

Client Identification and Verification Rules

Introduction

Effective December 31, 2008 Manitoba lawyers have been required to follow the client identification and verification procedures set out in Law Society rules 5-116 to 5-130 when retained by a client.

You should read the rules carefully and pay close attention to the definitions in rule 5-116. Terms such as "client", "money", "financial transaction", "lawyer", "organization", "public body" and "reporting issuer" may not be consistent with common usage. For example, "client" includes another party that a lawyer's client represents or on whose behalf the client otherwise acts in relation to obtaining legal services from the lawyer. When a lawyer is acting for an "organization", a lawyer has responsibilities to obtain information about the person instructing the lawyer on behalf of the organization.

Identification and *verification* are two distinct concepts in the rules. Identifying your client is easy; verifying your client's identity requires more effort because a financial transaction is involved. Many exemptions to the rules exist. Understanding the difference between identification and verification and knowing the exemptions will save you time and work. Lawyers must keep a record of the information and documents obtained to identify and verify a client's identity.

Lawyers must also retain a copy of every document used to verify the identity of any individual client or organizational client (including the instructing individual) when providing legal services in respect of a financial transaction.

The questions and answers found below are intended to assist lawyers in complying with the new client identification and verification requirements. More information may be added at a future date.

List of Frequently Asked Questions

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Identification

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15. Another lawyer in my firm already identified the client for whom I am acting. Am I permitted to rely on this identification?
16. I had a general retainer to provide legal services to a client before the rules were enacted. I have just been asked to provide legal advice on a new matter. I have not opened a new file. Do I have to identify this client?
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23. Am I required to identify a person who exercises his right to counsel upon being detained by the police and calls me from detention?

24. Does a lawyer who assists an unrepresented person in court, whether on her own initiative or at the request of the court, have an obligation to identify the person?
25. I provide summary legal advice through a "law line" service. Do I have to identify the callers to whom I give advice?
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Verification – Detailed Questions

45. I have been retained by an insurance company to act for it in relation to a subrogated litigation claim. Assume there is a financial transaction and that the claim is settled without commencing a proceeding. Do I have to verify the identity of the insurance company's client considering the definition of "client" in rule 5-116?
46. What are the obligations of insurance defence counsel, when defending an insured on the instructions of an insurer pursuant to a liability policy?
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48. I am a lawyer in Manitoba and my client is in Calgary. Are there any special rules to *verify* this person's identity?
49. What is caught by the exemption for funds "paid by a financial institution"?
50. I am acting for the vendor in a real estate transaction. I will be receiving the proceeds of the sale from the trust account of the purchaser's lawyer and, after paying off the outstanding mortgage, will be writing a cheque for the balance to my client from my trust account. Do I have to verify my client's identity?
51. I am acting for the vendor in a real estate transaction. My client has directed me to pay the proceeds of the sale to another party. Do I have to verify the identity of that party?
52. I am acting for the purchaser and the mortgagee in a real estate transaction. I will be receiving mortgage funds from the financial institution and cash to close from the purchaser. I will then be sending a trust cheque to the lawyer for the vendor. Do I have to verify my clients' identity?
53. My client has come to me for tax advice in connection with some investments. Is this a situation in which I have to verify my client's identity?
54. The rules talk about taking "reasonable steps" to verify a client's identity. What will be considered to be reasonable steps?
55. My client is a private corporation. I have tried to get the stipulated information for all of the directors and shareholders who own 25% or more of my client, but have not been successful. May I still act for the client?
56. I did the legal work to incorporate a business and am now acting for that business on another matter. May I rely on documents already in my possession to verify the client's identity or must I rely on documents from a governing registry?
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58. My client is a Canadian lawyer and the matter I am acting for him on involves a financial transaction. I am not meeting him in person. Do I have to verify his identity?
59. I am acting for an organization located outside of Canada. Do I have to use an agent to identify the organization?
60. My client is acting for another party. I will not be meeting that party in person. How do I verify the identity of this other party?

61. Do I have an obligation to ask my client if they are acting for another party?
62. My client is acting on behalf of a minor. Do I have to identify the minor?
63. Are beneficiaries to an estate considered clients within the meaning of the rules?
64. I am acting for a developer of a new condominium project and I am holding in trust the monies paid as deposits by the purchasers of the condo units. Do I have to identify the purchasers?
65. I am acting for a lender in collecting mortgage payments on his behalf. Do I have to identify or verify the identity of the person making the payments?
66. I have been retained by a joint venture. Do I have to identify and verify the identity of the parties to the joint venture?
67. I am acting for a living trust that makes ongoing disbursements to the beneficiaries of the trust. Do the identification and verification obligations apply to these beneficiaries?
68. Does a lawyer retained by a financial institution to do work for a client of the financial institution have to identify that client?
69. I am acting for a union on a grievance. Do I have to identify the grievor?
70. I am sometimes retained by the Attorney General to act as agent in the enforcement of support orders from other jurisdictions. This involves having a support order issued in another jurisdiction, confirmed in my jurisdiction to facilitate collection. Do I have to identify the beneficiary of the order?
71. What, if anything, do I need to record when I am relying on an exemption to the identification or verification requirements?
72. My client was very evasive when I tried to get the necessary information to identify him and to verify his identity. What do I do?
73. Do I have to keep identification and verification information in a separate file or can I keep it in my client's file?
74. Can I obtain and retain identification and verification information in electronic form?
75. I am acting for a client with respect to the completion of a commercial transaction. I have prepared the necessary documentation to complete the transaction, but the closing funds will not be flowing through my trust account as my client will be paying these directly to the other side in accordance with the agreement and closing documentation. Is this a situation in which I have to verify my client's identity?
76. I represent debtors in lending transactions which often include as security for a loan the pledge of shares by the borrower or guarantor. The pledge involves a transfer of physical possession of the share certificates to the lender (or its custodian or agent) but no transfer of beneficial ownership, unless there is an event of default that entitles the lender to foreclose on the shares and become the owner or exercise a power of sale and sell them to a third party. The situation is similar where public company shares are certificated and registered directly in the name of the borrower. When those shares are pledged, the pledgor is actually dealing with the rights to its securities account and the security entitlement in respect of those shares which the securities account gives to it. Pending

default, the pledgor retains the ownership rights in the shares including entitlement to dividends and voting. I note that the definition of "money" includes shares. Does the pledge of shares as security mean that "money" has been transferred, requiring the verification of the borrower's identity?

