Interpretation Guidelines:

Fiduciary Property and Accounts

Introduction

In 2012, the Law Society amended the Law Society Rules to create a definition of "fiduciary property." Fiduciary property is "funds, other than trust funds for which a lawyer is responsible in a representative capacity or as trustee, if the lawyer's appointment is derived from a solicitor – client relationship." Prior to the creation of the rule, such funds were designated as "trust funds" and were required to be deposited into a lawyer's trust account.

At the same time, Rule 3-55 was created. This Rule deals with fiduciary property held by a lawyer. Rule 3-55 permits a lawyer to hold fiduciary property outside of the law firm's trust account in recognition of the fact that the rules relating to trust funds and trust accounts are restrictive, and may interfere with the lawyer's obligations as a fiduciary. Rule 3-55(6), however, permitted the lawyer to deposit funds held as fiduciary property into the lawyer's trust account, provided that all the rules pertaining to trust funds were complied with.

Anti Money Laundering Rules

Following recommendations of the Federation of Law Societies Model Rules Committee, in July 2019 the Law Society passed Rule 3-58.1 that prohibits the deposit of funds into or withdrawal from a law firm's "trust account" unless the funds "are directly related to the provision of legal services by the lawyer or law firm." This rule was passed in recognition of the need to distinguish between funds held by a lawyer in relation to a solicitor-client relationship, which may attract solicitor-client privilege or confidentiality, and funds held by a lawyer outside the solicitor-client relationship, over which no such privilege or confidentiality applies.

Recognising that Rule 3-55(6) would permit funds not related to the provision of legal services to still be deposited into a trust account, the benchers have approved in principle that Rule 3-55(6) be deleted.

Rule 3-58.1 was introduced to prevent the use of a lawyer's trust account in circumstances where there are no legal services provided by the lawyer to the person whose funds are in issue. Where there are no legal services involved, there is no basis for asserting a commitment by a lawyer to a client, which is what underpins the Supreme Court of Canada decision in *Canada (Attorney General) v. Federation of Law Societies of Canada* [2015] 1 SCR 401.

As Cromwell, J. said at the outset of his reasons in that decision:

Lawyers must keep their clients' confidences and act with commitment to serving and protecting their clients' legitimate interests. Both of these duties are essential to the due administration of justice. However, some provisions of Canada's anti-money laundering and anti-terrorist financing legislation are repugnant to these duties. They require lawyers, on pain of imprisonment, to obtain and retain information that is not necessary for ethical legal representation and provide inadequate protection for the client's confidences subject to solicitor-client privilege.

Purpose of these Interpretation Guidelines

The Law Society realizes that removing Rule 3-55(6) may alter the practice of some lawyers. However, the changes are necessary in order to better protect the profession against the possibility that lawyers become unwitting accomplices to criminal activity, including money laundering. The Law Society believes that these rule changes allow lawyers to ensure that their clients understand that a lawyer's trust account cannot be used as a conduit of, or holding place, for funds that are not directly related to the provision of legal services.

These Guidelines are prepared to assist lawyers in identifying and handling fiduciary property.

Why is it necessary to distinguish "fiduciary property" and "trust funds?"

It is vitally important to maintain a clear separation between when a lawyer holds funds over which a lawyer has a duty of commitment to serving a client's interests and maintenance of confidences – including solicitor-client privilege – exists, and where no such duties exist.

Because only trust funds may be held in a trust account, and because fiduciary property are funds "other than trust funds," an exception (currently found in Rule 3-55(6)) was needed to permit funds held as fiduciary property to be held in a trust account. Otherwise, the funds must be held in accordance with the provisions found in the rest of Rule 3-55. However, because there are no legal services being provided in connection with funds held as fiduciary property, and because no lawyer's duty of commitment to protect client confidences including solicitor-client privilege can arise, permitting the deposit of funds that are fiduciary property in a trust account undermines the rationale for the decision in the *Federation* case.

Undermining that proposition could be detrimental to the legal profession's efforts to maintain exceptions necessary to protect client privilege and confidentiality overall insofar as it relates to the obligations set out in money-laundering legislation. This is why the Benchers have approved, in principle, the removal of Rule 3-55(6).

Trust Account vs. “Fiduciary Property” Account

A lawyers “trust account” relates to funds that a lawyer holds that are directly related to the provision of legal services. The lawyer holds these funds in trust, and they are regulated through Part 3 - Division 7 of the Rules.

