CRIMINAL LAWYERS' ASSOCIATION

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BY EMAIL ONLY

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Re: CLA Position on Proposed Amendments to Model Rules of the Federation of Law Societies of Canada

The Criminal Lawyers' Association ("CLA") represents approximately 1400 members. Our membership consists primarily of criminal defence lawyers in Ontario. The CLA appreciates the opportunity to make submissions on the proposed amendments to the Model Rules of the Federation of Law Societies of Canada ("FLSC") which the Law Society of Ontario ("LSO") may eventually incorporate into its By-Laws.

The current "No Cash Rule" in Ontario (By-Law 9, s. 4) provides as follows:

4. A licensee shall not receive or accept from a person, in respect of any one client file, cash in an aggregate amount of 7,500 or more Canadian dollars.

…

5. Section 4 applies when, in respect of a client file, a licensee engages in or gives instructions in respect of the following activities:

1. The licensee receives or pays funds.

2. The licensee purchases or sells securities, real properties or business assets or entities. 3. The licensee transfers funds by any means.

6. Despite section 5, section 4 does not apply when the licensee,

(a) receives cash from a public body, an authorized foreign bank within the meaning of section 2 of the Bank Act (Canada) in respect of its business in Canada or a bank to which the *Bank Act* (Canada)

applies, a cooperative credit society, savings and credit union or caisse populaire that is regulated by a provincial Act, an association that is regulated by the *Cooperative Credit Associations Act* (Canada), a company to which the *Trust and Loan Companies Act* (Canada) applies, a trust company or loan company regulated by a provincial Act or a department or agent of Her Majesty in right of Canada or of a province where the department or agent accepts deposit liabilities in the course of providing financial services to the public;

(b) receives cash from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity;

(c) receives cash pursuant to an order of a tribunal;

(d) receives cash to pay a fine or penalty; or

(e) receives cash for fees, disbursements, expenses or bail provided that any refund out of such receipts is also made in cash.

The current "no cash" rule in Ontario strikes an appropriate balance in allowing clients to pay for legal services in cash while at the same time ensuring that lawyers do not unwittingly launder proceeds of crime through acceptance of cash for legal fees and disbursements. We would encourage the LSO not to change the existing By-Law in favour of the proposed FLSC model. We would also recommend that FLSC adopt the wording of the LSO By-Law including the exceptions so that there can be a standard "no cash" rule across Canada.

Why Do People Choose To Pay In Cash?

The experience of our membership is that some clients choose to pay their legal fees in cash. The reasons for this vary. Often, clients receive assistance with legal fees from other family members or friends. The nature of the underlying offence or allegations being made against clients can cause families and friends to not want to be "associated" with the case notwithstanding their willingness to contribute to legal fees. This results in preferring to provide contributions by way of cash versus credit card, money order, or cheque. In some circumstances, clients do not want other people (spouses, children, employers, banks etc.) to be aware that they are facing criminal charges because of the stigma associated with being accused of a crime. This in turn leads clients to choose to provide deposits as against future legal fees in cash. We would also note that although most people choose to keep money in banks, the experience of our membership is that there is still a significant segment of the population that chooses not to do so.

Lawyers who choose to accept cash deposits as retainer (or choose to accept cash payments in respect of outstanding bills) are required to account for the same and provide receipts for such payments. Additionally, lawyers must ensure that they are not accepting "proceeds of crime" or becoming dupes for would-be money launderers. This is accomplished through explaining to clients, who choose to pay in cash, the legal prohibitions on accepting cash payments; explaining the "no cash" rule and also, in some cases, including an express term in the written retainer agreement whereby the client warrants that any cash paid in respect of future legal fees and disbursements is not the "proceeds of crime". Additionally, as the exceptions to the current rule make clear, any cash provided for future legal fees and disbursements that is not used for that purpose must be returned to the client in the manner in which it was provided – i.e. in cash.

The Proposed "No Cash" Model Rule

The proposed "no cash" model includes deletion of the following two exceptions, thereby prohibiting the acceptance of cash for legal fees and disbursements in the following two instances:

(b) from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity

(c) pursuant to a court order, or to pay a fine or penalty[1]

We oppose the deletion of these exceptions. Our understanding is that the reason for amending the rule and eliminating the above exceptions is a concern that lawyers would become complicit or parties (even if unwittingly) to money laundering. The concern is unfounded.

