubt, feel free to contact a Law Society practice advisor.

In addition to ensuring all communications with such clients are well documented, make certain your staff is equipped to deal with the client. You will need a flexible approach if you find yourself dealing with such clients.

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When dealing with those who have mental health issues, remember that as a lawyer you are neither equipped nor licensed to provide psychological counselling.

Familiarize yourself with the resources that are available from the Motivation Power & Achievement Society that assists with advocacy and court services for people living with mental illness.

13.6 - The Importance of Effective Communication

Effective communication is essential to managing all client relationships, particularly with difficult clients.

Review and consider *BC Code* rule 3.2-1 regarding the quality of service required by a lawyer to their clients. Communication starts with the first meeting and the retainer.

Be certain your client understands, and confirm in writing:

- what services you can and will perform. It is critical that you clarify in exact terms what the client's expectations are, and remain aware of those expectations throughout the course of your representation;
- what services you cannot, and will not, perform;
- how your relationship is going to work, including a protocol for ongoing communications that could include who at the office will communicate with the client and time frames for responsiveness; and
- your fee structure and billing requirements. It is imperative to provide sufficiently descriptive bills and to explain the billing process to all clients. For example, your client may call you all the time to micro-manage the file. Take charge of this situation as soon as you recognize the pattern and let the client know that you charge for your time. Explain that these communications distract from your ability to move matters along expeditiously and will result in increased cost to the client. Be certain to document these communications and bill for them regularly to emphasize the cost of frequent communication.

Document all phone and electronic communications, including the client's name, file name, contact, date, nature and details of the communication. In a later dispute over that communication, courts may prefer the evidence of the client over insufficiently documented lawyer's records.

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Engage in prompt, regular billing. Don't let overdue bills slide.

Failing to confirm communications in writing often results in miscommunication, a deterioration of the lawyer-client relationship, and ultimately complaints to the Law Society. Using email to communicate can lead to expectations for shortened response times that may tax your resources if not managed carefully. Difficult clients can either be overly demanding with persistent communications or fail to respond to your communications to them leaving you always acting at the last moment. Include a paragraph in your retainer agreement outlining a communication protocol and discussing email, phone calls, modes of reporting and reasonable response times. Such clarity may go a long way to address client expectations.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources*:*

- **Sample retainer letters** (including a **general retainer agreement** and a **joint retainer**) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
- **Sample non-engagement letters** under the heading *Client files*

Here is an excerpt from the Law Society's sample retainer letter for wording about communication issues:

Telephone Calls, Emails & Letters

I will try to return your phone messages or respond to your emails or letters as quickly as possible, but I will not always be able to do so on the same day that you sent them. I am primarily a [courtroom lawyer] OR [transaction lawyer] and am [often in court] OR [attending closings]. When representing a client [in court] OR [in a transaction], I devote my time during that period to that client and have only a limited ability to return other clients' phone messages or reply to their emails or letters. When it is your turn to go to court or close your transaction, I will be devoting my time to you and your case.

*I remind you that I will bill you for all telephone calls, emails and meetings, including any time I may need to prepare for such conversations or review documentation (including emails) before or after our discussions. In order to receive the most value for the services you pay for, I will try to be as efficient as possible. In turn I hope you will limit our conversations in time and subject matter to those topics necessary to resolve your legal problems. If you have any questions or need to provide me with additional information, I suggest that you write to me or, if I am not available, please speak to my legal assistant, *, who may be able to assist you or can pass on a detailed message to me.*

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Be aware that you may have a client who doesn't seem to be a difficult client early in the relationship. You might represent a client on a number of contested applications and are successful until you do not receive an award for costs. Suddenly your client becomes displeased with the quality of your services and questions your bill. It is important to keep open communication channels with the client as the file progresses, so they know the value you bring. Frequent billing can also defuse this situation. If the client has been happily paying bills for work they consider valuable, when they do become difficult, a smaller bill will make the situation less volatile. It also addresses an argument that the client has never been pleased with the quality of your work.

13.7 - Warning Signs of a Difficult Client

There are some general indicators that you may be dealing with an individual who is, or may become, a difficult client. A few examples include:

- a client who has gone through a number of lawyers and has not been satisfied with any of them;
- a client who demands that their work take priority over all your other clients' work;
- a client who makes unrealistic demands of you, and your staff;
- a client who has unpaid accounts with other lawyers; and
- a client who has unrealistic demands regarding what may be achievable.

A difficult client may also be a fraud artist.

If a client is making demands that push you out of your comfort or competence zone, you must assert control over the relationship. Remain aware of your professional obligations in the *Legal Profession Act*, the Law Society Rules, and the Code of Professional Conduct for British Columbia. Think about what the client is asking you to do and assess whether the client's request and conduct indicates of fraud.

Don't underestimate the ingenuity of fraud artists. You may be targeted simply because you operate outside a large firm environment. Note particularly the requirement of *BC Code* rule 3.2-7 (Dishonesty, fraud by client):

> A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.

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And the commentary to that rule:

> A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make inquiries. For example, a lawyer should make inquiries of a client who:
>
> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matters, or
> (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

Be vigilant to avoid being the enabler for fraud. Before you open your doors to clients, review ***Module 16: Fraud*** later in this course. Strive to stay current with the types of frauds circulating in the legal community and public at large.

13 - References & Resources

Statutes

- BC *Human Rights Code*
- *Legal Profession Act*

Law Society of BC materials

- Law Society Rules
- Code of Professional Conduct for British Columbia
  - rule 3.2-1 (Quality of service)
  - rule 3.2-7 (Dishonesty, fraud by client)
  - rule 3.2-9 (Clients with diminished capacity)
- Support and Resources for Lawyers > Practice Resources area of the Law Society website includes the following resources:
  - Sample retainer letters (including a general retainer agreement and a joint retainer) under the heading *Retainer agreements, limited scope retainers, joint retainer letters*
  - Sample non-engagement letters under the heading *Client files*

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Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Trust Assurance: trustaccounting@lsbc.org

External resources

- Motivation Power & Achievement Society assists with advocacy and court services for people living with mental illness

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MODULE 14 – FILE MANAGEMENT & DIARY SYSTEMS

14 - Introduction to the File Management & Diary Systems Module

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References & Resources

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For a summary of the key resources, see section ***14 - References & Resources*** at the end of this module.

IMPORTANT

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14.1 - Professional Obligations

14.1-1 - Quality of Service

You have a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil; see *BC Code* rule 3.2-1.

You should review your file management systems periodically to ensure they are functioning properly and are responsive to changes in your practice.

Take steps to ensure the system is:

- appropriate for your practice;
- appropriately documented in a procedural manual and all staff know where the procedural manual is located, understand it, and follow it;
- followed in everyday practice; and
- reviewed and audited periodically to ensure it is still appropriate and that computer software and hardware are properly maintained.

Why does it matter?

There are several important reasons for having robust file management procedures, sound policies for documentation, and an effective diary system to:

- ensure you provide competent and efficient legal service at a fair cost;
- assist you to have a viable practice;
- protect you against allegations of negligence or complaints to the Law Society by assisting you to meet regulatory and legislative requirements such as preserving confidentiality, tracking limitations periods, and remitting taxes and Trust Assurance Fund filings; and
- avoid conflicts.

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Note

In this learning module, “file” includes: a paper file or computer file or folder, as well the shorthand for a matter for which the lawyer is engaged (as in, "I am working on the Smith file").

For clarity, we have broken this learning module into sections, but it is important to think of the discussion that follows as elements of an integrated whole, rather than as isolated systems.

14.1-2 - Expected Practices

BC Code rule 3.2-1, Commentary [5] notes that the quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides examples of expected practices in regard to file management:

- keeping a client reasonably informed;
- answering reasonable requests from a client for information;
- responding to a client’s telephone calls;
- keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;
- taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
- answering, within a reasonable time, any communication that requires a reply;
- ensuring that work is done in a timely manner so that its value to the client is maintained;
- providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
- maintaining office staff, facilities and equipment adequate to the lawyer’s practice;
- informing a client of a proposal of settlement, and explaining the proposal properly;
- providing a client with complete and accurate relevant information about a matter;
- making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;

Having robust file management procedures, document practices, and diary systems are all very important tools to help you ensure provide your clients with quality service.

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14.2 - Technology

14.2-1 - Software Options

Educate yourself on technology available for office management, including case management software. Take time to consider what technology you wish to use and develop a plan that takes advantage of the technology best suited to the needs of your practice.

You will find software designed to handle:

- financial management;
- document processing;
- case management;
- research; and
- communications.

Selecting the right technology and understanding how it works should save you time down the road and enhance your efficiency.

Spending time at the outset to become familiar with a product is important for several reasons. It allows you to understand what the product can do and how to customize it for your needs. If you try to customize the product without first learning how it works, you might end up diminishing the value of the product by spending your time on frequent calls to a help desk. The up-front time investment will make you more efficient at your practice and at using the software. Consider using consultants when installing the program if you are not comfortable with the technology.

It is always easier to put in a strong foundation at the start of an enterprise than to constantly revisit and tinker as problems arise. When you become efficient at using software it takes less time and frees up your time for work for which you can charge. The advantage of the practice management software is that it can manage much more information than you can hold in your memory, and promptly alert you to important matters, allowing you to prioritize your work more effectively.

A critical part of implementing any technology system is training. Simply installing software on your computer is not enough. At a minimum, take time to learn how to use the software, and consider taking a training course to understand the products you use and any limitations in the technology.

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14.2-2 - Email Communications

While email can be an efficient way to communicate with clients and is common practice, you should not use email indiscriminately.

At the very least, consider these issues:

- **Security.** Email can be an insecure form of communication, as it is relatively easy to intercept. Consider using digital certification and encryption technology for confidential communications.

- **Misunderstandings.** Unlike face-to-face communications, email is prone to misunderstandings as to tone. The reader must interpret the words you write, and your intended tone might not be apparent.
    - Exercise caution to ensure the tone of your emails is professional, and your meaning is clear.
    - Proofread your emails carefully before sending them.
    - Some practitioners leave filling out the addressee until after an email is written and proofread.

- **Mistakes.** With a slip of the fingers email can be sent to the wrong person and can be difficult, if impossible, to retrieve.

- **Effectiveness.** **You should not assume that an email is received, read or understood.**
    - It is good practice to follow-up to ensure that an important email is received, read or understood, or request a receipt notification that the email was read.
    - Everyone, including your clients, opposing parties, and opposing counsel, receive large numbers of emails daily and it is important to ensure that important correspondence is not lost in the chatter.
- **Expectation management.** Because of the near instantaneous nature of email, a client might expect to have replies to communications 24/7, as opposed to merely the same day. Make certain your client understands your protocol for replying to emails.

- **Workflow and priority setting.** Constantly responding to emails can break the flow of your thought process and distract you from the work at hand. While it might not be practical to deal with all emails as you deal with traditional mail, consider establishing a standardized approach that best suits the way you work.

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- **Quality.** Sometimes the availability of instantaneous communication can compromise the quality of communication.

- **Storage and retention.** Consider storage and retention issues associated with electronic records as part of your file management plan. Records retention is addressed in ***Module 8: File Retention & Disposal***.

- **Confidentiality and privacy obligations.** Take the time to read the terms of service of the email provider you use in order to understand the service provider's policies regarding what they do with your emails. Do they index them or provide information to marketers, and what is their policy regarding retention of your emails? Don't blindly subscribe to a service that provides inadequate protection for your clients' confidential information merely because the price is right.