77. I am acting for a corporation that is listed on a designated stock exchange as described in the rules. The corporation's headquarters are in a country that is not a member of the Financial Action Task Force (the "FATF"), but it also operates in several countries that are members of the FATF. Is the corporation covered by the "reporting issuer" exemption?
78. I am representing the plaintiffs in a class action. Do I have to identify all of the plaintiffs?
79. The rules require identification of shareholders who own 25 percent or more of the shares of an organization when a lawyer is engaged in or gives instructions in relation to a financial transaction. Does this apply to ownership of all shares or just voting shares?
80. I am acting for an organization that operates in Kuwait. Although not a member of the FATF, Kuwait is a member of the Gulf Cooperation Council, an organization that is a member of the FATF. My client otherwise meets the definition of "reporting issuer" in the rules. Does the "reporting issuer" exemption apply?
81. You are acting on behalf of a Condominium Corporation and you receive instructions from the property manager to collect arrears of common expenses. You either send a demand letter or register a notice of lien. You subsequently receive payment from the unit owner. You determine that no exemption to the requirement to verify identity applies. Whose identity do you need to verify in these circumstances?
82. How do I verify the identity of the Condominium Corporation and the Property Manager?
83. I am acting for Corporation A on a matter that requires a financial transaction. One of the shareholders of Corporation A is Corporation B and Corporation B holds more than 25% of the shares in Corporation A. Do I have to identify the shareholders and directors of both Corporations A and B?

Identification v. Verification

1. The Rules talk about *identification* and about *verification*. What is the difference between them?

Identification refers to the basic information you need to obtain and record about your clients to know who they are whenever you are retained, for example their name, address, telephone number, occupation, etc.

Verification refers to the information you need to obtain to confirm that your client is who or what they say they are. Verification is required only when you are acting for a client or giving instructions on behalf of a client regarding the receiving, payment or transferring of money, ie. a financial transaction.

When you are verifying a client's identity, you must obtain and retain a copy of every document used to verify the client's identity.

Remember that "client" and "financial transaction" are defined in rule 5-116. These two terms have a broader meaning than in ordinary use.

Client Identification – Overview of Obligations

2. In what circumstances am I required to *identify* my client?

You must make reasonable efforts to identify your client whenever you are retained to provide legal services, except when:

- (a) you are in-house counsel providing legal services on behalf of your employer;
- (b) you act as an agent for another Canadian lawyer who has confirmed to you that he has already complied with the provisions of our rules or equivalent provisions in place in his home jurisdiction and that he has retained the required documentation;
- (c) you act for a client who was referred to you by another Canadian lawyer who has confirmed to you that he has already complied with the provisions of our rules or equivalent provisions in place in his home jurisdiction and he has retained the required documentation;
- (d) a member or employee of your firm has identified the client, including members or employees of your firm conducting business in another Canadian jurisdiction;
- (e) you provide legal services that do not involve a financial transaction as part of a duty counsel program sponsored by a non-profit organization;
- (f) you provide *pro bono* summary advice that does not involve a financial transaction;
- (g) you have previously identified and retained the identity documentation for this client;
or
- (h) your client retained you to provide legal services in respect of a matter before December 31, 2008 on which you are still acting and the client has not retained you in respect of a new matter.

3. I was acting for a client on a matter before December 31, 2008, and the matter is continuing. Do I have to *identify* this client?

Not as long as the matter is the same. But if you take on a new matter for the client on or after December 31, 2008 you must comply with the identification and verification requirements regardless of whether the client is an existing client.

4. What are my obligations in determining whether a lawyer for whom I am acting as agent or a lawyer who has referred a client to me has taken the necessary steps to *identify* that client?

You must exercise due diligence to satisfy yourself that the other lawyer has already identified the client. This involves asking the other lawyer to confirm to you that she has complied with the requirements. If you are acting as an agent on behalf of a lawyer practising in another

Canadian jurisdiction or if a lawyer practising in another Canadian jurisdiction has referred the client to you, that lawyer must have complied with the provisions of our rules or equivalent provisions in place in his home jurisdiction.

5. What information do I have to obtain to *identify* my client when my client is an individual?

When you are retained by an individual, you must obtain and record all of the following information that is applicable:

- (a) the client's full name;
- (b) home address and home telephone number;
- (c) occupation(s); and
- (d) business address and business telephone number.

6. What information do I have to obtain to identify a client that is an organization?

Organization means a body corporate, partnership, fund, trust, co-operative or unincorporated association. Subject to certain exceptions, when your client is an organization, you must obtain and record all of the following information that is applicable:

- (a) the client's full name, its business address and business telephone number;
- (b) the name, position and contact information of the individuals who instruct you in the matter for which you are retained; and
- (c) except for a "financial institution", "public body" or "reporting issuer",
 - (i) the general nature of the type of business or activity engaged in by the client, and
 - (ii) the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number.

