

AMENDMENTS TO RULES RELATING TO FIDUCIARY PROPERTY UNDER CONSIDERATION

The Law Society Rules currently permit (but do not require) lawyers to deposit “fiduciary property” into a trust account. Fiduciary property is defined as “funds other than trust funds and valuables for which a lawyer is responsible in a representative capacity or as a trustee if a lawyer’s appointment is derived from a solicitor-client relationship.”

The rules were created in order to permit lawyers, acting in a fiduciary capacity where no legal services were provided but where the appointment had derived from a solicitor-client relationship, to hold property outside a trust account, recognizing that the rules concerning how funds must be held and dealt with in a trust account might be too limiting in the discharge of fiduciary responsibilities.

When initially passed, the rules defined “fiduciary property” as being “funds other than trust funds.” Consequently, fiduciary property was not permitted to be held in a trust account. Feedback from the profession suggested that the requirement that fiduciary property could not be held in a trust account was too limiting and that, from time to time, it was more convenient for lawyers acting in a fiduciary capacity to deposit funds held in a fiduciary capacity in a trust account without having to open a separate account in which to hold the fiduciary property.

Recognizing that the intent of the new rules regarding fiduciary property was to permit lawyers acting in a fiduciary capacity to hold funds in a less restrictive way, the Benchers resolved that if lawyers acting as fiduciaries *wanted* to hold funds in a trust account, the rules could be amended accordingly. However, if fiduciary property was to be held in a trust account, the restrictive method of how funds were held in a trust account would also apply to the fiduciary property.

New Considerations

Subsequent to the amendment to the rules permitting fiduciary property to be held in a trust account, there has been increasing concern with respect to money laundering and other financial criminal activity. The legal profession is vulnerable as lawyers may be targeted by criminals seeking to use a lawyer’s trust account for improper purposes. To the outside world, there is a presumption that solicitor-client privilege over transactions that occur within a trust account, and concerns have been raised that lawyers’ handling of

non-trust funds through a trust account makes it difficult for law enforcement agencies to investigate allegations of criminal activity.

The Law Society Executive Committee has given further policy consideration to the matter and has determined that the rules should be amended to return to the initial requirement that fiduciary property cannot be deposited to or held in a the trust account.

The Law Society must continue to take steps to reduce the risk of lawyers being used to launder money. The Federation of Law Societies has also recently proposed a model trust accounting rule (that the Benchers approved in principle in late 2018) that prohibits the deposit of monies into trust that are not related to legal services.

Solicitor-client privilege does not apply to fiduciary property, but it may apply to funds deposited in trust arising from the provision of legal services. Mixing funds in this way sends the wrong message to the public about the legal profession's efforts to keep trust accounts for the purposes of providing legal services.

The Law Society expects that in most cases lawyers acting in a fiduciary capacity will want to deposit the fiduciary property outside of a trust account for the reasons that gave rise to the request to create rules for admitting fiduciary property to be held outside trust accounts in the first place. While the Law Society recognizes that it may be convenient from time to time to be able to deposit fiduciary property into a trust account, convenience is not a sufficient rationale for the use of a trust account.

Consultation

Before steps are taken to finalise amendments to the rules, however, the Law Society wants to hear from lawyers who may be affected by the proposed rule changes to understand and mitigate impacts that may unduly interfere with any fiduciary role undertaken by a lawyer. The consultation period is open until April 15. Comments may be delivered to Michael Lucas, Director of Policy and Planning, at **REDACTED**