

“INTERVENTION” BY THE GENERAL LEGAL COUNCIL – AN IDEA WHOSE TIME HAS COME!

“If the laws could speak for themselves they would complain of the lawyers in the first place.” – Lord Halifax

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“The illegal we do immediately. The unconstitutional takes a little longer” – Henry Kissinger

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“Lawyer: One who protects us against robbers by taking away the temptation” – H.L. Mencken

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Seymour in explaining to his friends why he was desperate to become a student of the Norman Manley Law School said “I don’t like money but it settles my nerves”!

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1. An event of momentous proportions occurred on Friday, the 13th July, 2012 when the Senate, Jamaica’s Upper House of Parliament, passed The Legal Profession (Amendment) Act 2012 with landmark amendments to the Legal Profession Act (“LPA”). Indeed the Observer newspaper headline the following day screamed in bold, black letters: **“PROTECTION FOR LAWYERS’ CLIENTS”!**
 2. There was a Bill circulated in 2005 and which had caused some consternation among practitioners. The Bar and other regional Bars made comments in relation to this draft legislation which fell into a state of suspended animation. The 2005 Bill was subsequently resuscitated from its dormant state, dusted off, given badly needed oxygen and life, improved and re-circulated in 2012.
 3. These 2012 amendments included provisions regarding continuing legal professional development (“CLPD”) and

empowering the General Legal Council (*“the GLC”*) to take action to protect client property. This empowerment is generally and succinctly referred to as **“intervention”**.

4. The Oxford dictionary has several definitions of “intervene”, a word originally from the Latin *intervenire* with “*inter*” meaning “between” or “among” and “*venire*” meaning “come”. The two definitions I think germane to this paper are:
 - (a) “*come between so as to prevent or modify the result or course of events*”; and
 - (b) “*come in as an extraneous factor or thing*”.

The reader will doubtlessly appreciate that either, or both, of these two definitions will be applicable from time to time in the matters raised herein.

WHAT IS CONTEMPLATED BY “INTERVENTION”?

5. It is thought that having regard to the scheme of the Bill ***“intervention”*** describes situations where the GLC assumes control, management or the running of a law practice or a part thereof. This includes taking over files, clients’ funds, documents or property and managing these in the best interests of the clients (*and also the attorney!*) for as long as the GLC, or a court of competent jurisdiction, deems necessary.
6. The above attempt at a definition of intervention was couched by me as, incredibly, one of the glaring lacunae in the Bill is that it fails to define *“intervention”* although other things are defined such as *“client property”* and *“banking account”*.

IS “INTERVENTION” NECESSARY ?

7. *Ab initio*, let me state that I believe, respectfully, that intervention is absolutely crucial and that, as a general principle, the above-mentioned amendments to the LPA were long overdue. **This is, of course, my personal view.** From my own experience and having spoken to other attorneys, intervention is necessary due to a variety of circumstances including, but not limited to, the following:
- (a) *the need to assist, and protect, clients where an attorney (especially a sole practitioner) has died. This situation is exacerbated where the attorney died intestate;*
 - (b) *where the attorney has been disabled, for whatever reason, or is very ill and cannot practice or provide his clients with the legal representation to which they are entitled; and*
 - (c) *to provide some safeguard or some kind of protection for clients’ funds, important documents (such as duplicate certificate of titles, share certificates and bank passbooks) and clients’ property (for example, jewellery). In this aspect, intervention would be critical if there are concerns, based on circumstances giving rise to the reasonable belief, that the attorney or his agents, employees or servants have been guilty of dishonesty or improper conduct regarding clients’ documents, money or property as aforesaid.*

DO LAWYERS WANT “INTERVENTION” ?

8. Many lawyers are totally against any form of intervention, their vehement stance being fuelled by fears of discrimination and unfair treatment by the GLC and/or its agents. Indeed, some believe that the proposed changes, having regard to their potentially intrusive nature, are unconstitutional and trample on individuals’ rights. From the numbers of persons with whom I have spoken I believe that these are in the minority.
9. On the contrary, there are attorneys who are absolutely in support of intervention in all forms (some calling it a “*necessary evil*”) especially having regard to what has been perceived as an unfortunate increase in recent times in the number of attorneys who have been disciplined (*including being struck of the Roll*) for offences involving dishonesty, misappropriation of clients’ funds etc.
10. It is my view, however, that the majority position of attorneys is somewhere between the above-mentioned diametrically opposed views. This majority believes that there is a need for intervention but the necessary precaution should be taken, and rules or regulations promulgated so as to protect, inter alia, the interests of the lawyers and the very clients themselves for whom the measures have been introduced primarily.

THE NEW POWERS GIVEN TO THE GLC

11. The new **Part IVA** of the Bill speaks to: ***Powers of the General Legal Council to take action to protect client property***” and states quite clearly that the GLC can operate through an agent. The following are some of the relevant sections of the Bill which I have chosen to highlight.

“IMMUNITY” FOR THE GLC AND ITS AGENTS

12. **Section 20B (2)** provides as follows:

“No action, suit or other proceedings may be brought or instituted against the Council, its servants or agents, or any member of the Council, in respect of any act done or omission made in good faith in the course of carrying out the provisions of this Part.”

13. It is clear from this provision that once bona fides can be advanced or established the GLC and its agents will have immunity. A number of questions arise from this including, but not limited to, the following:

- (a) If the GLC is not liable who will compensate the attorney, or the client for that matter, for any fall-out or losses suffered as a result of injudicious or mistaken action on the part of the GLC or its agents?
- (b) Is this “immunity” necessary for the GLC to operate within the scheme of the spirit and intendment of the amendments/statute?
- (c) Should the compensation fund (established under **section 42 (1)**) be extended to cover attorneys who have been “wronged” by the GLC and/or its agents?

