RETAINERS HELD BY LAWYERS WHO ARE MEDIATORS, ARBITRATORS OR PARENTING CO-ORDINATORS

Consultation

Lawyers have raised concerns about the impact that Rule 3-58.1 has had on retainers received by a lawyer who has been appointed as a mediator, arbitrator or parenting co-ordinator and who will be providing some incidental related legal services to the parties, such as the preparation of the mediation or arbitration (or related settlement) agreement.

Rule 3-58.1 prohibits lawyers from depositing to their lawyer trust account funds that are not directly related to the provision of legal services by a lawyer or law firm.

The Law Society has considered the concerns and proposes to amend the definition of "trust funds" in the Law Society Rules to provide that, for the purposes of the definition, "legal services" do not include the provision of legal services incidental to the provision of mediation, arbitration or parenting co-ordinator services by a lawyer. This amendment will permit lawyers who act in such capacities to deposit the entire amount of a retainer for these services into an account other than the lawyer's trust account, including the lawyer's general account.

Lawyers are invited to submit comments to policy@lsbc.org. Any feedback received before August 31, 2020 will be considered prior to making a final recommendation to the Benchers.

Background

Rule 3-58.1 came into effect on July 12, 2019. Subrule (1) provides "Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm."

Following the implementation of this Rule, the Law Society received a number of enquiries about whether this meant that retainers or other fees relating to mediation, arbitration and parenting co-ordinator services could not be placed in a lawyer's trust account. The response that was provided to the enquiries was that such services were not "legal services" within the intent of the Rule.

Given the number of inquiries and general interest in this issue, the February 7th edition of *EBrief* contained a notice about the application of client identification and verification and trust rules for mediators and arbitrators

> *Law Society Rules 3-98 to 3-110 apply to lawyers who are retained by clients to provide legal services. These rules generally do not apply to lawyers who act as mediators or arbitrators (Rule 3-99(1)). Mediators and arbitrators who take pre-payment of fees for their services from parties or the parties' counsel must not deposit these funds into their trust account regulated by the Law Society (Rule 3-58.1). See the FAQS on the Client ID & Verification web page for more information.*

This notice prompted further enquiries and, we understand, considerable discussion among lawyers who provide mediation and arbitration services.

The Problem

Rule 3-58.1 is a response to the potential for lawyers to make use of their trust account in circumstances where there are no legal services provided and therefore no basis for asserting a commitment to the client underpinning 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 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.*

In broadest terms, Rule 3-58.1 was intended to address the circumstances that were addressed in the *Gurney* decision[1] and in similar situations where the lawyer provided essentially no services other than transferring the funds. However, the Rule also extends to those situations where lawyers provided services that are not "legal services" in the

[1] Gurney (Re), 2017 LSBC 15 (CanLII)

sense contemplated by the *Federation* case. This includes the provision of mediation and arbitration services by lawyers.

When lawyers act as mediators, arbitrators, or parenting co-ordinators, the relationship they have to the participants is not the relationship a lawyer has with a client, As such, lawyers acting in these other capacities do not have the same duties toward serving and protecting their clients' legitimate interests and the clients' confidences subject to solicitor-client privilege that are the essential elements necessary to avoid participating in Canada's anti-money laundering and anti-terrorist regime. This is not to say that lawyers acting as mediators, arbitrators or parenting co-ordinators do not have a commitment to the participants in the process before them. Rather, this is solely meant to recognize that the position of a mediator ,arbitrator or parenting co-ordinator is different than the position of a lawyer acting for a client and that the duties that arise in those separate and distinct contexts are different.

The Code of Professional Conduct recognizes this in relation to mediators in providing:

> *5.7 Lawyers and mediators*
>
> *Role of mediator*
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> *5.7 A lawyer who acts as a mediator must, at the outset of the mediation, ensure that the parties to it understand fully that:*
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> *(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and*
>
> *(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.*

What was fundamental in the *Federation* decision was the relationship between the lawyer and the client; a relationship that does not arise out of necessity in the context of mediation and arbitration services. The provision of mediation and arbitration services by lawyers does not fall within the concern expressed by Cromwell, J. about the anti-money laundering and anti-terrorist financing legislation since there are no duties of legal representation of the client and no client's confidences subject to solicitor-client privilege.

Several lawyers have pointed out for example that mediators, during the process of a mediation, are often called upon to draft separation agreements or minutes of settlement for parties. And there is no question that we consider such services to be legal services. But the provision of those services during a mediation does not turn the entire process

from beginning to end into "legal services." It has been suggested that this provision of "legal services" complicates the accounting process in connection with retainers for the mediation because of the retainer for legal services are otherwise required to be deposited to a trust account. It has been said that separating out what is "mediation services" from what is "legal services" to determine what should be held in trust and what should be held elsewhere makes it near impossible to remain in compliance with the rules given the nature of the practice.

Proposed Solution

The Executive Committee considered this issue and resolved to recommend to the Benchers to amend the definition of "trust funds" in the Law Society Rules to provide that, for the purposes of the definition, "legal services" do not include the provision of legal services incidental to the provision of mediation or arbitration services by a lawyer. Such an amendment will permit lawyers who act as mediators or arbitrators to deposit the entire retainer for these services into an account other than the lawyer's trust account. This is consistent with the provisions in the *Code of Professional Conduct* that make it clear that a lawyer who is acting as a mediator is not acting as a lawyer for any of the parties to the mediation. This would eliminate the segregation issue that has troubled family law lawyer/mediators without undermining the arguments advanced in the *Federation* case. As it is doubtful that a solicitor-client privilege arises where a lawyer provides incidental legal services for both parties while acting as a mediator or arbitrator, the gravamen of the *Federation* case would not be diminished. This proposal takes the handling of retainers outside the scope of the Rules regarding the handling of trust funds but it could be accompanied by Rules prescribing how lawyers must manage any funds received as retainers in connection with the provision of mediation and arbitration services.

The Executive Committee considers that this proposal would also continue to protect the public, albeit in a different way as mediators arbitrators and parenting co-ordinators, who are also lawyers licenced to practise in British Columbia, will continue to be subject to the Code of Professional Conduct.