7. What are the exceptions to the requirement to obtain information to *identify* clients that are organizations?

When your client is a "financial institution", a "public body" or a "reporting issuer", you do not need to record the general nature of the type of business or activity in which your client is engaged. You also do not need to obtain the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number. You are still required to obtain and record all of the other applicable information to identify the organization.

8. If my client represents or acts on behalf of another party, do I have to obtain information to *identify* the other party, in addition to obtaining information to *identify* my own client?

Yes. See the definition of client in rule 5-116. If your client acts for or represents another party, you must obtain the same information to identify that other party as if the other party was your client.

9. Rule 5-121 talks about *identifying* directors, shareholders and owners. What is required?

You are only required to identify an organization's directors, shareholders and owners if:

- (a) the "organization" is a "client";
- (b) there is a "financial transaction"; and
- (c) the organization is not a "financial institution", "public body", "reporting issuer" or a "securities dealer".

When the client is an organization and there is a "financial transaction", the rule imposes special requirements. You must make reasonable efforts to obtain and, if obtained, record:

- (a) the name and occupation of all directors of the organization; and
- (b) the name, address and occupation of all persons who own 25% or more of the organization or of the shares in the organization.

Since you are not required to verify the identity of directors, shareholders and owners, you are not required to photocopy a driver's licence, etc.

10. What are "reasonable efforts" to obtain information to *identify* directors, shareholders and owners?

The answer will depend on the context. In many cases, asking your client for the information and recording it will suffice. It may also be appropriate to consult corporate minute books where readily available or an on-line corporate registry service.

11. If I am not able to get the names of the directors, shareholders and owners of a corporation or society, may I continue to act for the client?

Yes, provided you have made reasonable efforts to obtain the information. It would be prudent to record the efforts that you have made in such a case.

Client Identification – Detailed Questions

12. Can I act for an individual who doesn't have an occupation or doesn't want to tell me what it is?

You are required to find out what your client does. If your client doesn't want to answer the question, you should explain that all lawyers are required to ask all clients for this information and that you need it to properly represent him or her. If the client refuses to provide this information, you must advise the client that you will be in breach of the client identification rule unless you get it and your professional obligations do not permit you to act for a client in such circumstances.

Note that "occupation" does not need to be "employment". If your client is retired, a homemaker, a volunteer caregiver or otherwise occupied, you should record that information.

13. What if my client is living on the street and does not have a home address? How do I record the client's address?

Rule 5-118(1) requires you to obtain and record the information that is applicable. If the individual does not have a home address, you will be unable to record it. However, it would be prudent to record what efforts you have made to obtain an address. Consider where you will send correspondence and how you will reach this client if you need to do so. Obtain that address and record it.

If the person is not living on the street but simply will not give you a home address, consider whether you should be acting for that client at all.

14. Lawyers retain me to provide mediation services to their clients. I do not give legal advice; I merely act as a neutral mediator. I do not prepare documents for use in a proceeding; however, when there is a settlement, I often prepare minutes of settlement. The lawyers and their clients sign a mediation agreement with me. I bill the lawyers for my work as a mediator. Am I required to identify the lawyers? Am I required to identify their clients?

Rule 5-117(1) requires lawyers to identify clients who retain them to provide legal services. You do not provide legal advice and you do not draw documents for use in a proceeding. Non-lawyers can act as mediators in this context. You are not required to identify your client. However, if you provide your mediation services as part of your legal practice and provide legal advice then you are required to identify the lawyers and their clients.

15. Another lawyer in my firm already identified the client for whom I am acting. Am I permitted to rely on this identification?

Yes, you may rely on the identification and verification of identity obtained by another lawyer in your firm.

16. I had a general retainer to provide legal services to a client before the rules were enacted. I have just been asked to provide legal advice on a new matter. I have not opened a new file. Do I have to identify this client?

Yes. The question is not whether you have opened a new file since the rules were enacted, but whether you were retained to provide legal services in respect of a new matter. Since the matter you are providing legal advice on arose after implementation of the rules, you are required to identify your client.

17. If my client is unable to provide some of the identification information required, for example an address or a phone number, am I obliged to withdraw?

Where a client is unable to provide the information, for example where the client does not have a phone or telephone number, the lawyer is not obliged to withdraw. This situation is to be

distinguished from one in which the client refuses to provide the information. Where the information does not exist you should make a record of that fact.

18. The lawyer who referred the client to me identified the client, but I have now learned that the matter will involve a financial transaction. Do I have to verify the client's identity?

Yes, unless the referring lawyer also verified the client's identity.

19. I have been retained by a law firm to provide a legal opinion on an issue arising in a matter for which they are acting for a client. Do I have to identify or verify the identity of that client?

Generally, unless the law firm's client is actively instructing you or the other law firm in relation to the legal opinion, you would not have to verify the identity of the law firm's client. In any event, if the law firm that has asked you to provide the legal opinion is a Canadian law firm, and has already verified the identity of that client, then the exemption under the rules will apply.

20. The corporation I have been retained by has authorized several people to instruct counsel. Do I have to identify all of them?

No. The rule requires you to identify the individual or individuals actually instructing you.

21. Although there is one senior person giving me instructions on behalf of my corporate client, I am also receiving instructions on discreet aspects of the matter from several other employees of the corporation. Do I have to identify each of them?

You must use your judgment in this situation. If you are satisfied that an individual is responsible for the instructions you are receiving from others in the corporation it may be sufficient to verify his or her identity only. If, however, no instructing individual has overall responsibility for the instructions given by others, you must identify each of the persons instructing you on behalf of the corporation.