Where a lawyer holds fiduciary property, he or she must hold it in accordance with Rule 3-55. The funds are still held “in trust” – it is just that they are not held in a lawyer’s “trust account.” The account in which fiduciary property is held is still regulated by the Law Society, and can be the subject of audit. It must still be disclosed on a lawyer’s Trust Report. Crucially though, no privilege will apply to an account in which fiduciary property is held, because the funds to which it relate are not held directly in relation to the provision of legal services.

Interpretation Guidelines

1. What is "fiduciary property" and how is it different from "trust funds"??

"Trust funds" and "fiduciary property" are both defined in Rule 1:

"trust funds" means

> funds *directly related to legal services* provided by a lawyer or law firm received in trust by the lawyer or law firm acting in that capacity…

"fiduciary property" means

> (a) 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,
>
> but does not include
>
> (b) any funds and valuables that are subject to a power of attorney granted to the lawyer if the lawyer has not taken control of or otherwise dealt with the funds or valuables

2. What sort of relationship gives rise to "fiduciary property"

(a) General

The term "fiduciary property" has been created to identify funds that a lawyer holds outside a solicitor-client relationship where the solicitor is acting as a trustee, an attorney appointed under a power of attorney, or in another fiduciary or representative capacity where the appointment has derived from a solicitor-client relationship.

What the definition has been created for contemplates a capacity in which the lawyer is holding funds but is not providing legal advice. The lawyer is instead acting in a representative or fiduciary capacity to manage funds on behalf of a beneficiary or other third party. While the client or former client may have appointed the lawyer to act as a fiduciary due to a relationship of trust having arisen from circumstances in which the lawyer had provided legal services, the relationship to which fiduciary property applies creates no particular requirement for the lawyer to be a lawyer in order to act as a fiduciary or representative.

In short, when a lawyer is holding fiduciary property, the lawyer is not acting as a lawyer and all reporting requirements and any other laws of general application apply just as they would to any other person who is holding money in a fiduciary capacity who is not a lawyer.

Where the appointment of the lawyer as a fiduciary does not arise from a prior solicitor-client relationship (such as where, for example, a lawyer acts as Executor for a family member), then the property in question is not "fiduciary property" and the fiduciary property rules do not apply.

(b) Examples

Specific examples of situations that give rise to the likelihood that a lawyer would be holding "fiduciary property" would include where the lawyer, arising from a previous solicitor-client relationship, is:

(a) appointed as the trustee, or as one of the trustees, of a trust;

(b) holding funds or property in trust on behalf of third parties until the occurrence of a specified condition or event, in circumstances where the lawyer does not act for any of the parties who may have a claim to the funds or property;

(c) appointed as the personal representative, executor or administrator, or as one of the, personal representatives, executors or administrators, of the estate of a deceased person;

(d) a Committee appointed under the *Patients Property Act*, RSBC 1996. C 349;

(e) an attorney appointed under a power of attorney as described in the *Power of Attorney* Act, RSBC 1996, c 370 (but only if the lawyer has actually taken control of or dealt with the funds);

(f) a representative appointed pursuant to the *Representation Agreement Act*, RSBC 1996, c 405.

3. What does "directly related to the provision of legal services" mean?

The "practice of law" is defined in s. 1 of the *Legal Profession Act* S.B.C. 1998 c. 9. The provision of legal services therefore relates to the provision of services that fall within the definition of the "practice of law."

Lawyers must only hold funds in their trust accounts that are necessary for them to provide services that fall within the definition of the "practice of law." The funds being held in the trust account must be directly related to legal services being provided.

There is no requirement in law that a person holding funds in a fiduciary capacity has to be a lawyer, so the simple fact that a lawyer holds such funds does not mean that the funds are held directly related to the provision of legal services.

There may be circumstances where a lawyer is acting in a fiduciary capacity and also providing legal services. The lawyer must assess whether the funds they are holding in a fiduciary capacity are directly related to the legal services being provided. If the funds are directly related to the legal services being provided then the funds are "trust funds" and must be held in the lawyer's trust account. If it is not necessary for the lawyer, acting as a fiduciary, to hold funds in order to provide legal services, then such funds, if held by a lawyer, are likely to be considered "fiduciary property" and must not be held in a lawyer's trust account.

For example, while the lawyer may have been retained to create a trust instrument or other document by which he or she is acting in a fiduciary capacity, the holding of the funds in a fiduciary capacity is not directly related to the practice of law, and is therefore not "directly related to the provision of legal services." It is not necessary for the lawyer to hold the funds in order to perform the legal services (in this case, the drafting of the trust instrument).

