CLIENT MONEY

Much adverse publicity has recently surrounded the legal profession in Jamaica because of several reported incidents of attorneys being unable to account for client money when asked to do so. Larger firms have tried to distance themselves from these incidents by implying that it is really a problem encountered by sole practitioners who are answerable only to themselves - but recent experience has show that the public will no longer believe this. The proposed new rules relating to client money will enable the General Legal Council to enforce sanctions against attorneys and firms of attorneys if they infringe the rules.

Essentially, the proposed new rules will codify the principle to which many attorneys have adhered throughout their practices - that client money is to be kept separately from office money and used only as the client directs. In addition, they will direct how interest is to be dealt with. The proposed rules owe much to the Solicitors' Accounts Rules which bind the solicitors' profession in England and Wales. However, they do not make detailed provisions for money held on trust by the attorney in his capacity as a trustee. In England and Wales, there are provisions for accounts to be set up comprising such monies separately from client monies which are not held in an official trustee capacity.

However, I should say at this point that it does not matter how many rules are in place - integrity must underpin the profession. The rules cannot stop someone who is deliberately stealing from doing so - but they may make detection possible sooner than would otherwise be the case.

The proposed rules deal with money held on behalf of clients but not on any formal trust, and other trust money. The definitions of trust money and client money in England and Wales specifically exclude each other. Although I prefer not to make a presentation which contains a string of definitions, it is important to underpin this presentation with a definition of the concept.

> "'Client money' means money received by an attorney that belongs in whole or in part to a client or that is held on a client's behalf or to his or another's direction or order, and includes money advanced to an attorney on account of fees for services not yet rendered or of disbursements not yet made; and 'money in trust' or 'funds in trust' has the same meaning."

The regulations require an attorney to set up a "client's account" in which to keep "client's money." Such account must be kept at a licensed bank. They then go on to specify exactly which categories of money can be paid into client's account. Client's money must be paid in.

An attorney may also pay into the account splittable funds - ie., those belonging in part to the attorney and in part to the client, provided that the attorney's portion is withdrawn without delay. Money belonging to the attorney necessary to open or maintain the account may also be paid in.

A client may give his attorney instructions not to deposit certain monies in the account, or to deposit them elsewhere. He may ask the attorney to pay the money into a separate account in his (ie. the client's name) or that of his duly authorized agent. Money may come in to the attorney to be paid straight out to the client. In all these cases, the money need not be paid into the client account, but it must be shown in the attorney's books and records.

Money belonging entirely to the attorney or his firm should not be paid into the account. This includes money received as a general retainer, money received in payment of a bill or to repay disbursements or expenses. Attorneys must withdraw from the account money to which they become entitled.

The Rules stipulate, most crucially, when the attorney may and may not draw money. Basically, these are the scenarios in which the attorney may draw money from the account:

- if the money is required to make a payment to or on behalf of a client;
- if the money is required to reimburse the attorney for money or expenses expended or incurred on behalf of a client;
- if the money is properly required to pay any debt due to the attorney from the client which includes fees payable on an invoice which has been delivered.
- if the money is directly transferred into another client's account and is held on behalf of a client.

Also, money inadvertently paid into the account against the regulations and money the attorney paid into the account in order to open and maintain it may be withdrawn.

Stipulations as to how money may be paid out are also set out in the rules. It should be noted that a cheque drawn on a client account is not to be issued unless signed by at least one attorney who has a current practising certificate.

Attorneys must maintain enough money in the client account or accounts to meet all obligations re money held for clients.

The Rules go on to make mandatory the keeping of client account records to show certain information. Such accounts must be prepared at least once in every five weeks. All amounts held must be shown, together with a record of all unexpended balances held for clients, with reasons for differences between the totals. The accounts must show further detail and set out the amounts of trust money held for each client. Finally, a reconciliation of each account must be shown. All records must be preserved for at least nine years after the date of the last entry.

On a more general theme, all money (and other negotiable property) received must be recorded. Certain stipulations also apply to the types of records to be kept here also. The net result of the rules amounts to detailed accounts of all money coming in and all money going out, and of all movements of money between the various accounts held by attorneys. All these records must also be kept for not less than nine years after the date of the last entry.

What attorneys do with interest earned on client balances is a question which many clients ask. The new regulations make specific stipulations in this area. Unless certain exemptions and circumstances apply (to be dealt with shortly), the attorney must account to the client for interest earned on money held on deposit in a separate interest-bearing client account. If the attorney does not place such monies on deposit, he has to pay the client out of his own money a sum equivalent to the interest which would have been earned as from the date the money received should have been placed on deposit.