22. Do I have an obligation to look behind the assertion that an individual is authorized to instruct me on behalf of an organizational client?

The rule does not require that you investigate such an assertion. You should always be prudent, however, and if you have concerns about the assertion it would be advisable to make further inquiries to satisfy yourself that the individual is indeed authorized to instruct you.

23. Am I required to identify a person who exercises his right to counsel upon being detained by the police and calls me from detention?

No. Whether you are acting as duty counsel or are in private practice when you are providing summary advice and are not charging the client a fee or disbursements you have not been retained within the meaning of the word and so are not caught by the scope of the rules. This

applies to calls from people in detention as well as other situations in which a lawyer provides summary advice. If, however, you undertake to represent the person, the provisions of the rules will apply.

24. Does a lawyer who assists an unrepresented person in court, whether on her own initiative or at the request of the court, have an obligation to identify the person?

No. As long as the lawyer does not charge for fees or disbursements and the services do not extend to ongoing representation, the lawyer is not obliged to identify the person.

25. I provide summary legal advice through a "law line" service. Do I have to identify the callers to whom I give advice?

No. This is considered summary advice and is not caught by the rules.

26. I sometimes commission or notarize a document for someone I am not otherwise retained to represent. Do I have to identify that person?

Simply notarizing or commissioning a document is not the provision of legal services and does not trigger the obligations under the rules. However, it is always prudent to verify the identity of an individual when you are notarizing or commissioning a document to prove that someone is who he or she says they are. Additionally, if you are also providing legal advice or other representation, you will have to comply with the provisions of the rules.

Client Verification – Overview of Obligations

27. Do I have to *verify* my client's identity whenever I receive money for my legal fees and disbursements?

No, professional fees, disbursements and expenses are all exempted from the verification requirements. If that is the only money you receive, you do not have to verify your client's identity.

28. What are the exceptions to the *verification* requirements?

First, for the verification requirements to apply, the lawyer must receive, pay or transfer money on behalf of a client or give instructions on behalf of a client in respect of the receiving, paying or transferring of money (a "financial transaction").

Assuming a "financial transaction" exists, the client verification requirements do not apply when a lawyer:

- (a) pays money to or receives money from a "financial institution", a "public body" or a "reporting issuer";
- (b) receives money from the trust account of another Manitoba or Canadian lawyer;

- (c) receives money from a peace officer, law enforcement agency or other public official acting in an official capacity;
- (d) pays or receives money:
 - (i) pursuant to the order of a court or other tribunal,
 - (ii) to pay a fine or penalty,
 - (iii) as a settlement of any legal or administrative proceeding, or
 - (iv) for professional fees, disbursements, expenses or bail,
- (e) provides legal services as in-house counsel on behalf of the lawyer's employer,
- (f) acts as an agent for another Manitoba or Canadian lawyer who has confirmed that she has already complied with these rules or equivalent provisions in her home jurisdiction and she has retained the required documentation,
- (g) acts for a client who has been referred by another Manitoba or Canadian lawyer who has confirmed that she has already complied with these rules or equivalent provisions in her home jurisdiction and she has retained the required documentation,
- (h) has fulfilled her responsibilities through her firm, including fulfillment through members or employees of the lawyer's firm conducting business in another Canadian jurisdiction,
 - (i) previously verified the identity and retained the verification documentation for this client, and in the case of an individual, the lawyer recognizes the client,
- (j) acts for a client that is a "financial institution", a "public body", a "reporting issuer" or an individual who instructs the lawyer on behalf of a "financial institution", a "public body" or a "reporting issuer",
- (k) was retained by the client in respect of a matter before December 31, 2008 on which the lawyer is still acting and the client has not retained the lawyer in respect of a new matter.

In addition, the verification rules do not apply with respect to a transaction in which all funds involved are transferred by electronic transmission provided all the requirements set out in rule 5-119(c) are met. Neither the sender nor the beneficial receiver are permitted to handle or transfer the funds and a full record of the transaction must be kept. The transfer must occur between financial institutions or financial entities headquartered in and operating in countries that are members of the Financial Action Task Force.

Take note that the exemption from verification for money "paid to another lawyer in trust, on the direction of the client" was deleted from the rules. That exemption no longer exists.

29. My client will receive (or pay) money to settle a legal proceeding. Will I have to *verify* her identity in that case?

No. You do not have to verify the identity of your client if the only money involved is paid to settle a legal or administrative proceeding. Settlements reached prior to the commencement of a proceeding (eg. following the sending of a demand letter) are not included in the exemption. However, the proceeding must have actually been commenced for this exemption to apply, so, for example, settlements reached prior to the commencement of a proceeding (ie. following the sending of a demand letter) are not included in the exemption.

30. Do I have to *verify* the identity of my client when I receive money for my client from the trust account of another lawyer?

No, the verification requirements are not triggered in such a case provided the other lawyer is subject to the requirements of the rules or similar requirements of another jurisdiction in Canada. However, when you pay the money out to the client or otherwise, that may be a separate "financial transaction" (as defined in rule 5-116).

31. How do I *verify* the identity of my client when my client is an individual?

You must take reasonable steps to verify an individual's identity, obtaining and retaining copies of what you reasonably consider to be reliable, independent source documents, data or information. Independent source documents may include valid original government-issued identification, including a driver's licence, birth certificate, provincial or territorial health insurance card, passport or similar record.

If your client represents or acts on behalf of another individual in relation to the matter for which you are retained, you are required to verify the identity of the other individual too. See the definition of "client" in rule 5-116.