- **Completeness of records.** If your filing system consists of a combination of paper files and electronic files, remember to print copies of important emails for your paper files.

- **Security.** Think twice about taking your laptop or mobile device across the border. Border officials have demanded lawyer laptop and cell phone passwords when crossing into the United States. Any email communications with clients that remain on your device are no longer protected. The ethical rules for lawyer on preserving confidentiality are broad and strict. Any lawyer who experiences a loss of custody or control of their records must report it immediately to the Law Society pursuant to Law Society Rule 10-4.

For additional information see the following resources:

- "Crossing Borders with Electronic Devices—Canada, the US and Beyond" in the Spring 2019 Benchers' Bulletin for recommendations to minimize the risks of compromising professional obligations and responsibilities when travelling with electronic devices across borders. Links to correspondence about this topic between the Law Society, the Federation of Law Societies, and the federal government are included.
- "Crossing the Border with Electronic Devices: What Canadian Legal Professionals Should Know" (December 14, 2018, Federation of Law Societies of Canada), in the Support and Resources for Lawyers > Practice Resources area of the Law Society website under the heading *Confidentiality / Conflict of Interest*.
- Discipline Advisory: Rule 10-4 Reports (August 31, 2021)

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14.2-3 - Ethics & Security

Lawyers have an ethical imperative to keep track of changes in technology that affect legal practice.

Take the time to understand the technology you are using for critical client communications and develop a strategy for maximizing the security and confidentiality of those communications.

Be sure to review Law Society Rules 10-3 (Records) and 10-4 (Security of records) carefully in regard to storage, access, and security of your records.

Law Society practice advisors can assist with questions about these Rules, in addition to directing you to helpful resources such as the Cloud computing checklist Practice Resource.

Remember that, besides obligations of client confidentiality, your practice is subject to the *Personal Information Protection Act* (the PIPA) which governs the collection, use, disclosure, and retention of personal information. You must take reasonable measures to protect your clients' personal information from risks of unauthorized access, use, disclosure, and disposal under the PIPA in addition to your obligations under Rules 10-3 and 10-4.

If you work with a laptop, take extra precautions to ensure the information stored on it is not accessible in case someone steals the laptop, or you forget it at the Courthouse Library or in a taxicab or rideshare. A laptop lock is a useful device but will not prevent accessing the information stored on the computer. Guard against physical theft of the computer as well as theft of the information that resides on it. Insurance may replace stolen equipment, but it will not rebuild shattered confidences.

Review and consider the following:

- "Lost or stolen briefcase? Cyber attack? What to do if your practice records have been compromised" (2021) in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website under the heading *Safety and security*.
- Lawyers' Indemnity Fund resources on Your Cyber Coverage

Best Practice Resources

Don't allow yourself to become overwhelmed by the technology you use. There are many best practice resources available online about technology and security. Take the time to educate yourself on the issues, talk to your peers to see what systems and policies they use and how they assess effectiveness.

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Think about your ethical and legal obligations and ask:

"How does the technology I am using assist me in meeting my obligations, and

How does it expose me, my clients, and my practice to risk?"

When in doubt about how the technology you use works, remember that you can hire to help set up, maintain, secure, and monitor your computer systems.

14.3 - File Management

14.3-1 - Office Space & File Storage

Step 1: Evaluate your office space and determine where to store files.

Consider your practice arrangements

- If you are a sole practitioner, a centralized filing system may be preferable.
- If you are in a small firm, it might make sense to locate files in proximity to the lawyers and staff who are working on them.
- If you share space, take proper steps to ensure client confidentiality is maintained.

For more information, the Support and Resources for Lawyers > Practice Resources area of the Law Society website includes a **Lawyers sharing space** resource under the heading *Organizing your law office*.

Consider the types files and the sensitivity of the information

You will potentially have three types of files on site:

- active client files;
- closed client files; and
- non-client files like precedents and employment records.

These categories of files should be stored separately from each other.

All client confirmation should be protected, but if you deal with some highly sensitive information (for example, business information about an upcoming corporate merger or acquisition), consider taking extra precautions.

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Consider file accessibility

Avoid storing files in your work area and where you entertain clients, as it may be difficult or awkward for others to access the files or could compromise confidentiality.

14.3-2 - File Storage Classification System

Step 2: Establish a file storage classification system

This step refers to the system for locating files, not the system for labeling individual files.

The three principle types of file storage classifications systems are:

Alphabetical

- File alphabetically by client's last name and include a reference line like Bear, Y. — re Picnic Basket Ownership Dispute (v. Jellystone Park).
- The advantage of this system over a numerical system is it does not require cross-referencing a file number against a client list in order to locate the file.
- It also allows you to store all of a client's active files together, and all of a client's closed files together.

Numerical

- Files are assigned numbers based on such things as the calendar year, on a permanent number assigned to a client followed by an individual file number like 162-1, 162-2, and so on, or other systems.
- Although you can protect privacy by only listing a number on the file label such a practice has its limitations.
- There is a greater likelihood of misfiling under the numerical method, and you will need to cross-reference to an alphabetical client list.

Alphanumerical

- There are several approaches, including a combination of letter from a surname and a sequentially assigned number such as FLE-007.

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Whichever system you adopt, consider the value in:

- ensuring each file has a reference in addition to an identifier so that it is easy to differentiate between separate matters related to the same client;
    - The more detailed the keywords in your reference the better you can integrate it into your conflicts checking system. For example: Burns, Montgomery re: Personal Injury, MVA is less descriptive and useful for the purpose of checking conflicts than Burns, Montgomery (a.k.a. Monty) re: Personal Injury, MVA; (v. Simpson, Homer J.)
- storing files by area of law when you practise in more than one area of law;
- colour-coding your files by area of law and keeping a colour code index near your filing; and
- ensuring that the computer software you use supports the type of system you have adopted.

14.3-3 - File Classification System & Protocol

Step 3: Establish a file classification system and protocol

- Create a file-opening record that includes:
    - sequential file numbering; the file name;
    - the date the file was opened;
    - the name of the responsible lawyer (in a multiple lawyer firm);
    - the name of the client and contact information;
    - the subject matter and reference;
    - the name and contact information of opposing part(ies), their counsel, and other interested parties; and
    - a space for file closing date, along with retention and destruction instructions.
- Create a checklist for file opening and closing, including where to file material, and create file-opening and file-closing sheets.
- Be sure to enter client and new file information in your file-opening record, or your computerized list of clients and files, after completing the file-opening sheet.
- Review all documents before placing them in their file.
- Try to establish a system that keeps files moving along and filed promptly, rather than allowing a backlog of filing to build up.
- Once you have dealt with the matter, create the appropriate bring forward on the file and in your system, then return the file to the file cabinet.
- Ensure you open a new file for each new client matter, and each new client.

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- Create accounting records for each new file on opening the file.
- When dealing with individuals you only meet for a one-time consultation, at a minimum ensure you enter them into your accounting and case management systems in order to catch potential conflicts.
- Establish cards or databases for clients and opposing parties, which provides:
    - a quick contact list, which is useful both during the life of a file and when following-up with clients for additional work;
    - a record to assist in managing your practice; and
    - a useful tool for checking conflicts.
- Use distinct sub-files for correspondence, pleadings, memoranda of law, searches, documents, and other classes of paper, where appropriate.
- Ensure loose paper is fastened to the file.
- Date stamp documents when received.
- Ensure you keep notes of all significant communications and conversations, including date, time, and the names of the parties involved.
- Ensure you document all settlements offered and rejected and consider having your client sign them.
- Carefully document situations where your client refuses to follow your advice.

14.3-4 - Separating by File Type

Step 4: Separate Files into Active Files, Closed files, and Non-client Files

Active Files

- Create an active file list and update it regularly.
- File lists may be organized alphabetically, but it is also useful to put the date the file opened on the list.
- Active file lists provide:
    - a current record of all open files;
    - a reminder of the effect of files on your workload, billing and obligations; and
    - a framework document for delegating work to staff and following up on files.
- Consider automated accounting programs to help you produce active file lists to chart unbilled work in progress, unbilled disbursements, the amount of money in trust, and so on.

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Closed Files

- Until your file load gets too big, it might be more economical to keep both active and closed files at your office, but it is still advisable to separate them.
- At some point you will probably need to consider off-site storage options for closed files.

Non-Client Files

- Operational files, such as precedents and employee records, should be stored in a separate location.
- Create a user-friendly, general index that allows firm staff to access the documents and add new ones to the system.

14.3-5 - Closed Files

Step 5: Closing Files

Be sure to review ***Module 8: File Retention & Disposal*** for additional guidance regarding closing files.

- Have the responsible lawyer review the file to be certain no outstanding matters remain, especially making sure all undertakings have been met. If outstanding matters remain, don't close the file. If no matters remain, have the responsible lawyer sign off that the file has been reviewed.
- Send a file closing letter to your client and set out clearly in the closing letter any future limitation periods or anything that needs to be done in the future (for example renewing a judgment on title within two years).
- Determine which documents must be returned to your client and document that they have been returned, including client acknowledgement that the returned items were received.
- Provide the client with a final bill and make certain the bill and all disbursements are paid.
- Make sure all the proper storage and retention dates are entered in the file and in your file storage system.
- Strip the file on closing. When it comes time to do this, review the suggestions in "Closed Files: Retention and Disposition" for good tips on how to strip a file on closing, what material should go to the client, what material should be destroyed, what material should be retained, and so on.
- Make sure the file is properly coded and listed in your system as a closed file.

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- Create a file closing sheet with information such as:
  - the name of the file;
  - the date the file was closed;
  - who closed the file;
  - file stripping checklist indicating what, if anything, was removed from the file and where it was sent or placed; and
  - instructions on storage and eventual destruction of the file.

- Consider incorporating a checklist into your file-closing sheet to make sure essential tasks have occurred, like checking that a final bill was paid, that no outstanding matters exist, and that the client has acknowledged receipt of the contents of the file sent to client.

Winding up a Practice

When it comes time to wind up your practice, take the time to review the materials available on the Support and Resources for Lawyers > Practice Resources area of the Law Society website, under the heading *Closing a law practice*, including the **Winding Up a Practice: A Checklist** as there will be additional steps to follow beyond the normal file closing procedures.

14.4 - Time Management

14.4-1 - Time Management Protocols

Proper time management is essential to maintaining your bottom line and providing quality client service.

You should develop a time management plan that accounts for daily, weekly, monthly, and annual practices.

Being proactive, rather than reactionary, will help you avoid breakdowns in your file management systems and will make you more productive.

Dedicating Time to Accomplish Tasks

A critical part of practice management is setting aside dedicated time to deal with important and/or essential tasks such as:

- planning the day and week;

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- dealing with correspondence;
- evaluating and prioritizing work;
- docketing time;
- marketing and developing your practice;
- meeting with clients;
- performing legal work;
- ensuring compliance with legislative and regulatory matters such as accounting records and taxes; and
- setting aside time for continuing professional development and networking.

If you don't establish protocols for dealing with these important matters, you may focus too heavily in certain areas at the expense of others.

Minimize Interruptions

One way to make your use of time more effective is to minimize interruptions. Carving out blocks of time to deal with difficult matters increases the chance you will complete them, or elements of them, before moving on to something else.

Assess & Improve

One of the advantages of following time management protocols is that you will have a model to review in order to objectively assess how effectively you are managing your practice. You may discover you are spending too much time on one area at the expense of another. By tracking your billable and non-billable time you can draw conclusions about how to structure your practice better.