In England and Wales, there are detailed separate provisions governing the handling of money belonging to a trust of which the attorney is a trustee. These rules largely mirror the rules governing client accounts, but are not subject to the exceptions which I am about to detail. The new rules here deal with trust monies by including a sweeper clause to state that the reference to an attorney holding

money on behalf of a client includes the attorney holding money in his capacity as an attorney on account of the trustees of a trust of which the attorney is a trustee.

The rule regarding interest only applies where the attorney holds $200,000 or more for 30 days or more, or where he holds a sum in excess of $200,000 for less than 30 days, but it is fair and reasonable to account for interest, having regard to all the circumstances. For example, it would doubtless be construed as fair and reasonable to account in the case of a sum of $1m held for 2 weeks, particularly in a high-interest rate regime. Likewise, the attorney should account if he holds money continuously which varies significantly in amount over the period during which it is held and it is fair and reasonable so to account having regard to the amount of money and the length of time held. Further, interest must be accounted for where the sums of money are held intermittently during the course of action and it is fair and reasonable to account in all the circumstances, including the total of sums held and periods for which they are held, even if no single sum would have been over $200,000.

Where money is properly held in a separate account for only some of the time the attorney holds it, he need only account for interest during the period the money was in separate deposit for the rest of the period, he should pay interest where it is fair and reasonable so to do in all the circumstances.

Provisions are set out for the calculation of the relevant interest rates.

The rates also govern money being held by the attorney as a stakeholder, whoever has paid in the money. Interest must be paid to the person to whom the stake is paid (subject to the thresholds already discussed).

Clients who feel they should have received interest can apply to the Council for a certificate as to whether interest should have been earned, and, if so, the amount of the interest. The attorney will then be bound to pay the interest.

The Regulations do not override any agreements made between the attorney and his client regarding monies on deposit and interest thereon and shareholder money. They do not apply to trust monies other than those already dealt with.

Powers of investigation are given to the Council in order to enforce these regulations and the attorney is bound to produce all documents and records required. A confidentiality requirement is imposed on the investigator by the regulations.

Attorneys will be bound to produce to the Council annual accountants' reports, within 6 months of the commencement of each financial year, in respect of the previous financial year, unless exempted by the Council. The accountant must be shown all books and records required to be kept by the regulations, together with supporting or explanatory material. The accountant must be a chartered accountant or a public accountant entitled to practice under the Public Accounting Act. The report is in specified form.

Failure to comply with the Regulations constitutes professional misconduct, punishable by the sanctions set at the Legal Profession Act - ie., striking-off, payment of costs of action or restitution (or all of these).

Naturally, the Regulations are not retrospective.

Another point to note in England and Wales is that there is a set of rules called the "Solicitors' Investment Business Rules, 1995", which regulates the conduct of investment business by firms of solicitors. Firms may be authorized by the Law Society in the conduct of investment business and are regulated as to the type of advice they can offer and the kinds of investments they may make.

It is imperative that attorneys set in place the appropriate measures to deal with these new requirements without delay. In England and Wales, the majority of disciplinary cases about which one reads in the Law Society's Gazette relate to improper use of client's funds (usually without dishonest intent) or failure to render the accountant's report. In most cases where no dishonesty is found, an order for costs is made. Many of the practitioners before the Disciplinary Tribunal are sole practitioners or those in small partnerships, as the larger firms have the wherewithal to employ an in-house accountant/financial manager.

However, the sole practitioner need not find the rules burdensome. When I visited Mrs. Levers during the week to discuss today's presentations, I talked with her about how she thcught the rules would affect her. She showed me examples of her monthly financial reports, which detailed all client balances and other monies, and from which it would be straightforward to produce the reports required by the Regulations.

I also spoke to someone who was in a two-partner practice in England about how her firm complied with the accounting requirements. She told me that the key was to be well-organized and to ensure that someone was specifically responsible for the administrative tasks. In her firm's case, her partner was responsible for the administration and dedicated two days per week to it. They

also employed a part-time book-keeper who came in for an hour before his full-time job on two mornings each week and who updated all the ledgers. They had computerized all their records from 1986, which again was helpful in terms of time management.

Doubtless, there are many retired people with book-keeping ability who would be willing to earn some extra money by assisting with the administration associated with these Regulations.

The key is to have a workable organized system which is scrupulously maintained by competent staff who have a sound grasp of the business.