32. How do I *verify* the identity of a corporation or a society?

Unless another exemption applies, you must take reasonable steps to verify an organization's identity, obtaining and retaining copies of what you reasonably consider to be reliable, independent source documents, data or information.

If the "client" is an organization such as a corporation or society created pursuant to legislative authority, you must obtain and retain a written confirmation from a government registry as to the existence, name and address of the organization, including the names of its directors and officers, such as:

- (a) a certificate of corporate status issued by a public body;
- (b) a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation; or
- (c) a copy of a similar record obtained from a public body that confirms the organization's existence.

33. How do I *verify* the identity of a client that is a partnership?

You will need to obtain some sort of formal record that confirms its existence as an organization. You could obtain a copy of the partnership agreement; however some partnerships may be reluctant to provide this to you because of its confidential nature. In that situation, you may be able to obtain proof of the firm's identity through a government registry, such as the GST Registry available on the website of CRA or through confirming information available from the Companies Office.

34. I am acting for a trust. What kind of documents might I obtain to assist me to *verify* its identity?

The documentation you will need to consult to verify the identity of a trust will vary depending on the nature of the trust. Examples of appropriate documentation might include the trust agreement or other documents establishing the trust, documents amending the trust and documents identifying the trustees.

35. Who in Canada can provide an attestation to an individual's identity?

An attestation may be provided by a commissioner of oaths or a guarantor in Canada when the client is in Canada.

A guarantor must be a person who is engaged in one of the occupations set out in rule 5-122(4), such as an architect, dentist, medical doctor, lawyer, notary public, etc. You must exercise due diligence in ascertaining that the person providing the attestation is a member of one of the above occupations.

36. How would a commissioner of oaths or a guarantor attest to an individual's identity in Canada?

See the sample attestation form for the verification of identity on the Law Society website.

37. When would I use an agent to *verify* the identity of a client outside of Canada?

If your client is not present in Canada, you must rely on an agent to obtain the information required to verify the identity of the client under rule 5-120, which may be attested to in a form similar to that described in rule 5-122, to verify the client's identity, provided that you and the agent have an agreement or arrangement in writing for this purpose.

If you enter into such an agreement or arrangement, you must obtain from the agent the information obtained by the agent under that agreement or arrangement.

You may use your discretion to determine who would be an appropriate agent in the circumstances (ie. lawyer, notary).

See the sample agreement with an agent for verification of a client's identity when the client is outside of Canada on the Law Society website. There is also a sample attestation form for use outside of Canada.

38. I have acted for a client before and have already *verified* the client's identity. Do I have to do it again?

As long as you recognize the person you do not have to verify the identity of an individual more than once.

In the case of an "organization", you also do not have to verify the identity again. This exception also applies to verifying the identity of the individuals who instruct you on behalf of the "organization". There may be circumstances, however, where it is prudent to verify the identity of an "organization" more than once and to determine that the instructing individual is still authorized to act in that capacity.

39. I have acted for a corporate client on a number of matters and have complied with the identification and verification requirements. Someone new is now giving me instructions on behalf of the client. Do I have to *verify* that person's identity?

In every case involving a "financial transaction", you must verify the identity of the person instructing you unless you have previously done so or another exemption applies.

40. Do I have to *identify* my client or *verify* my client's identity before acting for the client?

You must make reasonable efforts to identify your "client", when you are retained to provide legal services.

In addition, you must verify the identity of a "client" who is an individual before or at the time that you provide legal services in respect of a "financial transaction".

The same is true for verifying the identity of individuals instructing you on behalf of a organization and for individuals whom your client represents or on whose behalf the client otherwise acts.

However, if your client is an "organization", you must take reasonable steps to verify the identity of the organization within 60 days of engaging in a "financial transaction".

41. What happens if I am unable to *verify* the identity of a corporate client within 60 days of engaging in a financial transaction?

Rule 5-121 requires you to take reasonable steps to verify your client's identity. Although you have 60 days within which to comply with the verification requirements if your client is an organization, you should verify the identity of your client as early as possible in the retainer. Despite having taken reasonable steps, if you are unable to verify your client's identity, it would be prudent to document the steps that you have taken.

42. Do I have to document the steps I take to *verify* my client's identity?

Rule 5-118 requires that you obtain and retain a copy of every document you rely on to verify the identity of any individual or organization.

You must also record the information that you obtain to identify your client and any information and copies of documents that you rely on to identify the directors, shareholders and owners of 25% or more of an organization, other than an organization that is a securities dealer.

43. Do I have to *verify* the identity of a client for whom I was retained before December 31, 2008?

Not as long as you continue to act for the "client" on the same matter. But if you take on a new matter for the same client on or after December 31, 2008, you are required to take the necessary steps to identify the client, and to verify the identity if you are involved in a "financial transaction".

Where you have verified the identity of an individual, you are not required to subsequently verify that same identity if you recognize that person.

If you have verified the identity of a client that is an organization and obtained the information under rule 5-121 (identifying directors, shareholders and owners), you are not required subsequently to verify that identity or obtain that information. However, if someone new is giving you instructions in respect of a financial matter on behalf of the organization, you must verify the identity of the individual or individuals authorized to give the instructions.

44. How long must I retain client identification and verification information?

You must retain a record of the information and retain any documents obtained to verify the identity of an individual or organization, for the longer of:

- (a) the duration of the lawyer and client relationship and for as long as is necessary for the purpose of providing services to the client; and
- (b) six years following completion of the work for which you were retained.

Verification – Detailed Questions

45. I have been retained by an insurance company to act for it in relation to a subrogated litigation claim. Assume there is a financial transaction and that the claim is settled without commencing a proceeding. Do I have to verify the identity of the insurance company's client considering the definition of "client" in rule 5-116?