In the course of criminal investigations and/or arrests, our clients will sometimes have money seized from them either incidental to arrest or pursuant to court orders. The amount of cash seized can vary from relatively modest amounts (under $1,000) to substantial amounts (over $25,000). In order to be lawful, the initial seizure must be either pursuant to a court order, pursuant to a common law authority to seize the money, or incident to a lawful arrest. Regardless of why the money was seized and what authority was relied upon, once seized the court has supervisory jurisdiction over the continued detention of the cash. In some instances s.490 of the *Criminal Code* will authorize the continued seizure. There is also a detailed legislative regime in relation to seized monies contained within Part XII.2 of the *Criminal Code*. Some property that is seized is "managed" through the provisions of the *Seized Property Management Act*, S.C. 1993, c.37.

If a determination is made (either by the state actors, i.e. Crown agents, police officers etc., or by a judge) that there is no lawful basis to continue the detention of cash that was seized, it will (subject to the caveat discussed below) be returned to the person from whom it was seized. The absence of a lawful basis to continue detention of the cash necessitates the return. To prohibit the accused from using the cash which has been lawfully returned for the purpose of paying legal fees and disbursements is not appropriate or fair to the accused who is lawfully entitled to possess the cash that has been returned. As long as the client can still warrant that the funds are not the proceeds of crime, it would place the client who has had his or her cash seized by the police but later returned in a worse position than the client who did not have any cash seized at first instance. There is no principled reason to treat the accused (or the cash) differently. If there is no lawful basis for the state to continue the seizure of the cash, there should be no concern about the source of the funds.

Additionally, there is another safeguard that ensures that the seized cash, which is being returned, is not "proceeds of crime". In Ontario, the Attorney General of Ontario can retain seized funds under the *Civil Remedies Act, 2001*, S.O. 2001, c. 28, if it establishes on a balance of probabilities that the funds are proceeds of unlawful activity. There are currently protocols in place where police agencies alert Crown agents that are in charge of enforcing the *Civil Remedies Act* of the pending release of seized cash (whether it has been ordered returned or the prosecuting Crowns determine there is no lawful basis to continue to seize the money). If there are reasonable grounds to believe that the cash is proceeds of crime, the Attorney General of Ontario can bring an application under s.4 of the *Act* (without notice – see s.4(3)) to take possession of and restrain the money. Subsequently, there is a civil process whereby the owner of the cash can seek the return of the money and/or the Crown can seek forfeiture of the funds. The onus is on the owner to demonstrate that the funds are not proceeds of crime on a balance of probabilities.

Where seized funds are being returned and there is either no application or an unsuccessful application brought by the Attorney General under the *Civil Remedies Act, 2001*, then there are no grounds to believe the funds are proceeds of crime. In these instances, there is no legitimate risk that legal counsel might be used to launder funds or facilitate the financing of terrorist activities, and legal counsel should be able to facilitate the return of seized funds to clients "from a peace officer, law enforcement agency, or other agent of the Crown acting in his or her official capacity" or "pursuant to a court order". Further, if

[1] Paragraph 4(b) and (c) of the FLSC Model Rule; Section 6(b), (c) and (d) of the LSO By-Law 9.

seized funds are being returned, there is no reason why it should not be returned in the form it was taken in, which is often in cash.

The FLSC Consultation Report explains that the primary reason for considering the removal of the exceptions to the "no cash" rule is because they are seldom used. There is no exact data on how often funds in excess of $7,500 are returned to individuals through lawyers, however, we do not agree that these exceptions are seldom or rarely used. Examples of reported cases where courts have ordered the return of funds in excess of $7,500 include:

- *Attorney General of Ontario v $8,740 In Canadian Currency*, 2016 ONSC 3773
- *A.G. of Ontario v. $787,940 in Canadian Currency*, 2014 ONSC 3069

Client Identification and Verification

The CLA also opposes the proposed deletion of the above exceptions which are mirrored in paragraphs 5(2)(c)-(e) of the FLSC Model Rules and sections 22(3)(c)-(f) of the LSO By-Law 7.1 for the same reason.

Thank you for the opportunity to contribute to the consultation on this issue. If you require further information, please do not hesitate to contact our organization for more input on this important issue.

Sincerely,
Criminal Lawyers' Association

Michael Lacy
President