



Practice Resource

# Fiduciary Property FAQs

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## What is “fiduciary property”?

“Fiduciary property” is defined in Rule 1 of the Law Society Rules. It is funds (other than trust funds) and valuables entrusted to a lawyer acting in a fiduciary capacity, where the appointment of the lawyer derives from a solicitor-client relationship. In other words, fiduciary property is funds and valuables that a lawyer holds where he or she is acting as a fiduciary, not as a lawyer, but only where the lawyer has been appointed fiduciary because of a previous or existing solicitor-client relationship.

In these situations, the lawyer has usually been appointed fiduciary because, as a lawyer, he or she is considered to be a member of a regulated profession with high standards of integrity who the client or former client views as being responsible and trustworthy. And, in fact, Part B of the Compulsory Liability Insurance Policy may cover dishonest appropriation of money or other property entrusted to a lawyer acting as a personal representative deriving from a solicitor-client relationship and providing legal services. It is therefore important that the Law Society is able to set standards for and audit the handling of such property.

Examples of fiduciary property will include funds or other property held by a lawyer acting as:

- Trustee
- Committee appointed under the *Patients Property Act*, RSBC 1996, C 349
- Executor of a will
- Administrator of an estate appointed by the court pursuant to the *Wills, Estates and Succession Act*, SBC 2009, c. 13
- 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 taken control of or dealt with the funds or valuables
- Representative appointed pursuant to the *Representation Agreement Act*, RSBC 1996, c 405

## Are there any occasions where money or property held by a lawyer acting as a fiduciary will not be “fiduciary property”?

Lawyers acting as fiduciaries where the underlying relationship did *not* arise from a solicitor-client relationship will not be holding fiduciary property. For example, where the appointment derived from a familial responsibility or where the lawyer was a long-standing friend of the donor or testator, property held by the lawyer acting in a fiduciary capacity will not be “fiduciary property.” The lawyer will, of course, still need to be able to account for the money or property he or she holds as fiduciary, but the Law Society rules do not apply to this relationship.

## **How do I handle “fiduciary property” so I comply with the Law Society rules?**

Lawyers must keep, and be able to produce on demand, proper records to account for fiduciary property that he or she is responsible for. At a minimum, you should retain:

- List of bank accounts, investments, valuables
- Bank and/or investment statements
- Copies of the front and back images of all cancelled cheques
- Book of entry or journal reflecting all receipts and disbursements
- Invoices, vouchers and deposit receipts as supporting documentation to the transactions
- Tax forms and/or statements if applicable (e.g. T3 and T5)

## **How long do I have to maintain the accounting records for “fiduciary property”?**

You must retain the accounting records at least 10 years from the final accounting transaction or disposition of valuables.

## **When and why did the Law Society distinguish “fiduciary property” from trust funds?**

Rule amendments were adopted by the Benchers on March 6, 2015 to distinguish between “fiduciary property” and “trust funds.” Previously, the definition of trust funds encompassed fiduciary property, but this meant that lawyers were required to deal with “fiduciary property” in accordance with the very strict parameters prescribed for the handling of trust funds. In some cases, concerns were raised that complying with the trust rules could be contrary to the obligations imposed upon you as a fiduciary. As an example, trust rules require that funds be held in a designated savings institution. While it may be prudent for a lawyer to hold funds held as fiduciary property in a designated savings institution as well, there may be reasons that the funds were being held elsewhere, and a requirement to transfer them may therefore be contrary to your obligation as a fiduciary.

## **Can I keep “fiduciary property” in my pooled trust account or in a separate interest bearing trust account?**

“Fiduciary property” is funds *other than trust funds*. Because only trust funds can be held in a trust account, a lawyer who holds funds as fiduciary property should not deposit them to their firm’s pooled or separate interest bearing trust account. The lawyer, acting as fiduciary will, of course, still be holding the funds “in trust” but the funds should be held and accounted for separately from “trust funds.”

## **Where can I find the applicable rules on “fiduciary property” in the Law Society Rules?**

The definition of “fiduciary property” is found under Rule 1 and the applicable rule is Rule 3-55.

Fiduciary property is defined as

- (a) funds, other than trust funds, and valuables for which a lawyer is responsible in a representative capacity as a trustee, if the lawyer’s appointment is derived from a solicitor-client relationship,  
  
but does not include
- (b) any funds and valuable 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.

### **Rule 3-55 Fiduciary property**

- (1) In addition to any other obligations required by law or equity, this rule applies to lawyers who are responsible for fiduciary property.
- (2) A lawyer must make all reasonable efforts to determine the extent of the fiduciary property for which the lawyer is responsible and must maintain a list of that fiduciary property.
- (3) A lawyer must produce on demand the following records for any period for which the lawyer is responsible for fiduciary property:
  - (a) a current list of valuables, with a reasonable estimate of the value of each;
  - (b) accounts and other records respecting the fiduciary property;
  - (c) all invoices, bank statements, cancelled cheques or images, and other records necessary to create a full accounting of the receipt or disbursement of the fiduciary property and any capital or income associated with the fiduciary property.
- (4) The records required under subrule (3) form part of the books, records and accounts of a lawyer, and the lawyer must produce them and permit them to be copied as required under these rules.
- (5) Subrules (3) and (4) continue to apply for 10 years from the final accounting transaction or disposition of valuables.

## **Who can I contact if I have questions about fiduciary property?**

You can contact a Trust Assurance Auditor at 604.697.5810 or a Practice Advisor at 604.669.2533.