First, remember that if the insurance company client is a "public body" (ie. MPI) or a "reporting issuer" (ie. Great-West Life) the verification rules do not apply. If your insurance company is not a "public body" or "reporting issuer", the rules apply.

To answer the question you must consider whether the insurance company represents or acts on behalf of the insured to determine whether the insured comes within the definition of "client". Is the insured instructing the insurance company? If yes, you must verify the identity of the insured. If the insured is not instructing the insurance company, you are not required to verify the identity of the insured. This would be the case where the insurer has, by operation of law or contract, succeeded to the rights of its insured in relation to the claim.

Obviously, if the insured also has a claim that the insured is bringing concurrently with the insurance company's subrogated claim, you must also verify the identify of the insured if you are also acting for the insured.

46. What are the obligations of insurance defence counsel, when defending an insured on the instructions of an insurer pursuant to a liability policy?

Whether you are in-house with an insurer or outside counsel, you act for both the insurer and insured when you are defending a claim against an insured under a liability policy. If you are in-house counsel for the insurance company, you need not identify or verify the identity of the insurance company, but you are required to identify the insured. If you are outside counsel, you are required to identify both clients. Regardless of your position, if and when settlement funds may become payable, you should consult the rules with regard to whether verification is necessary or whether an exemption might apply. If the matter is settled or a judgment is rendered after the claim has been filed, you are not required to verify the identity of your clients. If settled prior to filing a claim, however, the rules may require you to verify their identity. The status of the insurance company (ie. if it is a financial institution or reporting issuer) may determine if the insurer is exempt from the verification process.

Different issues arise when considering the identification and verification of the insured that affects outside defence counsel. In the event the insured has a right under the policy to guide and instruct counsel, and is doing so, identification and verification of the insured is required. There are many occasions in which the insured may be difficult or impossible to locate during the course of the retainer. In such cases, defence counsel is not obliged to decline the retainer simply because the insured cannot be located for the purpose of completing the identification process, nor will verification of the insured be required in the event funds are transferred. If counsel is able to make contact with the insured, identification and verification information will, however, be required.

47. My client is a Canadian lawyer. There is a financial transaction. I am not meeting with the lawyer in person. Do I have to verify the lawyer's identity?

Yes. In such a case you must have a commissioner of oaths or a guarantor certify that they have verified the client's identity.

48. I am a lawyer in Manitoba and my client is in Calgary. Are there any special rules to *verify* this person's identity?

Yes, when your client is an individual and is in Canada, but you cannot meet with him or her in person, you must have a commissioner of oaths or a guarantor certify that they have verified the client's identity.

49. What is caught by the exemption for funds "paid by a financial institution"?

This exemption is meant to cover a financial institution's own funds, for example those advanced pursuant to a mortgage or loan agreement. Cheques, whether regular or certified, bank drafts or other forms of payment are not included in the exemption.

50. I am acting for the vendor in a real estate transaction. I will be receiving the proceeds of the sale from the trust account of the purchaser's lawyer and, after paying off the outstanding mortgage, will be writing a cheque for the balance to my client from my trust account. Do I have to verify my client's identity?

Although the original source of the money is exempt because it came from the trust account of another lawyer, since you will be writing a cheque to your client you are acting as a financial intermediary and will have to verify your client's identity. In any event, in all real estate transactions, it is prudent practice to verify your client's identity.

51. I am acting for the vendor in a real estate transaction. My client has directed me to pay the proceeds of the sale to another party. Do I have to verify the identity of that party?

Unless the vendor is acting for or on behalf of the other party, there is no obligation to verify that party's identity.

52. I am acting for the purchaser and the mortgagee in a real estate transaction. I will be receiving mortgage funds from the financial institution and cash to close from the purchaser. I will then be sending a trust cheque to the lawyer for the vendor. Do I have to verify my clients' identities?

When your client is a financial institution you are not required to verify its identity. However, you must verify the identity of your purchaser client as funds remitted to the trust account of another lawyer are not exempt under the rules.

53. My client has come to me for tax advice in connection with some investments. Is this a situation in which I have to verify my client's identity?

The verification obligations apply when you are giving instructions on behalf of a client regarding the receiving, payment or transferring of money. Simply providing legal advice about a money matter does not trigger the verification obligations unless you are also moving the money.

54. The rules talk about taking "reasonable steps" to verify a client's identity. What will be considered to be reasonable steps?

The answer depends a lot on the context. The rule directs lawyers to rely on reliable, independent source documents, data and information and sets out a number of examples. Lawyers are expected to make a reasonable effort to obtain such documents and information.

55. My client is a private corporation. I have tried to get the stipulated information for all of the directors and shareholders who own 25% or more of my client, but have not been successful. May I still act for the client?

You must take reasonable steps to obtain the information. In the case of a private corporation this would probably involve asking your client and perhaps looking at the corporate minute books. Provided you have exercised due diligence in trying to obtain the information you may continue to act for the client. In these circumstances, it would be prudent to record the efforts you made.

56. I did the legal work to incorporate a business and am now acting for that business on another matter. May I rely on documents already in my possession to verify the client's identity or must I rely on documents from a government registry?

As long as the documents are current, relying on documents in your possession is fine. The documents referred to in the rule are examples of independent, reliable documents, but the list is not exhaustive. Appropriate documents from non-governmental sources may also be sufficiently reliable. In any event, if you incorporated the business you likely have a copy of the certificate of incorporation, which is perfectly acceptable.

57. May I rely on a faxed copy of an attestation?

Yes, but you must obtain a copy of the original for your records. It is important that all documents used to verify identity are clear and legible. If you wish, you may store the document electronically as long as you can readily produce a hardcopy.

