

Practice Resource

HIGHLIGHTS OF CHANGES TO TRUST ACCOUNT AND CASH RULES, JULY 2019

The Benchers have made changes to the trust account and cash transactions rules based on changes to the Federation of Law Societies model rules. The changes are part of the Law Society's ongoing commitment to combat money laundering. The Law Society has been implementing and updating anti-money laundering rules since 2004, when the "no cash" rule was first introduced. It is essential that every lawyer is familiar with these measures.

The rule changes include the following:

- an amendment to the definition of "trust funds" (Rule 1)
- a new trust account rule (Rule 3-58.1)
- amendments to the cash transactions rule (Rule 3-59)
- new defined terms for "disbursements," "expenses," and "professional fees" (Rule 3-53 and Rule 3-98)
- amending the definition of "public body" (Rule 3-53)
- moving and amending the definition of "financial institution" (Rule 3-53 and Rule 3-98)
- an amendment to the records of cash transactions requirements (Rule 3-70)

1. Trust account only for legal services – Rule 3-58.1

Most significantly, Rule 3-58.1, the new trust account rule, explicitly provides that *funds paid into or out of a trust account must be directly related to legal services provided by the lawyer or law firm*. In addition, on completion of the legal services to which the funds relate, a lawyer or law firm must take reasonable steps to obtain appropriate instructions to pay out the funds as soon as practicable. Moreover, there is a corresponding change in the definition of "trust funds" in Rule 1.

Subject currently to Rule 3-55(6), lawyers who accept funds into trust or pay out funds from trust that are not directly related to legal services may be subject to discipline. For example, see the Discipline Advisory, [Lawyers are Gatekeepers](#) and the following citations, with hearings pending: Citations issued [October 25, 2018](#), [December 12, 2018](#) and [March 8, 2019](#).

The new rule states:

Trust account only for legal services

3-58.1 (1) 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by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

(2) A lawyer or law firm must take reasonable steps to obtain appropriate instructions and pay out funds held in a trust account as soon as practicable on completion of the legal services to which the funds relate.

The definition of “trust funds” in Rule 1 has been narrowed so that funds received that are not directly related to legal services are not trust funds. This change is meant to aid in prohibiting the use of a trust account for purposes that are not directly related to legal services.

1 In these rules, unless the context indicates otherwise:

“**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, including funds

- (a) received from a client for services to be performed or for disbursements to be made on behalf of the client, or
- (b) belonging partly to a client and partly to the lawyer or law firm if it is not practicable to split the funds.

If a person seeks to use your trust account without requiring substantial legal services in connection with the funds in trust, do not accept the money. Review *BC Code* rule 3.2-7, Rule 3-109 and the Discipline Advisory, [Lawyers are gatekeepers](#), April 10, 2018. A lawyer’s trust account must not be used as a client’s bank (and not even for you to hold money for your child’s team’s carwash fundraiser).

If you currently have funds in trust that are not connected with legal services, you may wish to seek advice from a Law Society practice advisor (practiceadvice@lsbc.org) or seek legal advice.

2. Cash transactions – Rule 3-59

A significant change to the cash transaction rule concerns refunds. A lawyer who receives or accepts cash for professional fees, disbursements or expenses in an aggregate amount greater than \$7,500 *must make any refund of such money in cash*. Do not write a trust cheque in these circumstances. Also notable is that the cash limit is increased by one cent (from less than \$7,500 to \$7,500).

As some lawyers have experienced, improper handling of cash may lead to discipline. Some lawyers and law firms make it their policy never to accept cash.

When Rule 3-59 applies

Review Rules 3-59 [*Cash transactions*] and 3-53 [*Definitions*]. Lawyers must be familiar with the cash rules to assist them in deciding whether they may accept cash. The purpose for which cash is used affects how much cash a lawyer may accept.

Rule 3-59 applies when a lawyer or law firm engages in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

- receiving or paying funds
- purchasing or selling securities, real property or business assets or entities
- transferring funds or securities by any means

This is not new, but changes to the exemptions to subrule (1) are new. See below.

When Rule 3-59 does not apply

Changes were made to the limited exemptions to the rule set out in subrule (2). Rule 3-59 does not apply when a lawyer or law firm receives or accepts cash in connection with the provision of legal services by the lawyer or law firm:

- from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,
- pursuant to the order of a court or other tribunal for the release to the lawyer or the lawyer's client of cash that has been seized by a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,
- to pay a fine, penalty or bail, or
- from a "financial institution" or "public body" (the words in quotations are defined in Rule 3-53 [*Definitions*]).

The exemption for a lawyer engaged in subrule (1) activities on behalf of the lawyer's employer is eliminated (the in-house counsel exemption).

\$7,500 cash limit with limited exceptions

An amendment increases the cash limit by one cent (from less than \$7,500 to greater than \$7,500) to align the amount with a corresponding amendment to the Federation's model rule. Subrule (3) states:

(3) While engaged in an activity referred to in subrule (1), a lawyer or law firm must not receive or accept cash in an aggregate amount greater than \$7,500 in respect of any one client matter.

Subrule (4) provides limited exemptions to the \$7,500 ceiling:

(4) Despite subrule (3), a lawyer or law firm may receive or accept cash in an aggregate amount greater than \$7,500 in respect of a client matter for “professional fees,” “disbursements” or “expenses” in connection with the provision of legal services by the lawyer or law firm.

