

Trust Funds

Advance payments under fixed fee agreements part of lawyers' trust funds: B.C. Court of Appeal

By **Ian Burns**

(May 9, 2022, 9:23 AM EDT) -- B.C.'s top court has ruled against a lawyer who was involved in a conflict with the provincial law society over her trust funds, saying even advance payments under fixed fee agreements with clients fell into the definition of "trust funds" in law society rules.

Hong Guo was appealing a disciplinary decision by the Law Society of British Columbia (LSBC) that she committed professional misconduct in her handling of money she had received from six clients under fixed fee agreements, which she then deposited into her general account. At the time, she was subject to an order prohibiting her operating a trust account in her name or in the name of her firm after a forensic examination of her books, records and accounts because of employee theft from her trust accounts.

A hearing panel of the law society found that Guo committed professional misconduct by breaching the order and by failing to ensure that the advance payments were deposited into a trust account. According to the rules, "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 received from a client for services to be performed or for disbursements to be made on behalf of the client. For her part, Guo argued the definition is not broad enough to include all advance payments for fees and disbursements, and the cash advances in this case were not impressed with a trust.

But Justice Barbara Fisher, who authored the court's unanimous decision, wrote that such payments "are trust funds within the meaning of the rules absent a specific agreement with the client permitting the lawyer to treat the funds as their own." She also ruled a finding of professional misconduct by the law society attracts significant deference on appeal, and Guo had not identified a basis for the court to interfere with it (*Law Society of British Columbia v. Guo* 2022 BCCA 154).

"Given the nature of the fiduciary relationship between lawyers and clients and common law principles ... the law society rules require lawyers to receive in trust all funds from a client that are directly related to their legal services, whether those funds are provided under more conventional retainers or under fixed fee agreements," she wrote. "The only exception to this is where the client provides fully informed, and preferably written, consent that the lawyer is entitled to treat those funds as their own property on receipt."

Craig Jones of Branch McMaster LLP, who represented Guo, said the decision was "not entirely unexpected."

"I think the courts are going to be quite deferential to professional bodies when they are applying their own standards and statutes, and I think at the end of the day it was an exercise of that deference," he said. "We submitted that there should be more leeway given to Ms. Guo in this case given that there was no client dissatisfaction or anything like that. They were all perfectly happy."

Guo's situation is "definitely a cautionary tale to err on the side of putting advance payments in a trust account," said Jones.

"My takeaway would be a cautious practice will have that as a very strong default," he said. "But I think this has an impact on operations that do very routine work on a sort of instantaneous basis, such as having a document notarized for a small amount. Taken literally the law society's position is that lawyer has to establish a trust account and follow all the trust accounting rules — and that

seems quite onerous for those sorts of practices.”

LSBC communications director Jason Kuzminski said in an e-mail the court’s decision “confirms the law society’s position that cash advances under fixed-fee agreements are trust funds within the meaning the law society’s rules, absent a specific written agreement with the client that permits the lawyer to treat the funds as their own.”

“The disciplinary penalty for the misconduct in this case is a one-month suspension, and Ms. Guo is currently suspended from practising law,” he said.

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