58. My client is a Canadian lawyer and the matter I am acting for him on involves a financial transaction. I am not meeting him in person. Do I have to verify his identity?

Yes. In such cases you will have to use a guarantor or a commissioner of oaths to obtain an attestation to verify your client's identity. You may also choose to engage an agent to obtain the attestation.

59. I am acting for an organization located outside of Canada. Do I have to use an agent to identify the organization?

No. You will have to use an agent to identify the instructing individual or individuals if not located in Canada, but you may identify the organization through documents.

60. My client is acting for another party. I will not be meeting that party in person. How do I verify the identity of this other party?

If the other party is an organization, you may rely on documents to identify it. To identify an individual you will have to use either the attestation method or arrange for an agent to take the necessary steps to verify the identity. Which method you may use depends on where the third

party is located. If the person is in Canada, you may use either the attestation method or an agent. If located outside of Canada, you will have to rely on an agent.

61. Do I have an obligation to ask my client if they are acting for another party?

Although the rules do not impose a specific obligation to inquire about other parties, it would be prudent practice to do so.

62. My client is acting on behalf of a minor. Do I have to identify the minor?

No. A minor does not have legal capacity and so cannot be formally directing or instructing the client.

63. Are beneficiaries to an estate considered clients within the meaning of the rules?

The rule obliges a lawyer to identify other parties who are directing or instructing the client. The fact that there are parties who might benefit from or be affected by the actions of the client does not trigger the obligation to identify them. Therefore, the beneficiaries of an estate would not be considered clients in a situation in which an estate trustee is seeking legal advice about the administration of an estate. There may be situations, however, in which the beneficiary is instructing the estate trustee, for example in a case involving litigation over the settlement of an estate. In that case the beneficiary would have to be identified.

64. I am acting for a developer of a new condominium project and I am holding in trust the monies paid as deposits by the purchasers of the condo units. Do I have to identify the purchasers?

No. In that case the developer is not being directed by the purchasers and is not acting for or representing them.

65. I am acting for a lender in collecting mortgage payments on his behalf. Do I have to identify or verify the identity of the person making the payments?

No. You must verify the identity of your client, but not the borrower.

66. I have been retained by a joint venture. Do I have to identify and verify the identity of the parties to the joint venture?

Yes. By definition, a joint venture is not an independent legal entity, but rather a collection of organizations that have joined together for some common purpose. In such case, each of the parties to the joint venture would be considered to be directing the affairs of the joint venture.

67. I am acting for a living trust that makes ongoing disbursements to the beneficiaries of the trust. Do the identification and verification obligations apply to these beneficiaries?

Whether you must identify and verify the identity of beneficiaries to a trust will depend on the facts of the case. If the beneficiaries are directing the client they will have to be identified and, where the matter involves a financial transaction, you will also have to verify their identity.

68. Does a lawyer retained by a financial institution to do work for a client of the financial institution have to identify that client?

Again, it depends on the facts of the case. If the financial institution's client is instructing or directing the institution, the lawyer must identify and in appropriate cases verify the identity of the client. Where the client is not directing the institution, however, the financial institution is the client and any identification requirements relate to it.

69. I am acting for a union on a grievance. Do I have to identify the grievor?

No. Except in very rare cases it is the union that has carriage of a grievance. The grievor, while clearly an interested party, is not instructing the union and as such is not a client within the meaning of the rules. This would be true even in the case of a group or policy grievance where a large number of union members have a stake in the outcome of the matter. Where a grievor does have carriage of the grievance and is instructing the union as to how to proceed, the obligation to identify that person and, in appropriate cases, to verify their identity, would apply.

70. I am sometimes retained by the Attorney General to act as agent in the enforcement of support orders from other jurisdictions. This involves having a support order issued in another jurisdiction, confirmed in my jurisdiction to facilitate collection. Do I have to identify the beneficiary of the order?

No. Your client is the Attorney General that has retained you. In such a case the beneficiary of the support order is neither directing nor instructing the Attorney General and is not considered a client for the purposes of the rules.

71. What, if anything, do I need to record when I am relying on an exemption to the identification or verification requirements?

While the rules do not oblige you to make any record when you are relying on an exemption, if asked by the Law Society about the situation, you must be able to demonstrate that you relied on a valid exemption and it would therefore be helpful to note the reason identification or verification was not required.

72. My client was very evasive when I tried to get the necessary information to identify him and to verify his identity. What do I do?

If, in the course of obtaining the information and taking the required steps or while retained by the client, you know or ought to know that you would be assisting the client in fraud or other illegal conduct, Rule 5-128 requires that you must withdraw from representation of the client.

See also Commentary 7 of Chapter 3 of the *Code of Professional Conduct* regarding activities that a lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.

73. Do I have to keep identification and verification information in a separate file or can I keep it in my client's file?

You can keep the information and documents in your client file. There is no need to maintain a separate file but you may decide that you want to do that.

74. Can I obtain and retain identification and verification information in electronic form?

Yes, you may obtain and retain a copy of every document used to verify the identity of any individual or organization in a machine-readable or electronic form, if a paper copy can be readily produced from it.

75. I am acting for a client with respect to the completion of a commercial transaction. I have prepared the necessary documentation to complete the transaction, but the closing funds will not be flowing through my trust account as my client will be paying these directly to the other side in accordance with the agreement and closing documentation. Is this a situation in which I have to verify my client's identity?