Time Management Strategies

Some steps you can take include using to do lists and trying to handle each piece of paper only once.

Use desk diaries or calendars to plan out your day/week/month/year, and to remind you of court dates, limitation periods, insurance and tax deadlines, and so on.

As with other office systems, ensure that entries are mirrored in your assistant’s calendar as well as in your own.

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14.4-2 - Time Tracking

Always Track Your Time and Strive for Precision

Even in situations where you are working on alternative fee arrangements, such as contingent fee agreements, track how much time you spend each day on a file. This serves at least two purposes:

- it allows you to determine how effectively you are spending your time; and
- it provides evidence that your fee is fair should your client seek a fee review.

Properly tracking your time, rather than estimating it later, often leads to higher billables as you might underestimate the amount of time you spent on any given file.

Reasonably descriptive statement of the services

When keeping time, ensure your records are easy to understand and that you provide a sufficiently detailed explanation of the service performed. Your bill needs to include a reasonably descriptive statement of the services (*Legal Profession Act*, s. 69(4)). A notation such as "2.5 hours for work performed on your file" is not sufficiently descriptive. Also get in the habit of docketing time right after completing the work and recording your dockets daily.

Case management technology can assist you manage your time by providing detailed breakdowns on the time you spend on files and areas of law, and information relating to billing for that time.

Whether using software or paper, consider the value in including:

- the time spent by each lawyer and staff on the file;
- a breakdown of billable and non-billable time;
- a sufficiently descriptive explanation of services performed;
- a system for producing both interim and final statements of accounts; and
- a system for generating time management reports on a monthly, quarterly and annual basis.

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14.5 - Diary & Bring Forward Systems

14.5-1 - Importance of Diary & Bring Forward Systems

Your diary and bring forward system are critical for tracking limitation periods and other important dates.

Do not rely on your memory alone!

- Enter limitation and bring forward dates immediately in the proper systems.
- Consider setting a pre-deadline date as required to allow lead-time to complete a task before a deadline.
- Make sure that staff are fully familiar with your diary and bring forward systems so you will have a second set of eyes.
- Make sure that both you and your assistant keep a hard copy diary that records all client and office management dates.

14.5-2 - Important Dates to Consider

Some of the important dates to consider with your bring forward system include:

Due dates for:

- commencing an action;
- completing each stage of litigation;
- court appearances; and
- closings.

Renewal dates for:

- writs;
- notices of civil claim;
- licenses; and
- judgments.

Review dates for:

- wills;
- notices of civil claim;

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- trusts; and
- buy/sell valuations of business interests.

Office management dates for:

- tax obligations and remittances;
- insurance renewals;
- continuing professional development; and
- annual practice fees and insurance.

A more detailed version of this list is in the **Loss prevention planning checklist** in the Support and Resources for Lawyers > Practice Resources area of the Law Society's website under the *Organizing your law office* heading.

Also take the time to review the helpful resources from the **Lawyers Indemnity Fund** on the Limitations and deadlines page, including:

- **Beat the Clock The Limitations - LIF's guide for avoiding missed limitation and deadlines** and
- **Limitations and Deadlines Quick Reference List**.

14 - References & Resources

Statutes

- *Personal Information Protection Act* (the PIPA)
- *Legal Profession Act,* s. 69(4)

Law Society of BC materials

- Law Society Rules
  - Rule 10-3 (Records)
  - Rule 10-4 (Security of records)
- Discipline Advisory: Rule 10-4 Reports (August 31, 2021)
- "Crossing Borders with Electronic Devices—Canada, the US and Beyond" in the Spring 2019 Benchers' Bulletin sets out recommendations to minimize the risks of compromising professional obligations and responsibilities when travelling with electronic devices across borders. Links to correspondence about this topic between the Law Society, the Federation of Law Societies, and the federal government are included.

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- Support and Resources for Lawyers > Practice Resources area of the Law Society's website includes the following resources:
    - "Crossing the Border with Electronic Devices: What Canadian Legal Professionals Should Know" (December 14, 2018, Federation of Law Societies of Canada), under the heading *Confidentiality / Conflict of Interest*
    - Lawyers Sharing Space practice resource under the heading *Confidentiality / Conflict of Interest*
    - Loss prevention planning checklist under the heading *Organizing your law office*
    - "Lost or stolen briefcase? Cyber attack? What to do if your practice records have been compromised" (2021) under the heading *Safety and security*
    - Winding Up a Practice: A Checklist under the heading *Closing a law practice*

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Registration and Licensee Services: registration@lsbc.org
- Trust Assurance: trustaccounting@lsbc.org

External resources

- Lawyers' Indemnity Fund
    - Limitations and deadlines
        - *Beat the Clock The Limitations - LIF's guide for avoiding missed limitation and deadlines*
        - *Limitations and Deadlines Quick Reference List*
    - Your Cyber Coverage

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MODULE 15 – DELEGATION OF TASKS & SUPERVISION

15 - Introduction to the Delegation of Tasks & Supervision Module

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References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***15 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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15.1 - Authority to Practice Law

There are limits on who has the authority to practice law, and what the practice of law entails. It is important that you know what acts constitute the "practice of law" under the *Legal Profession Act* and the Law Society Rules because:

- to practice, lawyers must have insurance through the Lawyers Indemnity Fund or be expressly exempted from that requirement (lawyers that work in-house at a company, for the government, etc.), see Rule 3-39 (Compulsory professional liability indemnification) and Rule 3-43 (Exemption from professional liability indemnification);
- you must not knowingly facilitate anyone other than a practising lawyer to engage in the practice of law (see Rule 2-14(1) (Unauthorized practice of law)), except for:
    - persons otherwise permitted to practice law under sections 15 to 17 of the *Legal Profession Act*, such as articled students, or persons employed and working under the supervision of a practicing lawyer); or
    - practicing as part of a Multi-Disciplinary Practice under Rule 2-39 (Conditions for MDP).
- A "practicing lawyer" is a member in good standing who holds, or is entitled to hold, a practicing certificate (*Legal Profession Act*, s. 1(1)), and the "practice of law," among other things, includes:
    - appearing as counsel or advocate; drawing, revising or settling documents that relate in any way to proceedings under a statute of Canada or British Columbia;
    - giving legal advice; and
    - making a representation to a person that you are qualified to do any of these things.

15.2 - Paralegals

15.2-1 - About Paralegals

Depending on the nature of your practice, you may find that there is real value in hiring a paralegal. There are many tasks that a competent paralegal may perform. There can be economic advantages to your clients and your practice from employing a paralegal. For example, a paralegal's work could be charged to your clients at a lower rate than if you did the work yourself, and more of your time will be available for other more lucrative tasks. Training and

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employing paralegals could help you to deliver more efficient, comprehensive, and higher-quality legal services.

The *BC Code* sets out rules regarding hiring and supervising employees and paralegals.

A **paralegal** is defined as a "non-lawyer who is a trained professional working under the supervision of a lawyer" (see rule 6.1-2).

If you choose to hire a paralegal, the paralegal must:

- have knowledge of law and procedure relevant to the tasks being delegated by a supervising lawyer; have practical and analytical skills necessary to carry out the work; and carry out the work in a competent and ethical manner (rule 6.1-3.2).

There are limitations on what paralegals may do. You must:

- understand the scope of tasks paralegals may perform;
- ensure the paralegals work under the supervision of a lawyer; and
- ensure that the paralegals are not performing tasks that they should not be performing.

It is important to:

- take the time to evaluate your paralegal's ability to perform the duties you intend to delegate; and
- continue to be conscious of your paralegal's competency throughout the employment relationship.

Review and consider Appendix E – Supervision of Paralegals of the *BC Code* for further information on supervision best practices and competence assessment.

Your obligation as a lawyer to protect the public requires you to oversee any work you delegate to non-lawyer staff. It is a sound policy to establish objective criteria to assess whether an employee's training, education, and experience are appropriate for the work you are delegating.

Whether dealing with paralegals or other staff, you are responsible for all business entrusted to you and must maintain personal and actual control and management of your office. You must maintain direct supervision over every non-lawyer staff member (*BC Code* rule 6.1-1 (Direct supervision required)).

One of the challenges you face is that while a client may appreciate a smaller bill, a client also expects that in hiring a law firm, a lawyer will deal with their matter. A client who only ever

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communicates with a paralegal, may end up dissatisfied and complain to the Law Society. Always remember that the accountability for improper delegation of work rests on your shoulders.

Note that assigning the work to the paralegal is acceptable within the scope of the *BC Code*, but you must still supervise their work and remain cognizant that some clients will expect or demand lawyer contact.

15.2-2 - A Paralegal Must Not...

It is critical to remember that you must not, amongst other things, permit a paralegal or other staff member to:

- give or receive undertakings, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified (*BC Code* rule 6.1-3(c)).
- give legal advice (rule 6.1-3(b)), *[note there are exceptions in rule 6.1-3.3 for designated paralegals];*
- appear in court or actively participate in legal proceedings on behalf of a client, except in a support role to the lawyer appearing at the proceedings (rule 6.1-3(f)), *[note there are exceptions in rule 6.1-3.3 for designated paralegals]*; and
- act finally and without reference to you or another lawyer in your firm in matters involving professional legal judgment (rule 6.1-3(d)).

See the full list of prohibited activities in *BC Code* rule 6.1-3 (Delegation).

15.2-3 - A Paralegal May...

Some tasks that a paralegal may perform under a lawyer's supervision include:

- researching legal questions;
- preparing draft letters and memoranda;
- attending to routine administration and communication; and

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- if they have the necessary skill and experience and are a designated paralegal, giving legal advice or representing clients before a court or tribunal, as permitted by the court or tribunal, (see *BC Code* rule 6.1-3.3).

15.2-4 - Lawyers' Obligations

Matters to Which a Lawyer Must Personally Attend

BC Code rule 6.1-3 (Delegation) sets out examples of the tasks and functions that you must personally attend. They include:

- meeting the client to advise and take instructions on all substantive matters; and
- attending any hearing before the court, a registrar, or an administrative tribunal or at any examination for discovery.
- Note that a paralegal may support a lawyer who attends a hearing.

It is a good idea to provide your paralegal with a written job description and set guidelines for their job, including what tasks they may and may not perform.

While this does not absolve you of your duty to supervise, it does provide a foundation for the relationship and may make supervision more efficient.

15.3 - Articled Students

A full discussion of articled students is outside the scope of this module. If you decide to take on an articled student, familiarize yourself with the rules about your obligations, the student's obligations, and the procedures to follow in the student-principal relationship.

Both the *Legal Profession Act*, s. 20 (Articled students) and the Law Society Rules 2-57 to 2-75 set out the parameters for the relationship.

Law Society Rule 2-60 (Legal services by articled students) permits an articled student to provide all legal services a lawyer can offer, with some important exceptions, see Rule 2-60(2) and (3).

You have an obligation to ensure your articled student receives proper training and does not engage in prohibited activities. If the scope of your practice does not provide a sufficient

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articling experience, you can arrange a secondment to ensure your student receives proper articles. Note that there are limits to secondments in Law Society Rule 2-66 (Secondment of articles).

If you decide to take on an articling student, review the resources on the Law Society's website and contact the Law Society's Registration and Licensee Services department if you need additional information.

The Articling Centre area of the Law Society's website provides Articling Guidelines and Articling Guidelines for Principals as well as answers to frequently asked questions about articles.

Law Society Benchers' Bulletins often address issues relating to articled students.

