



LIANS/NSBS Solo and Small Firm Virtual Conference 2021

Acting in a Representative
Capacity

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Regulatory amendments 2020

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Council adopts a new trust accounting rule intended to restrict the use of lawyers' trust accounts to purposes directly connected to the provision of legal services:

Definitions

10.1.1 (e) “money” includes cash, cheques, drafts, credit card transactions, post office orders, express and bank money orders and electronic transfer of deposits at financial institutions.

...

10.2.9.1 A practising lawyer must pay into and withdraw from, or permit the payment into or withdrawal from, a trust account only money that is directly related to legal services that the practising lawyer or law firm is providing.

10.2.9.2 A practising lawyer must pay out money held in a trust account as soon as practicable upon completion of the legal services to which the money relates.



Old Regulation

- The representative capacity rules, as they were at that time, permitted funds to be deposited into trust where there are no legal services provided, and were therefore inconsistent with subregulations 10.2.9.1 and 10.2.9.2
- The most significant change is to ensure that it is clear that this regulation only applies when a lawyer is not providing legal services
- For example, if the lawyer is acting as both an Executor and Proctor for an Estate, this regulation would not apply as the Proctor necessarily provides legal services to a client (the Estate)
- If the lawyer is acting solely as an Executor for the Estate, then this regulation would apply



New Regulation 10.1

Acting in a Representative Capacity

10.1.2 A lawyer is acting in a representative capacity if the lawyer is not providing legal services and is:

- (a) the personal representative, executor or administrator, or one of the personal representatives, executors or administrators, of the estate of a deceased person;
- (b) a trustee, or one of the trustees, of a trust under an appointment made pursuant to a trust instrument creating the trust;
- (c) a trustee, or one of the trustees, of the property of another person under an appointment by a court; or
- (d) an attorney, or one of the attorneys, of a person under a power of attorney, whether general or special, enduring or otherwise.

Receipt of Money

10.1.3 When a lawyer receives money in a representative capacity, the money must not be paid into the lawyer's or law firm's trust account but must be paid into a separate trustee account that has been established by the lawyer for that purpose.



Obligations

- 10.1.4** Where a lawyer is appointed to act in a representative capacity, the lawyer must:
- (a) notify the Executive Director, in writing, that the lawyer is acting in a representative capacity within 14 days of receiving any money or property;
 - (b) maintain a record of all appointments or assumptions of a representative capacity and a list of the beneficiaries of the estate or trust together with their last known address;
 - (c) maintain the books, records, accounts and documentation of the estate or trust in a form sufficient to accommodate an examination, review, audit or investigation ordered by the Executive Director or Complaints Investigation Committee; and
 - (d) cooperate with the Society's auditor or investigator in the conduct of any examination, review, audit or investigation so ordered.

Solicitor-Client Relationship

10.1.5 Where a lawyer acts in a representative capacity that arises outside of a solicitor and client relationship, the lawyer must provide notice in writing to the beneficiaries of the trust and, where possible, the party making the appointment that the Lawyers' Insurance Association of Nova Scotia and the Lawyers' Fund for Client Compensation Fund may not respond to claims in relation to the lawyer's handling of any money or property of the estate or trust.



New obligations

- The amendments require that the lawyer establish a specific account for use when the lawyer is not providing legal services, but is acting as a trustee, executor or attorney pursuant to power of attorney
- The lawyer is required to notify the Executive Director of their representative capacity appointment on the receipt of trust money or property
- The lawyer is required to notify those who appoint the lawyer that the services provided by the lawyer while acting in a representative capacity may not be covered by professional liability insurance through LIANS or the Lawyers' Fund for Client Compensation
- These regulations do capture lawyers who are acting in their personal capacity (ie at the request of friends or family)



- Whether LIANS or the LFCC would respond to claims related to this work is dependent on a number of factors
- For example, if a lawyer is employed by the Federal DOJ, they do not have E&O insurance through LIANS and would not be covered by LIANS for an error made in relation to their activities as the Executor of an Estate
- The LFCC is discretionary, however the money must have been received by the lawyer in the lawyer's "capacity as a lawyer"
- An Executor, for example, is not required to be a lawyer
- The question of coverage by the LFCC will ultimately be for the Committee's or Council's interpretation based on the facts of any claim that may be received



- A lawyer is not required to provide formal notification to the Executive Director unless your appointment and receipt of money or property occurred after November 2020 (but there is no downside to doing so)
- A lawyer does remain subject to audit should the Society determine one is required
- It is therefore expected that you are maintaining appropriate accounting records related to your role as Executor/Trustee/Attorney etc
- For example, an audit may be required in a circumstance where a complaint was received that alleged that you had mismanaged funds belonging to an Estate



Court appointed auctioneers

Lawyers who are acting as court appointed auctioneers should open separate accounts to hold deposits (cash or otherwise) received in their role as auctioneer

These deposits are not funds that belong to a client and should not be held in the lawyer's general, pooled trust account

- See regulation 10.2.9.1:

10.2.9.1 A practising lawyer must pay into and withdraw from, or permit the payment into or withdrawal from, a trust account only money that is directly related to legal services that the practising lawyer or law firm is providing.

[emphasis added]



- This is the same advice we provide lawyers who are holding funds in a representative capacity
- The firm/lawyer is still holding these funds in “trust”, but this account would not be considered a *general* trust account under our regulatory definition
- It is outside the *traditional* lawyer/client relationship
- It would *not* be reported on the annual Trust Account Report
- However, since the law firm is operating and maintaining the records of this auctioneer services trust account, it *could* still be selected for audit by the Society, therefore it is still important to maintain appropriate records (see reg. 10.1.3)
- The key difference would be the firm’s obligation to consider how other regulatory structures (such as FINTRAC) might apply to this account



Incidental services

LIANS policy language:

- **incidental services** are defined as “...services that are connected with and incidental to the practice of law, including services as an executor, administrator, trustee, personal representative, committee, guardian, or patent or trademark agent”.
- Distinction - If you change your category of membership to non-practising, you can continue to act as an executor, administrator etc, so those “incidental services” do not fall within the definition of legal services
- At this time and under the NSBS’ current regulatory structure, only a lawyer, or a non-lawyer under the direct supervision of a lawyer, may provide legal services to the public