Therefore, if a lawyer is holding funds in a capacity where the lawyer is, essentially, simply managing the funds for the benefit of other parties, and is providing no legal services directly related to the funds that he or she is holding, then those funds are not "trust funds" and must not be held in the lawyer's trust account. The funds are likely being held as "fiduciary property."

4. Where is fiduciary property to be held?

Where a lawyer is acting in a representative or fiduciary capacity, the new modified rule requires that the lawyer hold fiduciary property "in trust" in a separately identified account, which the Law Society suggests may be called a "fiduciary property account." The Law Society Rules require that these funds not be held in a lawyer's trust account because lawyers' trust accounts must only be used where the funds in question are directly related to legal services. A fiduciary property account need not differ in form from a lawyer's trust account except insofar as how the account is designated.

Obviously the lawyer, acting in the representative or fiduciary capacity, is still holding the fiduciary property "in trust" but not in a capacity that is related to the provision of legal services. The Law Society Rules therefore require that such property not be held in a lawyer's "trust account." Lawyers' trust accounts are designated now by the rules to be used only where the funds in question are directly related to legal services.

How a lawyer sets up a fiduciary account, when needed, will depend on what works best for the lawyer and his or her firm. Where a lawyer uses accounting software, the Law Society suggests that a new set of books for fiduciary property accounts be set up. By doing this, the fiduciary property account can be recorded separately from the funds held by the law firm in its general and its trust accounts. It will assist to designate the accounts in the software as "fiduciary property accounts."

The Law Society recognizes this may add to the workload associated with holding such funds and that the new requirements will not be as convenient as being able to deposit fiduciary property into a pooled or separate interest-bearing trust account. This is an unfortunate consequence, but one that the Law Society considers is necessary in order to maintain public confidence that Law Society rules do not permit the potential abuse of privilege or confidentiality that could result from the holding of funds not related to the provision of legal services in a trust account.

Lawyers should also ensure that their financial institution is clear that an account that holds fiduciary property is not a lawyer's "trust account."

5. Estates: Where the Lawyer acts both as Solicitor and as Executor to the Estate

The Law Society recognises that from time-to-time solicitors are appointed in a testamentary instrument to act both as personal representative (including as an executor or administrator) of an estate and as solicitor for an estate.

When a lawyer is acting as a personal representative, executor or administrator, the lawyer will be treating the estate funds as "fiduciary property". Consequently, these funds need to be held outside of the lawyer's trust account in a fiduciary property account. If, on the other hand, the lawyer is providing legal services to a personal representative or of an estate, then the funds related to the provision of such legal services must be held in the lawyer's trust account.

For example, collecting the assets of the estate is what an executor does. As the assets are collected, they should be held in trust by the lawyer, acting in his or her capacity as executor, in a fiduciary property account. Rule 3-55 would apply to this account (provided the lawyer's appointment as executor arose from a previous solicitor-client relationship). Where, on the other hand, legal services are necessary to collect the funds for the estate, such as through the sale of a property, the lawyer/executor is providing legal services, and the funds obtained are directly related to the provision of such services. These funds must be held through the lawyer's trust account, and, as soon as practicable after the funds are collected, they should be transferred to the executor's account to comply with rule 3-58.1(2) and held outside the lawyer's trust account in accordance with Rule 3-55.

If the estate is complicated and there is considerable legal work necessary to collect the assets, or where there are other claims on the estate in connection for which the solicitor is providing legal advice such that it can truly be said that the funds are "directly related to the provision of legal services" in connection with the estate, then the funds should be held in the lawyer's trust account.

6. Escrow-holding

From time to time a lawyer is retained to hold funds or property in trust until the occurrence of a specified condition or event – such as is provided for in escrow agreements. Where the funds or property do not relate to the current provision of legal services for a client, such funds or property are not to be held in the lawyer's trust account. They may be held in a fiduciary property account where the relationship arises from a former solicitor-client relationship. If the lawyer has been asked to draft the escrow agreement, this does not mean that the funds or property held pursuant to that agreement are thereby "directly related to the provision of legal services" where no legal services to the client relating to those funds or property exist. Holding funds or property for someone does not by itself constitute the provision of legal services.

This is to be distinguished from where a lawyer is holding funds or property in trust for a client directly relating to the current provision of legal services, pending the occurrence of a condition or event (such as acting for the vendor on a real estate transaction). In such matters, the funds or property must be held in the lawyer's trust account.