15.4 - General Staff Issues

While staff are invaluable and often essential to the operating and expanding a practice, remember that once staff are hired, you shift from being a lawyer to being a lawyer-employer.

Quite apart from the issues of what it means to practise law, the limitations placed on who may engage in the practice of law, and supervision of paralegals, a lawyer-employer needs to consider many practical issues.

A thorough overview is beyond the scope of this module, but some of the issues to consider are:

- providing continuing education for staff to ensure they are staying current in areas relevant to your practice;
- setting aside time for regular staff meetings to give and receive feedback, and make employees aware of the firm's direction;
- reviewing employment law obligations, along with issues such as tax deductions and benefits.
- establishing rules about staff use of technology; and
- emphasizing the confidential nature of the information the staff will access, and the obligation to preserve client confidences (see *BC Code* rule 3.3-1 (Confidential information)).

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This is the tip of a very large iceberg.

Before you hire, take the time to educate yourself about staff issues, and develop a staffing plan. Develop an office manual that sets out standard procedures, firm policies, as well as employee benefits, and ensure that it is available in hard copy or electronic form for each employee.

Note that some relevant matters are discussed in other modules, such as ***Module 1: Accounting***, including section ***1.2 - Working with a Bookkeeper*** and ***Module 4: Taxation & Employee Deductions***.

15 - References & Resources

Statutes

- *Legal Profession Act*
  - section 1(1) (Definitions), "practice of law"
  - sections 15 (Authority to practice law)
  - section 16 (Interprovincial practice)
  - section 17 (Practitioners of foreign law)
  - section 20 (Articled students)

Law Society of BC materials

- Law Society Rules
  - Rule 2-14 (Unauthorized practice of law)
  - Rule 2-39 (Conditions for MDP)
  - Rules 2-57 to 2-75 regarding articling including:
    - Rule 2-60 (Legal services by articled students)
    - Rule 2-66 (Secondment of articles)
  - Rule 3-39 (Compulsory professional liability indemnification)
  - Rule 3-43 (Exemption from professional liability indemnification)
- Code of Professional Conduct for BC (*BC Code*)
  - Chapter 3 - Relationship to Clients
    - rule 3.3-1 (Confidential information)
  - Chapter 6 - Relationship to Students, Employees, and Others
    - rule 6.1-1 (Direct supervision required)
    - rule 6.1-2 (Definitions)
    - rule 6.1-3 (Delegation)

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        - rule 6.1-3.2 (regarding paralegals)
        - rule 6.1-3.3 (regarding designated paralegals)
    - Appendix E – Supervision of Paralegals
- The Articling Centre area of the Law Society's website provides Articling Guidelines and Articling Guidelines for Principals as well as answers to frequently asked questions about articles.
- Law Society Benchers' Bulletins often address issues relating to articled students.

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Registration and Licensee Services: registration@lsbc.org
- Trust Assurance: trustaccounting@lsbc.org

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MODULE 16 – AVOIDING FRAUD

16 - Introduction to the Avoiding Fraud Module

References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***16 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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16.1 - Professional Obligations

The Law Society Rules and the *BC Code* include professional obligations in relation to avoiding dishonesty, crime and fraud when providing legal services.

Some key Law Society Rules are in:

- Part 3 - Protection of the Public
    - Division 7 (Trust Accounts and Other Client Property),
    - Division 9 (Real Estate Practice), and
    - Division 11 (Client Identification and Verification); and
- Part 10, Rule 10-4 (Security of records).

Some key *BC Code* obligations are in rule 3.2-7 (Dishonesty, fraud by client) and rule 3.2-8 (Dishonesty, fraud when client an organization). Lawyers obviously must also comply with the law (*BC Code* section 2.1, Canons of Legal Ethics).

Law Society Rules

In Division 7, be keenly aware of Rule 3-58.1 (Trust account only for legal services), the restrictions on cash (Rule 3-59 (Cash transactions)), and the cash transaction records that lawyers must keep (see Rule 3-70 (Records of cash transactions)); see 2019 LSBC 31.

In Division 9, note the reporting requirements about late mortgage discharges (see Rule 3-96 (Report of failure to cancel mortgage)). Also be aware that you must not disclose your Juricert password to any other person, including your legal assistant or paralegal (Rule 3-96.1 (Electronic submission of documents) and *BC Code* rule 6.1-5 (Electronic registration of documents)); see 2020 LSBC 20.

Rule 10-4 (Security of records) requires that a lawyer must protect all records related to the lawyer's practice and the information contained in them by making reasonable security arrangements against all risks of loss, destruction and unauthorized access use or disclosure (see Discipline Advisory: Rule 10-4 Reports (August 31, 2021)).

When retained by a client to provide legal services, comply with the Division 11 rules for client identification and verification, including obtaining information about the source of money for financial transactions, monitoring and record-keeping (note the Client ID & Verification resources webpage and the Frequently Asked Questions listed in the resources box, below); see 2020 LSBC 20.

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The Division 11 requirements are in keeping with a lawyer's overarching obligation to know the client, understand the client's financial dealings in relation to the retainer and manage any risks arising from the professional business relationship (Rule 3-99(1.1)). Be aware of Rule 3-109 regarding criminal activity and the duty to withdraw. Rule 3-109(1) states:

> **3-109 (1)** If, in the course of obtaining the information and taking the steps required in Rule 3-100 [Requirement to identify client], 3-102(2) [Requirement to verify client identity], 3-103 [Requirement to identify directors, shareholders and owners] or 3-110 [Monitoring], or at any other time while retained by a client, a lawyer knows or ought to know that the lawyer is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

BC Code

The starting point in the *BC Code* is rule 3.2-7 (Dishonesty, fraud by client):

> **3.2-7** A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.
>
> **Commentary**
>
> **[1]** A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.
>
> **[2]** A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which 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.
>
> **[3]** If lawyers have suspicions or doubts about whether they might be assisting a client in any dishonesty, crime or fraud, before accepting a retainer, or during the retainer, the lawyers should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.
>
> **[3.1]** The lawyer should also make inquiries of a client who:

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> (a) may be seeking, contrary to the prohibition in Rule 3-58.1(1) of the Law Society Rules, the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or
>
> (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.
>
> **[3.2]** The lawyer should make a record of the results of these inquiries.

BC Code rule 3.2-8 (Dishonesty, fraud when client an organization) applies too, if the client is an organization.

Do not fall into the trap of verifying identity in accordance with Division 11 but failing to make reasonable inquiries and recording them in the face of usual or suspicious circumstances.

Look for circumstances that ought to raise suspicion or doubts that you might be assisting any dishonesty, crime or fraud, including investment fraud, mortgage fraud, or money laundering. This is a low bar. One red flag could be enough to call for increased due diligence. Generally, the more red flags, the greater a lawyer's duty to make reasonable inquiries. If you have doubts about the client or the subject matter of the retainer, obtain more information until you are satisfied that you can accept money in trust and that you can act in the circumstances. Make a record of the results of your inquiries and if you're not satisfied with the results, withdraw (Rule 3-109 (Criminal activity, duty to withdraw), *BC Code* rule 3.7-7 (Obligatory withdrawal)). Cases of interest include 2017 LSBC 15 and 2017 LSBC 32; and 2020 LSBC 45.

The Law Society website has many resources to assist lawyers with their professional obligations including:

- Risk Assessment Case Studies for the Legal Profession (incudes Red Flags Quick Reference Guide)
- Risk Advisories for the Legal Profession (includes advisories for real estate, shell corporations, private lending, trusts and litigation)
- Discipline Advisories (e.g., Country/geographic risk, Securities fraud: Micro-cap stocks, Private lending, Lawyers are gatekeepers)
- Benchers' Bulletin practice advice articles (e.g., Forming companies and other structures – managing the risk, Spring 2021, p. 8)
- Resources on the Client ID & Verification resources webpage including the Client Identification and Verification Checklist, the "Source of money" FAQs and more
- Law Society practice advisors are also available for confidential guidance

16.2-1 - Common Frauds & Illegal Activity

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

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

Social engineering scams

First, there are social engineering scams such as the bad cheque scam, the phony change in payment instructions, or a phony direction to pay. With these scams, the lawyer or law firm is usually the target of a fraudulent diversion of client trust funds into the scammer's pocket.

Ransomware attacks and data breaches

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

Law firm employee theft

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

Investment & banking scams and real estate fraud

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

For criminals, coming up with new schemes and looking for unsuspecting victims and vulnerabilities to exploit can be a full-time job. They will target anyone, including lawyers that they can dupe into becoming unwittingly involved in a dishonest, illegal or fraudulent scheme. Take care to comply with the law and your professional responsibilities. The sections that follow include more information about each of these scams to help you identify them.

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16.2-2 - Social Engineering Scams: The Lawyer as Victim

The Bad Cheque Scam

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

The scammer may use the same name as a real person (whether posing as an individual client or as an individual providing instructions on behalf of a company) or a legitimate organization that is not part of the wrongdoing. They may present government-issued photo ID that may be stolen, altered or fake. The documents that scammers use to support a ruse may include collaborative divorce agreements, settlement agreements, pleadings, court orders, invoices, bills of lading, loan documents, promissory notes, contracts, letters and photos of injuries or damage.

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

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

The Bad Cheque Scam: Red Flags

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

- The initial contact with you is often by email and the individual may use a free web-based address (e.g., Gmail, Hotmail or Yahoo).

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- Sometimes your name is in the salutation; however, because the message is commonly crafted to cast a wide net, you may receive an email addressing you more generally such as "Dear Counsel," "Good day," or "Dear Attorney" (they often use the American term "Attorney," sending the emails to lawyers in the United States too).
- The individual usually claims that they reside in another jurisdiction or that they are temporarily outside of the jurisdiction (e.g., "on assignment" or tending to a sick relative).
- The initial email message often says that the person who owes them money "resides in your jurisdiction" (again using a generic term to cast a wide net, because they may be sending the same email to lawyers in Canada, the United States, Australia, England, etc.).
- The individual usually requires simple services – often just a demand letter – and the money arrives quickly, sometimes before you have received a retainer and verified the client's identity.
- The individual may try to elude the verification process and ty to convince you to accept a scan of a government-issued photo ID.
- The individual may be overly familiar with the need to check for conflicts, verify identity and provide a retainer.
- The individual may be willing to pay you too much for little work. You receive a realistic looking but phony certified cheque (or other instrument that you believe is secure) from the opposite party in an envelope with no return address or one that doesn't make sense.
- After you receive the money in trust (usually six figures or more), the client wants you to send the funds quickly, before you learn the instrument is no good. They tell you to pay your account out of the funds in trust.

Avoiding Becoming a Bad Cheque Scam Victim

How do you protect yourself from the bad cheque scam?

- Learn to identify the scam by becoming familiar with the ruses and common characteristics that can act as red flags.
- Review the Lawyers Indemnity Fund's Bad Cheque Scam: List of Names and Documents page to see many names and ruses that scammers have used to try to trick BC lawyers (includes an A to Z alphabetical list).
- If you take on a new client, and there is a financial transaction, identify and verify the client's identity and obtain information about the source of money for the transaction in accordance with Part 3, Division 11 of the Law Society Rules (see the Client Identification, Verification and Source of Money Checklist as well as other important resources on the Client ID & Verification page of the Law Society's website).

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- Ask questions if there is anything unusual or suspicious and record the answers to your inquiries with the applicable date (*BC Code* rule 3.2-7 and the associated Commentary).
- If you are not satisfied with the results, withdraw (Rule 3-109 and *BC Code* rule 3.7-7).