The words in quotations are new defined terms in Rule 3-53 [*Definitions*].

“Professional fees”, “disbursements”, “expenses” – Rule 3-53

“**Professional fees**” means amounts billed or to be billed to a client for legal services provided or to be provided to the client by the lawyer or law firm.

If a client wants to provide cash over \$7,500 for a retainer for legal services, Rule 3-59 technically permits this; however, it may be objectively suspicious. The lawyer must ask detailed questions regarding the source of a client’s funds to satisfy the lawyer that the cash is not connected with the proceeds of crime. If in doubt, the lawyer should not accept it (see *BC Code* rules 3.2-7 and 3.2-8 and Law Society Rules 3-98 to 3-109). The possession of proceeds of crime is an offence. Further, a cash retainer should be commensurate with the legal services that the lawyer has agreed to provide and not be deposited into a lawyer’s trust account as a place for a client to store money (e.g. don’t permit a client to deposit \$50,000 with you for an \$8,000 matter). For more on retainers, see the Discipline Advisory, [Bills and retainers are frequent source of complaints](#), December 7, 2011.

“**Disbursements**” means amounts paid or required to be paid to a third party by a lawyer or law firm on behalf of a client in connection with the provision of legal services to the client by the lawyer or law firm that are to be reimbursed by the client.

For example, if lawyer pays a third party company for photocopying and binding a client’s documents, pays an e-discovery professional on the client’s behalf, pays a courier company to deliver documents, or pays for an airline ticket to travel to an examination for discovery, the lawyer would incur a disbursement that the lawyer would bill to the client for reimbursement. Disbursements must be billed at their actual, rather than estimated, costs (Discipline Advisory, [Proper recording and billing of disbursements required by rules](#), August 10, 2012).

“**Expenses**” means costs incurred by the lawyer or law firm in connection with the provision of legal services to a client that are to be reimbursed by the client.

An example of expenses is costs incurred by a law firm for in-house photocopying (not for photocopying services provided by a third party).

Beware of aggregate amounts of cash

What does “an aggregate amount” of cash mean in Rule 3-59(3)? Though this is not new, it deserves special attention. For example, if a client in a landlord/tenant dispute provides a lawyer with a \$3,000 cash payment each month for three consecutive months to pay the client’s apartment rent, the lawyer would have improperly received an aggregate amount of \$9,000. This

is more than the permitted cash limit for this purpose. If a lawyer or law firm receives cash at different intervals on a client's behalf, the cash amounts must be tracked for the file's duration.

Direct cash deposits by clients or third parties

Watch out for direct deposits of cash into your trust account by clients or third parties. This could happen without your knowledge or consent and put you over the cash limit. You must check all direct deposits to determine the form of funds received and accurately record the information. If cash was received, you must determine whether you are permitted to accept it.

Know the difference between receiving and accepting cash

Rule 3-59 distinguishes between "receive" and "accept". If you receive cash that you are not permitted to accept, subrule (6) requires that you must:

- make no use of the cash
- return the cash, or if that is not possible, the same amount in cash, to the payer immediately,
- make a written report to the Executive Director within 7 days of receipt of the cash, and
- comply with all other rules pertaining to the receipt of trust funds.

If, for example, a client made a direct deposit of \$10,000 cash into your trust account towards the completion of a real estate purchase, you would have received the cash but you cannot accept it. You would be required to follow the steps in subrule (6).

Cash refunds of professional fees, disbursements or expenses

The rule regarding refunds of cash received or accepted for professional fees, disbursements or expenses has been changed. In keeping with the Federation's model rule, a lawyer who receives or accepts cash in an aggregate amount greater than \$7,500 must make any refund of such money in cash. Do not write a trust cheque. Rule 3-59(5) states:

(5) A lawyer or law firm that receives or accepts cash in an aggregate amount greater than \$7,500 under subrule (4) must make any refund out of such money in cash.

Records of cash transactions

A lawyer who receives any amount of cash for a client must maintain a cash receipt book of duplicate receipts and make a receipt in it for the amount received (Rule 3-70). This is not new; however subrule (1) is changed so that in-house counsel are not exempted from maintaining a cash receipt book:

- (1) A lawyer who receives any amount of cash for a client must maintain a cash receipt book of duplicate receipts and make a receipt in the cash receipt book for any amount of cash received.

Subrules (2) to (5) set out in more detail the requirements and particulars that must be recorded. The receipt must be signed by the person who provides the cash (who may not always be the client) and by the lawyer or individual authorized by the lawyer. Similar information must be recorded when issuing a refund. The cash receipt book must be kept current. Lawyers have the option to use the Law Society's [cash receipt template](#) for the purpose of complying with Rule 3-70. For questions about using the template, contact a Law Society trust auditor at trustaccounting@lsbc.org.

More information

Lawyers who have an ethical question with respect to the use of a trust account, including accepting or refunding cash or trust funds, are welcome to contact a practice advisor (practiceadvice@lsbc.org or 604.443.5797). If you have a trust accounting question, contact a trust auditor (trustaccounting@lsbc.org or 604.697.5810).