Yes. The verification obligations apply whenever you receive, pay or transfer money on behalf of a client or give instructions on behalf of a client in respect of the receipt, payment or transfer of money. Although funds are not passing through your trust account in this transaction, you are instructing with respect to the transfer of money when you instruct on how the money will flow to complete the transaction, which may include the preparation of documents containing such instructions.

76. I represent debtors in lending transactions which often include as security for a loan the pledge of shares by the borrower or guarantor. The pledge involves a transfer of physical possession of the share certificates to the lender (or its custodian or agent) but no transfer of beneficial ownership, unless there is an event of default that entitles the lender to foreclose on the shares and become the owner or exercise a power of sale and sell them to a third party. The situation is similar where public company shares are certificated and registered directly in the name of the borrower. When those shares are pledged, the pledgor is actually dealing with the rights to its securities account and the security entitlement in respect of those shares which the securities account gives to it. Pending default, the pledgor retains the ownership rights in the shares including entitlement to dividends and voting. I note that the definition of "money" includes shares. Does the pledge of shares as security mean that "money" has been transferred, requiring the verification of the borrower's identity?

A share pledge will almost inevitably be part of a transaction involving a transfer of money from lender to borrower. Unless exempt (e.g. because the lender is a financial institution, or because the funds are transferred by EFT), that aspect of the transaction would require verification.

However, a pledge of shares as security for the loan would not be a transfer of shares that requires verification of identity. No beneficial ownership is transferred by the pledge, and the event that would transfer full rights in the shares to the lender – a default – is a future event and may not occur. When a default occurs and a lawyer is involved in advising on default (whereby the lender takes beneficial title to the pledged shares as a result of default by the borrower), the verification obligations would apply unless otherwise exempt.

77. I am acting for a corporation that is listed on a designated stock exchange as described in the rules. The corporation's headquarters are in a country that is not a member of the Financial Action Task Force (the "FATF"), but it also operates in several countries that are members of the FATF. Is the corporation covered by the "reporting issuer" exemption?

Yes. A corporation that operates in at least one country that is a member of FATF, and which otherwise meets the definition of reporting issuer is covered by the exemption even if it also operates or is headquartered in countries that do not belong to FATF.

78. I am representing the plaintiffs in a class action. Do I have to identify all of the plaintiffs?

No. You need only identify the representative plaintiff.

79. The rules require identification of shareholders who own 25 percent or more of the shares of an organization when a lawyer is engaged in or gives instructions in relation to a financial transaction. Does this apply to ownership of all shares or just voting shares?

The provision requires a lawyer to identify all owners of 25 percent or more of all voting shares.

80. I am acting for an organization that operates in Kuwait. Although not a member of the FATF, Kuwait is a member of the Gulf Cooperation Council, an organization that is a member of the FATF. My client otherwise meets the definition of "reporting issuer" in the rules. Does the "reporting issuer" exemption apply?

No. Although the Gulf Cooperation Council is a full member of the FATF, its individual member countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates) are not subject to evaluation by the FATF of implementation of the anti-money laundering and counter terrorist financing measures agreed to by members of the FATF. To be covered by the exemption an organization must operate in at least one of the 34 jurisdictions that is a full member of the FATF and is thus subject to the mutual evaluation process.

81. You are acting on behalf of a Condominium Corporation and you receive instructions from the property manager to collect arrears of common expenses. You either send a demand letter or register a notice of lien. You subsequently receive payment from the unit owner. You determine that no exemption to the requirement to verify identity applies. Whose identity do you need to verify in these circumstances?

You must verify the identity of your client, the Condominium Corporation, and the Property Manager, who is the individual giving you instructions on behalf of the Condominium Corporation.

82. How do I verify the identity of the Condominium Corporation and the Property Manager?

The Corporations Act (Manitoba) does not apply to Condominium Corporations and so there are no off-title, public record searches (specifically, no search of the Companies Office) that can be conducted to confirm the status of a Condominium Corporation. To verify the identity of a Condominium Corporation you can search the Condominium Index at the Land Titles Office; if no Notice of Termination has been registered against it, then the Condominium Corporation is in existence. In addition, you could obtain the Condominium Corporation's GST number, if applicable, to verify its identity.

To identify the Condominium Corporation's Board of Directors, you could requisition from your client, the Condominium Corporation itself, a short form of the Form 1 Disclosure Certificate, certifying the names, addresses and telephone numbers of the directors and officers. The Disclosure Certificate should also identify the Property Manager.

To identify and verify the identity of a Corporate Property Manager, you can obtain a Certificate of Status from the Companies Office and the name, position and contact information for the individual at the Property Manager giving instructions. You should obtain, review and keep a copy of that person's driver's licence or an original identifying document from an independent source.

If you have identified and verified the identity of the organization including the individuals authorized to give instructions on behalf of the organization with respect to the matter, you do not have to repeat this identification procedure each time you act on behalf of the same Condominium Corporation and Property Manager.

83. I am acting for Corporation A on a matter that requires a financial transaction. One of the shareholders of Corporation A is Corporation B and Corporation B holds more than 25% of the shares in Corporation A. Do I have to identify the shareholders and directors of both Corporations A and B?

You would only have to identify the directors and shareholders in Corporation B if Corporation B was directing Corporation A. In that scenario Corporation B would fall within the definition of a client as set out in the rules as A would be representing or acting on behalf of B in retaining you to provide legal services to it.

I need advice about a specific situation that is not addressed in these questions. What should I do?

You may contact the Deputy Chief Executive Officer, Marilyn Billinkoff at (204) 926-2010 or mbillinkoff@lawsociety.mb.ca. You may also review a webcast prepared by the Law Society of Alberta which can be found at <http://www.lesaonline.org/courseware/knownyourclient>.

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