16.2-3 - Phony Direction to Pay: Change in Payment Instructions

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

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

BC law firms have fallen victim to the phony change in payment instructions scam and faced hundreds of thousands of dollars in trust shortages, funds which they are professionally obligated to replace (Rule 3-74 (Trust shortage)).

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If you are about to pay out trust funds, and you receive new or changed payment instructions electronically from your client, assume that a hacker is impersonating your client behind the scenes.

- STOP, and ensure that the new or changed instructions are legitimate by making in-person or phone contact with your client.
- Remember to use the number that your client or the third party initially provided to you, not a number provided in the email, for any telephone contact, and follow the tips found in the Lawyers Indemnity Fund resource provide below. Not only will this help you to avoid a trust shortage, it is also a condition of your firm's cyber coverage. Trust shortage liability coverage is contingent upon: (1) compliance with Part 3 – Division 11 of the Law Society Rules; and (2) verifying new or changed payment instructions.

Helpful **Lawyers Indemnity Fund** resources include the following:
- Other Social Engineering Scams, Including Phone Changes in Payment Instructions

16.2-4 - Phony Direction to Pay within Your Law Firm

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

The guidance to protect yourself is similar to the phony change in payment instructions (see previous section of this module, ***16.2-3 - Phony Direction to Pay: Change in Payment Instructions***).

- If you receive an email direction to pay from someone at your law firm, double check by speaking with the individual.
- Do not rely on the telephone number in the email.
- Consult your staff directory.

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If your accounting staff's names and contact information are on your website, consider removing them from public view. Once a scammer knows a staff member's name, it is easy to figure out their email address because every address will presumably have the same domain name, e.g., @buchananandco.com.

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16.2-5 - General Tips to Protect Yourself from Social Engineering Scams

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

- Be on high alert for scams during holiday periods or at other times when your full complement of staff may not be in their normal office routine (like during a pandemic). These times provide opportunities for criminals to take advantage.
- If you have doubts about the client or the subject matter of the retainer, obtain more information until you are satisfied that you can accept money in trust and that you can act in the circumstances. Make reasonable inquiries and record the results in the face of unusual or suspicious circumstances (*BC Code* rule 3.2-7 and the associated Commentary). If you are not satisfied with the results, withdraw (Rule 3-109 and *BC Code* rule 3.7-7).
- Establish firm-wide protocols for verifying any electronic instructions regarding transferring money out of your accounts, and adhere to them. Empower lawyers and staff to resist a request to bypass the protocols on the basis of urgent circumstances (urgency can be a red flag).
- Implement a policy of refusing to accept payment instructions by email. Require instructions and changes to be given in person or at a minimum, telephone the sender of the email to verify the instructions or any changes – this is a condition of coverage under your firm's cyber policy. Be sure to use a telephone number that has been previously provided and independently verified (not the telephone number in the email).
- Protect the records relating to your practice and the information contained in them by making reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure (Rule 10-4 (Security of records)). Train your staff not to click on suspicious attachments in emails. Obtain professional technical expertise to help you protect confidential information through security measures including up-to-date antivirus software, firewalls, and strong passwords, and to detect potential security breaches.
- Review Law Society publications and the Lawyers Indemnity Fund's fraud prevention information and videos (e.g., Bad Cheque Scam: Steps to Manage the Risk)

- Review your insurance and indemnity coverage with your broker and determine whether you should purchase excess insurance coverage (see the Lawyers Indemnity Fund's guidance regarding Excess Insurance Coverage).

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16.2-6 - Law Firm Employee Theft

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

Consider these tips to help protect you and your firm from inside threats.

- Establish a policy that blank trust cheques must not be signed and store trust cheques securely. See 2020 LSBC 52 regarding a lawyer who left a series of signed blank cheques with her bookkeeper. The panel found, among other things, that she failed to properly supervise her bookkeeper and improperly delegated her trust accounting responsibilities. A theft of about $7.5 million of client trust funds occurred that the lawyer was obligated to replace.
- Separate office functions so that one employee is not responsible for opening the mail, and as well for all accounting, bookkeeping and banking functions. See the Law Society's Sample Checklist of Internal Controls with respect to the segregation of staff duties, staffing policies and procedures and other measures to help safeguard your practice.
- With existing lawyers and staff, be alert to changes in lifestyle or behaviour (e.g., if an employee seems to be living beyond their means).
- Maintain direct supervision of your non-lawyer staff and proper delegation. Train your staff to recognize issues and bring them to your attention in a timely manner. You remain responsible to exercise your professional judgment. See *BC Code* section 6.1 (Supervision) with respect to work that must not be delegated.
- Do not disclose your Juricert password to anyone, including an employee at your firm, and do not permit anyone else to affix your digital signature (Rule 3-96.1 (Electronic submission of documents) and *BC Code* rule 6.1-5 (Electronic registration of documents)). A Law Society hearing panel found that, by disclosing his password to his staff and permitting them to affix his electronic signature to documents filed with the Land Title Office for over three years, a lawyer had committed professional misconduct. The lawyer was suspended for four months and was ordered to pay costs (2020 LSBC 13).

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- The Lawyers Indemnity Fund policy does not cover theft by your non-lawyer staff. As the partners and firm are liable for losses, consider purchasing commercial insurance to protect yourself from employee theft or other wrongful or unlawful conduct of an employee.

For more information about your coverage, visit the Your Policy page of the Lawyers Indemnity Fund website.

16.2-7 - Investment & Banking Scams

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

Another example of an investment scam is the Ponzi or pyramid scheme. Investors into are convinced to place their money into a project that in essence “robs Peter to pay Paul” (early investors receive payments with funds from more recent investors). Again, large returns are promised, and an investor puts money into a scheme that sounds good but is not specific. Scammers use terms such as "global currency arbitrage," "hedge futures trading," "high yield investment properties," and "exceptional mortgage opportunities." For a time, investors do receive returns, but not because the scheme has access to any exceptional investments. Rather, it's because the first wave of investors is paid using money from the second wave, and so on. Eventually the scheme gets top heavy and collapses. The scammers disappear, and the lawyers and investors are left to cope on their own.

Scammers want to use lawyers to lend credibility to these types of schemes and sometimes they actually need legal services for some aspects of their plan. The mere presence of a lawyer in the scheme can influence naive investors to believe the scheme is legitimate and their money protected, especially if it is in a lawyer’s trust account. Scammers may try to convince lawyers to give so-called independent legal advice or signing officer certifications pursuant to Part 5 of the *Land Title Act*.

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

Common Characteristics of Investment Scams

Here are some common characteristics of investment scams:

- The scammer is not registered to trade securities or other investment products.
- The scammer claims that their business includes negotiating loans, letters of credit or promissory notes with a foreign financial institution or a "prime bank" that is supposedly affiliated with a reputable international organization (e.g., World Bank, ICC, IMF).
- The scheme is cloaked in confidentiality. Paradoxically the exception to the "little in writing" rule is that there is often a confidentiality agreement that the investors, and sometimes lawyers, are asked to sign.
- The scammer may say that the investment is only offered to a select few.
- The investment is baffling, may be complex, and includes investment terms and concepts that people, including lawyers, think they should understand.
- Very little concrete detail is provided.
- Most of the income seems to be generated from the number of people recruited into the scheme and not from the product or investment opportunity itself.
- The profits offered are high and too good to be true.
- The typical investor is unsophisticated.

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

- You are promised big money, a retainer and fees that are not in keeping with the legal services to be provided.
- You are promised big money, a retainer and fees that are not in keeping with the legal services to be provided.
- You are promised big money, a retainer and fees that are not in keeping with the legal services to be provided.
- You may be offered a percentage of every dollar that passes through your trust account, or a finder's fee for each new investor that you bring through the door or that you sign up by giving independent legal advice or certifying for *Land Title Act* purposes.
- You may be pressured to release money, often in breach of trust conditions that investors have placed on it, with assurances that the investment is about to pay off and you are the only one holding things up.

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

What to do if you Suspect an Investment Scam

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

Ask yourself these questions:

- If this is such a powerful and unique opportunity, why was I picked as the lawyer for the project?
- Is this work outside of my practice area?
- What real legal services am I being asked to perform, and how do they relate to the project?
- If I am asked to receive funds in trust, would I be in compliance with Rule 3-58.1 (Trust account only for legal services)? Would I be providing substantial legal services directly related to those particular funds?
- Have I made reasonable inquiries about the client, the subject matter and objectives of the retainer, and about the client's source of money for the project? Have I made a record of my inquiries? See the source of money FAQs on the Law Society website and *BC Code* rule 3.2-7 (Dishonesty, fraud by client) and Commentary.
- Do I understand the deal? Does it make sense? Do I need more information, including more supporting documents? Have I made of record of the results of my inquiries?
- How is this investment meant to generate a profit beyond simply generating further investment money?
- Why can't I communicate with the individual from the financial institution or why does my client control all my communications with them?
- Who are some of the other lawyers that represented this client in the past, and may I contact them? If not, why not?
- Am I in a position to provide assurances of the nature that I am being asked to give?
- Is this individual on the BC Securities Commission's Disciplined List or the subject of a Notice of Hearing or Temporary Order?

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- Consider whether you need to seek your own counsel before acting or taking further steps.

- Run the scenario by another trusted lawyer or a Law Society practice advisor.

If you suspect a scam...

Withdraw from acting for the client (Law Society Rule 3-109, *BC Code* rule 3.2-7 (Dishonesty, fraud by client), rule 3.2-8 (Dishonesty, fraud when client an organization) and section 3.7 (Withdrawal from representation).

- See ***Module 10: Withdrawal of Services***, above, to ensure you withdraw properly.
- Again, seek assistance from counsel if necessary, or a Law Society practice advisor if you have issues with withdrawal and especially if you have received money from third parties.

Consider whether you need to make a report to the Lawyers Indemnity Fund or your commercial insurer or both.

- Note that the LIF policy does not respond to situations where you have merely acted as a conduit for funds without providing professional services (e.g., performing an activity that is the "practice of law").

For more information on investment scams, see the following resources:

- Law Society Discipline Advisory: Micro-cap stocks (June 1, 2020)
- Lawyers Indemnity Fund Fraudulent Investment Schemes
- the BC Security Commission's investment 5 Key Fraud Warning Signs
- other resources including the Canadian Securities Administrators Investor Alerts and more

For a case of interest, see *Uzelak,* 2020 LSBC 58. The lawyer admitted receiving and disbursing up to $1,167,000 through his trust account on a client's behalf without making reasonable inquiries about the circumstances and without providing substantial legal services in relation to the funds. As a result, the lawyer's client was able to dupe an individual into investing in a fraudulent investment scheme.

16.2-8 - Real Estate Frauds

Although new fraud schemes can appear at any time, the preponderance of real estate frauds involving lawyers generally fall into two main categories: value fraud and identity fraud. In

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addition, criminals who have already committed a crime (e.g., illegal drug trafficking, human trafficking, fraudulent transactions) may try launder their ill-gotten gains through real estate (e.g., for a purchase, private mortgage, phony builder's lien claim).

Although fraud and money laundering are different, indicators of fraud and indicators of money laundering frequently overlap. For example, you may see some of these indicators in connection with either of them:

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

Value Fraud - Inflating the Property's Price to Obtain a Large Loan

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

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The scammers then disappear with the excess value, leaving the bank holding a property worth less than the mortgage. The scammers take their chances that the lender will not do a proper appraisal. Although lenders are responsible for their own decisions on when to lend money and for how much, you can assist in fighting fraud if you think a value fraud is being perpetrated.

Common Characteristics of Value Fraud

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

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

Tips for Guarding Against Value Fraud

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

- Be cautious about flips. Many are legitimate, but in any situation where the seller on the contract is not the same as the registered owner, ask questions to find out the background

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to the transaction and assess its legitimacy. Make a record of your inquiries and the results.

- Insist on the documentation and evidence you need to be satisfied about the legitimacy of the transaction and the parties. Such evidence may include obtaining cancelled charges from the Land Title Office if you suspect a large number of background transactions have occurred, such as a rapid turnover of mortgage financings with the amounts rising in each case. If you suspect that the flips have been happening on separate occasions using different lawyers each time, consider doing historical searches to see if there have been repeated sales at progressively higher prices over a short period of time.
- Verify your clients' identities in accordance with the Law Society Rules, Part 3 (Protection of the Public) – Division 11 (Client Identification and Verification). Note the wide definition of "client" in Rule 3-98. If you act for an attorney, appointed under a power of attorney, verify the identity of both the donor and the donee. If you act for an organization, verify the organization and the individual instructing you on the organization's behalf.
- Follow the *BC Code* rules respecting joint retainers (see section 3.4 (Conflicts), in particular rules 3.4-5 through 3.4-9 (Joint retainers)).

When acting under a joint retainer, the *BC Code* requires that you reasonably believe that you are able to represent each client without having a material adverse effect on the representation on, or loyalty to, the other client. This precludes you from acting for parties to a transaction who have different interests, except where joint representation is permitted by the *BC Code* (rules 3.4-5 to 3.4-7 and Appendix C - Real Property Transactions). In situations permitted by the *BC Code* where you are being asked to represent more than one party (e.g., a buyer and an institutional lender) you should review the joint retainer rules with the clients and follow Appendix C. If you have done this, you will have advised the parties that nothing can be kept in confidence between them. You will have advised the clients as provided under rules 3.4-5 to 3.4-6 and have confirmation in writing that the parties are content that you act. *BC Code* rule 3.4-7 provides:

> **3.4-7** When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer must obtain their consent.
>
> **Commentary**
>
> **[1]** Consent in writing, or a record of the consent in a separate letter to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights or obligations will diverge as the matter progresses.

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

Identity Fraud - Impersonating an Owner

In an identity fraud, a scammer poses as a property's owner or as an attorney acting under a power of attorney. Also, two scammers working together, may impersonate both individuals. Generally, a scammer, posing as an owner, either secures mortgage financing or sells the property and pockets the proceeds. In either case, the scammer usually asks you to wire the funds. Once the scammer receives the mortgage funds or proceeds of sale, they disappear.

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

16.3 - Fraud vs Money Laundering

Fraud and money laundering are different; however, as noted earlier, the indicators of fraud and the indicators of money laundering and the associated professional obligations often overlap. Money laundering is the process that criminals use to disguise the source of money or assets that they derived from criminal activity. Money laundering can occur without cash being involved; however, it has often been associated with cash (hence the strict provisions regarding cash in Law Society Rules 3-59 (Cash transactions) and 3-70 (Records of cash transactions)). For example, a criminal may make money from selling illegal drugs for cash. They purchase a luxury

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car with the dirty money. Then they sell the car to obtain money for a deposit on a condo. .The purchaser wires the money for the car to the criminal. The criminal then purchases a condo, purchased indirectly, by the commission of an offence.

Laundering the proceeds of crime is a criminal offence (*Criminal Code*, section 462.31). In order for money laundering to occur, there must first be a designated offence (e.g., fraud, extortion, human trafficking, robbery, illegal drug trafficking, or being an accessory after the fact). Criminals then attempt to cover up the source of their ill-gotten gains by placing the funds into the financial system, moving the funds around to make it difficult to trace by investigators and auditors, and ultimately integrating the funds into the legitimate economy (e.g., by purchasing real estate, luxury vehicles, vessels, art, jewelry). Criminals try to retain lawyers to provide traditional legal services in which lawyers may accept money into trust and unknowingly assist in laundering the proceeds of crime. Examples of such legal services might include the creation of legal structures (companies, trusts), purchasing or selling business entities, arranging financing for the purchase or sale or operation of business entities or business assets, and purchasing and selling real estate.

Using a lawyer can lend legitimacy to a criminal's transaction, provide confidentiality, and the opportunity to deposit their money in a lawyer's trust account. Lawyers, as gatekeepers to their trust accounts, should ensure that they do not recklessly accept dirty money into their trust accounts. Recklessness was added as a form of *mens rea* to section 462.31 in 2019.

Lawyers should make inquiries about the client's source of money for the matter for which they have been retained (see *BC Code* rule 3.2-7 (Dishonesty, fraud by client) and its detailed commentary and the Client ID & Verification - Frequently Asked Questions (FAQs) on the Law Society website about obtaining and recording information about the source of money for a client's transaction).

Money laundering is beyond the scope of this module; however, the Law Society has resources, including practice advisors, to assist you.

See the Client ID & Verification page of the Law Society website to access an array of resources including an Anti-Money Laundering (AML) Measures webinar (free of charge and eligible for two hours of CPD credit), discipline advisories, checklists, risk advisories and case studies, FAQs, and Benchers' Bulletin articles.

The aforementioned webinar discusses what money laundering is, risks to lawyers, red flags, the Law Society Rules regarding the restrictions on cash (Rules 3-59 and 3-70) and client identification and verification (Rules 3-98 to 3-110), and the *BC Code*.

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16.4 - Know Where You Can Get Help

If you experience a potential fraud, help is available. Contact a senior lawyer that you trust, a Law Society practice advisor or a Lawyers Indemnity Fund (LIF) claims counsel. Remember your reporting requirements to the Law Society and to LIF set out in the previous sections.

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

For questions about client identification and verification or for guidance on *BC Code* obligations, contact a Law Society practice advisor.

If you have questions about cash or trust accounting, contact a Law Society trust auditor (trustaccounting@lsbc.org or 604.697.5810).

To speak with a claims counsel, contact the Lawyers Indemnity Fund.

16.5 - Reporting Obligations

Law Society of BC

Note the reporting obligations in the following Law Society Rules:

- Rule 3-74 (Trust shortage)
- Rule 3-96 (Report of failure to cancel mortgage)
- Rule 3-97 (Reporting criminal charges)
- Rule 10-4 (Security of records)

Also see *BC Code* rule 7.1-3 (Duty to report) and section 7.8 (Errors and omissions).

Trust Shortage

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A lawyer who discovers a trust shortage must immediately pay enough funds into the account to eliminate the shortage and with some limited exceptions, make a written report to the executive director, including all relevant facts and circumstances (Rule 3-74).

If there has been a security breach, you will want to ensure that it is safe to use your email, computer system or fax machine.

- Your report may be sent by email to the Law Society's Trust Assurance Department at trustaccounting@lsbc.org.
- You can also report by fax (604.646.5917) or by letter to the Law Society of BC, Attention: Trust Accounting.

Lost Custody or Control of Records

Lawyers are required to take reasonable security measures to protect their records against the risk of loss, destruction and unauthorized access.

If you have lost custody or control of your records for any reason, you have an obligation to immediately report to the Executive Director. This includes if you have been a victim of ransomware, or a data or privacy breach.

- See the Discipline Advisory, Rule 10-4 Reports (August 31, 2021).
- If it is safe to use your email, you may send your report to Professional Conduct at professionalconduct@lsbc.org.
- You also have the option to send it by fax (604.605.5399) or report by letter to the Law Society of BC, Attention: Intake Officer, Professional Conduct.

The Lawyers Indemnity Fund ("LIF")

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

LIF's website includes detailed reporting guidelines, see Reporting a claim and Cyber claims.

If you suspect that you have been involved or may be involved in a cyber claim, immediately report the mater following the detailed reporting requirements set out here. LIF's indemnification

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program includes cyber coverage for qualifying law firms operating in BC through underwriter, Coalition, Inc. Coverage is claims-made and applies to third party liability claims, first party losses and cybercrime claims, and the most common cyber risks – social engineering fraud (including the "bad certified cheque scam"), ransomware and data or privacy breaches. If you do not do your due diligence to properly authenticate payment instructions received electronically, you may not have coverage if there is a theft of client funds.

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

16 - References & Resources

Statutes

- *Criminal Code*, section 462.31
- *Land Title Act*, Part 5 - Attestation and Proof of Execution of Instruments

Law Society of BC materials

- Law Society Rules
    - Part 3 - Protection of the Public
        - Division 7 - Trust Accounts and Other Client Property
            - Rule 3-58.1 (Trust account only for legal services)
            - Rule 3-59 (Cash transactions)
            - Rule 3-70 (Records of cash transactions)
            - Rule 3-74 (Trust shortage)
        - Division 9 - Real Estate Practice
            - Rule 3-96 (Report of failure to cancel mortgage)
            - Rule 3-96.1 (Electronic submission of documents)
        - Division 10 - Criminal Charges
            - Rule 3-97 (Reporting criminal charges)
        - Division 11 - Client Identification and Verification
            - Rule 3-98 (Definitions), "client"
            - Rule 3-99(1.1) (Application)
            - Rule 3-109 (Criminal activity, duty to withdraw)
    - Part 10 - General
        - Rule 10-4 (Security of records)
- Code of Professional Conduct of British Columbia (*BC Code*)

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    - Chapter 1 - Interpretation and Definitions
        - section 1.1 (Definitions)
    - Chapter 2 - Standards of the Legal Profession
        - section 2.1, Canons of Legal Ethics
        - rule 2.1-3
    - Chapter 3 - Relationship to Clients
        - rule 3.2-7 (Dishonesty, fraud by client)
        - rule 3.2-8 (Dishonesty, fraud when client an organization)
        - section 3.4 (Conflicts), in particular rules 3.4-5 through 3.4-9 (Joint retainers)
        - rule 3.7-7 (Obligatory withdrawal)
    - Chapter 6 - Relationship to Students, Employees, and Others
        - section 6.1 (Supervision) with respect to work that must not be delegated
        - rule 6.1-5 (Electronic registration of documents)
    - Chapter 7 - Relationship to the Society and Other Lawyers
        - rule 7.1-3 (Duty to report)
        - section 7.8 (Errors and omissions)
    - Appendix C - Real Property Transactions
- Benchers' Bulletin practice advice articles (e.g., Forming companies and other structures – managing the risk, Spring 2021, p. 8)'
- Client ID & Verification resources include:
    - Anti-Money Laundering (AML) Measures webinar (free of charge and eligible for two hours of CPD credit)
    - Benchers' Bulletin articles
    - checklists, including the Client Identification, Verification and Source of Money Checklist
    - Client ID & Verification - Frequently Asked Questions (FAQs), including "Source of money" FAQs
- Discipline Advisories (e.g., Country/geographic risk, Securities fraud: Micro-cap stocks, Private lending, Lawyers are gatekeepers)
    - Discipline Advisory: Micro-cap stocks (June 1, 2020)
    - Discipline Advisory, Rule 10-4 Reports (August 31, 2021)
- Risk Assessment Case Studies for the Legal Profession (incudes Red Flags Quick Reference Guide)
- Risk Advisories for the Legal Profession (includes advisories for real estate, shell corporations, private lending, trusts and litigation)
- Sample Checklist of Internal Controls with respect to the segregation of staff duties, staffing policies and procedures and other measures to help safeguard your practice.

Law Society of BC contact information

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- Practice Advice: see the website for various ways to contact practice advisors
- Trust Assurance: trustaccounting@lsbc.org

External resources

- Lawyers Indemnity Fund
  - Bad Cheque Scam: Steps to Manage the Risk
  - Bad Cheque Scam: List of Names and Documents to see many names and ruses that scammers have used to try to trick BC lawyers (includes an A-to-Z alphabetical list)
  - Cyber claims
  - Excess Insurance Coverage
  - Fraudulent Investment Schemes
  - Other Social Engineering Scams, Including Phone Changes in Payment Instructions
  - Reporting a claim
  - Your Policy
- BC Securities Commission
  - 5 Key Fraud Warning Signs
  - Disciplined List
  - Notice of Hearing or Temporary Order
- Canadian Securities Administrators
  - Investor Alerts

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MODULE 17 – UNDERTAKINGS & TRUST CONDITIONS

17 - Introduction to the Undertakings & Trust Conditions Module

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References & Resources

The learning materials for this module may refer to various references and resources including the Code of Professional Conduct for British Columbia (*BC Code*), the Law Society Rules and the *Legal Profession Act*.

For a summary of the key resources, see section ***17 - References & Resources*** at the end of this module.

IMPORTANT

PLEASE NOTE:

While some revisions may have been made more recently, this module was last reviewed en masse for update in 2020.

DISCLAIMER:

The information contained in this module, including any references to websites, appendices or links, has been prepared to assist you as you develop or refresh your skills in the various areas of law covered by this module.

Given the changing nature of the law, you should exercise your own skill and professional judgment when using the content.

Always refer to the most current statutes, regulations, practice directions and notes, as well as the most recent case law and any other appropriate sources.

These materials do not provide legal advice and should not be relied on in any way.

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17.1 – What are Undertakings & Trust Conditions?

17.1-1 - Undertakings

Nature of an Undertaking

An undertaking is a promise or commitment made by a lawyer to another person, whereby the lawyer assumes a personal obligation to act, or refrain from acting, in a certain manner.

Generally, an undertaking is given expressly; however, it may also be implied in special cases, as discussed later in the course.

Common Types of Undertakings

In practice, undertakings commonly fall within one of two categories:

1. **An undertaking to pay money, held in trust**, upon the happening of an event or the occurrence of specified set of circumstances, such as:
   (a) execution and delivery of consent orders;
   (b) tendering documents effecting a legal, equitable or possessory interest in real or personal property; and
   (c) filing or registration of documents at an appropriate registry;
2. **An undertaking to do, or refrain from doing, an act** upon the happening of an event or the occurrence of a specified set of circumstances, such as those described above.

The different forms of undertakings that may arise are limited only by the circumstances in which they are given and the ingenuity of the practitioner.

17.1-2 - Trust Conditions

Trust conditions can be the equivalent of undertakings but can also be standalone professional obligations.

Trust conditions should be imposed in writing and communicated to the other party at the time the property that is the subject of the condition is delivered.

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Cote J.A. for the majority in *Carling Development Inc. v. Aurora River Tower Inc*. 2005 ABCA 267 [*Carling Development*] noted that "trust conditions aim to link [the] obligation directly to the use of documents, rather than to words or assent." Cote J.A. further stated that "trust conditions between solicitors are intended to create, and do create, a traditional trust."

There is a three-part test for the creation of an express trust:

Certainty of intention

The recipient must take the property for described persons or objects, not beneficially. "The words 'in trust' suffice, but are not necessary;"

Certainty of subject

There must be a clear identification of the property that is the subject matter; and

Certainty of object

There must be certain or ascertainable persons or objects who are to benefit.

At paragraph 56 of *Carling Development*, Cote J.A. stated:

> One rule about solicitors' trust conditions is very clear in Alberta and British Columbia. They bind the recipient solicitor fully, and are in no way qualified by whatever rights, powers or immunities [their] client has or claims to have.

17.1-3 - Professional Responsibility

BC Code rule 2.1-4(b) states, in part: "A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfill every undertaking given."

BC Code rule 7.2-11 (Undertakings and trust conditions) provides:

A lawyer must:

(a) not give an undertaking that cannot be fulfilled;
(b) fulfill every undertaking given; and
(c) honour every trust condition once accepted.

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BC Code rule 5.1-6 (Undertakings) states:

> **5.1-6** A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.

The Commentary to rule 7.2-11 provides:

> **[1]** 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.

The Commentary to *BC Code* rule 7.2-11 adds helpful information about honouring trust conditions. In particular, if a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless the trust condition terms can be amended in writing on a mutually agreeable basis. Trust conditions are equivalent to undertakings and when a lawyer accepts property subject to trust conditions, whether from a lawyer or a lay person, the lawyer must fully comply with such conditions. Compliance requires following the conditions, even if they appear unreasonable or not in accordance with the contractual obligations of the parties.

The person who delivered the property without any trust condition cannot retroactively impose conditions on the use of the property. A lawyer must not impose trust conditions that are unreasonable or unilaterally impose cross-conditions about compliance with the original trust conditions. Clients and others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them.

Further, trust conditions should be:

- clear, unambiguous and explicit, and should state the time within which the conditions must be met;
- imposed in writing and communicated to the other party at the time the property is delivered;
- accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally;
- accepted only if they can be fulfilled personally; and

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- varied only with the consent of the person imposing them, which should be confirmed in writing.

17.1-4 - Deemed Undertakings

Trust conditions can be implied.

BC courts and Law Society disciplinary panels have applied *Carling Development*.

In *Law Society of British Columbia v. Richardson*, 2009 LSBC 7, a Law Society disciplinary review panel dealt with the release of trust funds by a member contrary to undertakings imposed on him. The member claimed he never expressly agreed to the terms. At paragraph 27 the panel concluded the member "… did breach the trust condition imposed upon him with respect to the trust funds." In coming to that decision, the panel relied on a number of cases including *Carling Development* and the established law regarding undertakings at paragraphs 22-23:

> As to what constitutes an undertaking, the Hearing Panel relied upon the established law regarding undertakings:
>
> (a) An undertaking may be imposed through the imposition of trust conditions. They are not restricted to those voluntarily given (*Witten v. Leung* (1988), 1983 CanLII 1028 (AB QB), 148 DLR (3d) 418 (Alta. QB); *Carling Development Inc. v. Aurora River Tower Inc*., 2005 ABCA 267);
> (b) "Undertakings take precedence over any dispute that has developed between the parties." (*McCarthy Tétrault v. Lawson Lundell* (1991), 58 BCLR (2d) 310 (SC) at para. 13);
> (c) A court will enforce an undertaking regardless of any contractual defence on the merits between the parties (*Carling Development Inc. v. Aurora River Tower Inc*. at para. 13). This reflects the court's interest in ensuring the honesty of its officers.

In summary, the combined effect of the written ethical guidelines for lawyers together with the case law is that no distinction can or should be drawn between the effect of an imposed trust condition and a solicitor's undertaking; they are equivalent. An undertaking is not a contract. It need not be supported by consideration; it cannot be overridden by instructions from the client; and it remains binding and enforceable until satisfied or until the parties mutually agree to modify the undertaking or it is otherwise withdrawn. The lawyer cannot reject or repudiate an undertaking while retaining or using the subject of it. The Review Panel approves the Hearing

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Panel's view of the law surrounding undertakings and trust conditions and its application to these circumstances.

17.1-5 - Enforceability

An undertaking will be enforceable in nearly all circumstances.

In *Valleyfield Construction Ltd. v. Argo Construction* (1978), 20 O.R. (2d) 245 (Ont. H.C.), Linden J. explained:

> […] The word of a solicitor is viewed by another solicitor as virtually sacred. The solicitor can rely on it because it will be kept. It is only in rare circumstances that measures have to be taken in formal proceedings to force solicitors to honour their commitments. Lawyers generally have always done what they have said they would do in undertakings. […]
>
> […] If a solicitor reneges on an obligation, the Courts should enforce it. Delivery of a certificate of readiness does not waive the obligation. There can be no obligation without the right to have that obligation enforced. Either it is enforceable or it is not enforceable. I believe that the sanctity of solicitors' undertakings must predominate over the admittedly important effect of a certificate of readiness. There is no indication that anything improper was done by the solicitor in this case by refusing to honour his obligation, because he may have reasonably believed that there was a waiver and that there was no obligation on him to do so.
>
> […] When a solicitor undertakes to do something, he must do it unless, of course, there is an express direction to him that he need no longer comply. There is an assumption, well-founded, that solicitors' undertakings will be met and the Courts should do whatever is necessary to continue this practice.

Subsequent client instructions will not override an undertaking previously given by the client's lawyer.

An undertaking will take precedence over any dispute that has developed between the lawyers' clients *Tetrault v. Lawson Lundell Lawson & McIntosh*, 1990 CanLII 963 (BCSC).

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17.2 - Breaching Undertakings & Trust Conditions

17.2-1 - Professional Responsibility

The consequences of breaching an undertaking or trust condition are very serious.

Duty to report

BC Code rule 7.1-3(a.1) mandates that a lawyer must report to the Law Society a lawyer's breach of undertaking or trust condition that has not been consented to or waived.

This includes a self-report of a lawyer's own breach of an undertaking or trust condition.

17.2-2 - Lawyer's Liability

A lawyer's responsibility for breaching a professional undertaking or trust condition may arise in the following ways:

In Court

- the court may enforce the undertaking or trust condition on a summary application. The court's jurisdiction is based upon its inherent right to govern the conduct of its officers and the observance of their high standard of conduct;
- an injured party may bring a civil action for damages resulting from a breach of undertaking or trust condition; or

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- professional discipline proceedings may be instituted under the Legal Profession Act. Usually, breach of an undertaking or trust condition will support a citation and finding of professional misconduct.

Liability based upon professional undertakings given by a solicitor is discussed in 36 Halsbury, paras. 266-268:

> [I]t is immaterial that no misconduct on the part of the solicitor is suggested. The solicitor cannot, therefore, defend himself on the ground that his undertaking is not enforceable as

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> a contract against him, or on the ground that the application has been delayed, nor will an undertaking given under a mistaken belief of having authority to fulfil it be set aside . . . The undertaking must be one which is not impossible ab initio for the solicitor to perform. An undertaking will, however, be enforced against the solicitor although after it is given, the client dies or instructs the solicitor not to perform it, or changes his solicitor.

17.2-3 - Implications of Breach

If a lawyer breaches an undertaking, the professional reputation of the lawyer may be seriously damaged. For example, if a plaintiff's lawyer breaches an undertaking not to seek default judgment but obtains a default judgment on the first available day, even if the judgment is set aside, the lawyer's reputation for trustworthiness and fair dealing might suffer irrevocably.

The BC Court of Appeal confirmed that undertakings are critical to public confidence in professionals and that delay in complying can amount to a breach of undertaking *Law Society of British Columbia v. Heringa*, 2004 BCCA 97. Mr. Justice Hollinrake quoted with approval the Law Society hearing panel's decision:

> The heart of the panel's reasoning is, in my opinion, found in these words:
>
> > [37] Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
> >
> > [38] The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

17.2-4 - Deemed & Implied Undertakings

The courts and the Law Society have implied terms in lawyers' undertakings and trust conditions when the facts support this approach, although they do so cautiously; see, for

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example, *Hammond v. Law Society of British Columbia*, 2004 BCCA 560 and *The Law Society of British Columbia v. Heringa*, 2004 BCCA 97.

Undertakings can also be implied by operation of law. Section 84(6) of the *Legal Profession Act* provides that "an undertaking given by or on behalf of a law corporation that would constitute a solicitor's undertaking if given by a lawyer is deemed to be a solicitor's undertaking given by the lawyer who gives, signs or authorizes it."

BC Code rule 7.2-12 (Trust cheques) and rule 7.2-13 (Real estate transactions) provide for two types of deemed undertakings in certain circumstances involving trust funds and executed documents:

- when a lawyer gives a trust cheque, a deemed undertaking arises that the lawyer's cheque will be honoured (except in "the most unusual and unforeseen circumstances, which the lawyer must justify"); and
- if a lawyer acting for a purchaser of real property accepts the purchase money in trust and receives a registrable conveyance from the vendor in favour of purchaser, then the lawyer is deemed to have undertaken to pay the purchase money to or as directed by the vendor on completion of registration.

Implied undertakings also arise in court proceedings as *BC Code* rule 5.1-6 (Undertakings) requires a lawyer to "… strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation …" (emphasis added). This duty is in addition to a lawyer's general duty to fulfill every undertaking and to honour every trust condition under *BC Code* rule 7.2-11 (Undertakings and trust conditions). Usually these involve a duty to the Court not to use information provided as a result of disclosure and discovery processes for a collateral purpose without leave of the court. In criminal proceedings involving Crown disclosure, "absent an order of the Court, there is an implied undertaking on a recipient of a 'Stinchcombe package' from the Crown not to disclose its contents for any collateral purpose" *Wong v. Antunes*, 2009 BCCA 278.

There is also an implied undertaking by parties in a civil litigation to keep information obtained in the discovery process confidential. A party to the proceeding may not use the evidence for any other purpose than that required for the conduct of the litigation, and may not share it with others outside of this purpose without leave of the court *Juman v. Doucette*, 2008 SCC 8.

Further the court has decided that the remedy of contempt of court is available against counsel in British Columbia for breach of an implied obligation after a plaintiff's lawyer used documents obtained during discovery for a collateral purpose *Sandbar Construction Limited v. Howon Industries Ltd*. 1998 CanLII 6562 (BCSC).

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17.2-5 - Practical Rules for Undertakings & Trust Conditions

Here are some practical rules about undertakings to keep in mind:

- Never give an undertaking or agree to a trust condition when some lesser form of communication or assurance will suffice.
- Never use the word “undertaking” except in the very special sense of an irrevocable binding promise.
- If another lawyer or a third party drafts and puts you on an undertaking or purports to impose a trust condition, read it very carefully and be quick to indicate that you disapprove if you do. You may otherwise be bound to perform the undertaking or the trust condition *Wynndel Box & Lumber Co. v. Zlotnik*, 1996 CanLII 2707 (BCCA).
- Never give any undertaking or agree to a trust condition that is outside of your absolute control. Only give an undertaking, for example, to deliver funds or documents if you have the funds or documents in hand. Never give an undertaking or agree to a trust condition based on performance by some third party.
- If you do not intend to accept personal responsibility for an undertaking or a trust condition and you intend that your client should be responsible for the performance of the undertaking, make this absolutely clear.
- When an undertaking can only be implemented by a client, it is the duty of a lawyer to do everything possible to induce his client to honour it (Orkin on Legal Ethics at page 138).
- Before giving or accepting an undertaking or trust condition, ensure you have explained the procedure to your clients and that you have their clear and irrevocable instructions to carry out the terms.
- Draft your undertakings and trust conditions precisely. Avoid using broad phrases such as “the usual undertakings.”
- Understand the mechanics of the transaction around which you are drafting the undertaking or trust condition and draft it in such a way as to make it self-determining if some part of the transaction does not proceed according to plan. For example, if you are dealing with a real estate transaction and the purchase price depends, in part, upon mortgage money coming from another source, always make the undertaking to pay conditional upon your receiving that money. If you do not, remember that the only person that can release you from an undertaking is the person to whom you gave it.
- Be aware of the implied undertakings and trust conditions.
- Always confirm an oral undertaking or trust condition in writing to avoid future misunderstanding as to the terms.
- Do not impose fresh conditions once undertaking or trust conditions are settled.

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- Do not impose an undertaking or trust condition that is unreasonable, see *BC Code* rule 7.2-11 (Undertakings and trust conditions), Commentary [3].
- Do not impose undertakings or trust conditions that conflict with the underlying contract.
- Review and consider any agreement(s) the clients may have made before your involvement in the file – for example, have the parties agreed to change or amend the CBA/BCREA undertakings referenced in a Contract of Purchase and Sale of a property?).
    - If you are unable to give or accept the amended undertakings, you will need to discuss it immediately with your client(s) to allow time to amend, or even find other counsel, if necessary.

- Consider whether standard undertakings, like the CBA/BCREA undertakings, are being used and consider EC April 2008, item 3, which is summarized in the annotations to *BC Code* rule 7.2-11 as follows:

    > A lawyer who routinely declines to accept the standard undertakings contained in client contracts that have been negotiated prior to the lawyer's involvement in the matter places each client at risk of losing the benefits of the client's contract and may be practising negligently. *[PCH]*

- Do not request or give undertakings that are open-ended – there should always be a time-limit or defined end point.

17.3 - Undertakings in BC Real Estate Transactions

17.3-1 - Undertakings in BC Real Estate Transactions

Madam Justice Prowse of the BCCA in *Hammond v. Law Society of British Columbia*, 2004 BCCA 560 noted that undertakings "…play a particularly important role in the area of real estate transactions as a means of expediting and simplifying those transactions."

In a Torrens jurisdiction like British Columbia, this process relating to the exchange of money for title is satisfied by lawyers' undertakings and trust conditions.

In large commercial real estate transactions, the conditions of closing are often agreed to, in detail, weeks before the closing.

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17.3-2 - Land Title Registration

Most undertakings in real estate transactions have two distinct parts. As a buyer's lawyer you are first undertaking that you have or will have a particular amount of money in trust. Second, you are promising to do something very specific with that sum of money once certain events occur. These events must be clearly spelled out. In order to give undertakings with which you can comply, you must know when an application for registration can be withdrawn and by whom. Note section 167 of the *Land Title Act* and, in particular, that:

- The registrar has discretion whether or not to allow an application for registration to be withdrawn, and may impose terms. The Land Title Office will issue a Defect Notice that allows the application to be withdrawn for 30 days so that appropriate corrections may be made. The Defect Notice ensures that the application doesn't lose priority within those 30 days.
- There must be no other pending application affected by the application you wish to withdraw. For example, you cannot withdraw an application to register a transfer if there is an application for registration of a mortgage following, unless the application to register the mortgage is also withdrawn. Bear in mind that you are not in control of applications affecting the land you are dealing with and a third party may apply to register an unanticipated instrument following your application.
- The registrar may refuse to allow an applicant to withdraw an application for registration until the written consent of the applicant's principal is produced, if the person making the application is not a lawyer or a notary public. For this reason, the lawyer in charge of the transaction should always sign the application for registration.

17.3-3 - Mortgage Discharges

In December 2002, former Vancouver lawyer Martin Wirick was disbarred for professional misconduct. Mr. Wirick breached his undertakings and misappropriated trust funds by failing to apply the funds to payout and discharge certain mortgages. He paid out the funds contrary to his undertakings. The Law Society of BC has paid $38.4 million for numerous claims arising from Mr. Wirick's law practice.

For more information, see In the Matter of the *Legal Profession Act* and Martin K. Wirick, 2005 BCSC 1821.

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As a result of the Wirick case, the Law Society's Conveyancing Practices Task Force implemented reforms in conveyancing practice to reduce the opportunity for fraud.

First, the Real Property Section of the Canadian Bar Association revised the CBA Standard Undertakings by imposing a responsibility on the seller's lawyer who is undertaking to discharge the seller's mortgage after closing to promptly provide the buyer's lawyer evidence that the seller's lawyer has paid out the mortgage. See Appendix A. These "transparency provisions" respecting mortgage discharges, require that the seller's lawyer provide to the buyer's lawyer, within 5 business days of the completion date, copies of specified documents that demonstrate that the seller's lawyer has made payments to existing chargeholder. Copies of the mortgage payout statement, the letter from the seller's lawyer that accompanies the payout, payout cheque and evidence of delivery of the payor cheque are all required. The buyer's lawyer is not to release those documents to his or her client unless the mortgage discharge is still not received 60 days after completion.

Second, the Benchers approved Law Society Rules 3-95 and 3-96, known as the "60 day" reporting rules. These Rules require a lawyer to report to the Law Society the failure of a mortgagee to provide a registrable discharge of mortgage within 60 days of any real property transaction. They also oblige a lawyer to report to the Law Society the failure of another lawyer or notary public to provide satisfactory evidence that they have filed a registrable discharge of mortgage as a pending application at the Land Title Office within that 60-day period.

**From PLTC Resource Materials September 2017; updated and modified May 2018*

17.3-4 - Closing

Historically, lawyers closed residential conveyances on undertakings that permitted the parties to complete in spite of the terms of their contract. The BC Court of Appeal decision in *Norfolk v. Aikens*, 1989 CanLII BCCA, clarifies that undertakings must be used with caution and only with instructions from the client. If the parties are unable to agree on alternate procedures, completion will have to be strictly set out in the purchase and sale agreement.

Lawyers should not undertake to discharge an existing mortgage or undertake to pay to the institutional lender sufficient money to discharge the mortgage. Instead, lawyers should obtain a payout statement from the institutional lender and undertake to pay to the institutional lender the amount calculated in accordance with the payout statement on condition that the institutional lender provide a registrable discharge.

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This practice will prevent lawyers from breaching their undertaking if the payout statement is subsequently found to be wrong and the institutional lender refuses to deliver the discharge of mortgage until further money is paid.

17.3-5 - BC Standard Undertakings

A safe, trustworthy and effective procedure is needed to close transactions when the exchange of payment for title is not simultaneous. This issue was addressed by the CBA/BCREA standard forms of contract of purchase and sale used widely throughout the BC. Ensure the CBA/BCREA standard contract you are working with allows:

- the seller to wait to pay and discharge existing financial charges until immediately after receipt of the purchase price; and
- the buyer to wait until after the transfer and new mortgage documents have been filed for registration in the appropriate land title office before paying the purchase price to the seller.

When dealing with a non-institutional lender, a lawyer should have the discharge of mortgage in hand before paying out the money secured by the mortgage. If the lender will not agree to this arrangement, then a formal tender of the money should be made in exchange for a discharge of mortgage in registrable form.

17 - References & Resources

Statutes

- *Land Title Act*, section 167 (Withdrawal of application)

Law Society of BC materials

- Law Society Rules
  - Division 9 - Real Estate Practice
    - Rules 3-95 (Definitions)
    - Rule 3-96 (Report of failure to cancel mortgage)
- Code of Professional Conduct of British Columbia (*BC Code*)
  - Chapter 2 - Standards of the Legal Profession

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        - rule 2.1-4
    - Chapter 5 - Relationship to the Administration of Justice
        - rule 5.1-6 (Undertakings)
    - Chapter 7 - Relationship to the Society and Other Lawyers
        - rule 7.1-3 (Duty to Report)
        - rule 7.2-11 (Undertakings and trust conditions)
            - Annotation
                - EC April 2008, item 3
        - rule 7.2-12 (Trust cheques)
        - rule 7.2-13 (Real estate transactions)

Law Society of BC contact information

- Practice Advice: see the website for various ways to contact practice advisors
- Trust Assurance: trustaccounting@lsbc.org

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