PROTECTION FOR CLIENT’S PROPERTY

14. **Section 20C (1)** provides as follows:

“The Council may apply to the Court for an order to take action to protect client property in the possession or control of an attorney on the grounds that –

- (a) the attorney has been found guilty by a court of competent jurisdiction of any offence involving dishonesty, or any improper conduct, in relation to the money or other property of any other person;*
- (b) the attorney is of unsound mind or, by reason of the attorney’s ill health, his clients’ accounts are not being properly administered;*
- (c) an employee or agent of the attorney has stolen client property, and any client property, or any records concerning client property, in the possession or control of the attorney are at risk of loss or destruction as a result;
or*
- (d) the attorney has ceased to practice, or has ceased to reside in Jamaica, but has failed to wind up his practice or settle his clients’ accounts,*

and the Court may grant the application if satisfied as to any of the grounds set out in paragraphs (a) to (d).

(2) The Council may –

- (a) subject to subsection (3) and without an application to the Court for an order to do so, take action to protect client property in the possession or control of an attorney, where –*
 - (i) a Court has made an absolute order for bankruptcy against the attorney, under the **Bankruptcy Act**; or*

(ii) *the attorney has died; or*

(b) *subject to subsection (4), apply without notice to a Judge in Chambers for an order to take action to protect client property in the possession or control of an attorney where*

—

(i) *the attorney's name has been struck off the Roll; or*

(ii) *the attorney is suspended from practice for a period of six months or more.*

ATTORNEY TO BE RESPONSIBLE FOR AGENT ?

15. On the 25th June, 2012 a sub-committee of the Bar prepared a report (*hereafter called "the Report"*) that was submitted to the Senate and which generated a lot of debate. Some of the "concerns" raised by the Report will be dealt with when the various provisions in the Bill are placed under the microscope.
16. A crucial question concerned the Bar's said sub-committee was - should an attorney who is clearly innocent of any charge be held responsible for the dishonesty of his agent or employee ? The Bar's sub-committee felt that this question should be answered in the negative as did the **Northern Jamaica Law Society** when it examined the issue many years ago.
17. *Arguendo*, it seems to me that there are at least two schools of thought on the issue. Firstly, if the attorney was truly unaware of the nefarious activity of his agent/employee should he be held vicariously liable? It seems to me that

there is at least a strong *prima facie* case for him to be liable in circumstances where he allowed the agent access to the clients' money or property. At the very least an argument may be mounted that it was the attorney who chose or employed the agent and should be vicariously liable for any wrongdoing committed by the said agent.

18. Secondly, or on the other hand, the attorney should not be liable if he clearly had nothing to do with the agent's conduct and did not facilitate it. For example, the client's money was locked away in a safe and the agent broke into the safe and stole the money. It appears to me that in such circumstances, the attorney should have good chances of resisting liability particularly if the agent/employee is in the jurisdiction and has been held by the police etc.

INTERVENTION WITHOUT ANY COURT ORDER

19. Again, a number of questions have to be asked including, but not limited to, the following:
 - (a) Should the GLC be allowed to intervene without the benefit on a Court Order in the stated circumstances stated in Section 20C (2) (a)? It is my personal view that this should be so and is perfectly understandable in the circumstances. *(In this respect, I humbly disagree with the recommendation of the Bar's sub-committee report dated 25th June, 2012 that there should be a court order in all cases of intervention. Several reasons for my disagreement are that: (i) re the death of an attorney - it often takes too long to get before a judge even sometimes for ex parte/without notice hearings; (ii) the cost of litigation – who will bear this cost? (iii) re a bankrupt attorney - no chances should be taken (for example, allowing time for any possible dishonest*

or unscrupulous action to be done) with an attorney who has been declared bankrupt);

- (b) What information has to be provided to the GLC by a complainant before it can/will decide to intervene in a practice without a court order?
- (c) What will be regarded as a “crisis point” for the GLC to exercise this power?
- (d) How is such an intervention to be effected? For instance, will the GLC representatives or their agents turn up at the attorney’s office (*a la the Ernie Smith case!*) with a battalion of police men? (*especially if the attorney, knowing of the GLC’s “interest” had previously indicated to the GLC that the GLC can intervene “only over my dead body”!*).

WITHOUT NOTICE ORDERS FOR GLC

- 20. Some members of the Bar’s said sub-committee expressed “disquiet” at the power given to the GLC to obtain without notice orders. Again, consistent with my reasoning (*supra*) regarding intervention without any court orders, I have no difficulty with this if the GLC or its duly appointed agents give full and frank disclosure to the courts. One of my concerns in this respect is that the without notice order might later prove unjustified and the attorney might be left without compensation for any loss suffered having regard to the GLC’s above-mentioned immunity.
- 21. Having regard to the provision in the Civil Procedure Rules (*re without notice orders generally lasting for no*

more than 28 days) there are some parameters set regarding the time period for which a without notice order can last. The Bar's said 2012 Report stated that "the Attorney should have a right to apply for a variation or discharge on giving three days' notice".

WHAT ARE SATISFACTORY ARRANGEMENTS ?

22. The Bill further provides (*S.20C (3) (4)*) that the GLC shall exercise its powers, or a Judge in Chambers shall grant the relevant order, **only** where it/he determines that no **"satisfactory arrangements"** are in place for protecting the interests of the attorneys' clients ?
23. The following questions have to be asked: what are **"satisfactory arrangements"**? Can the GLC determine that these are not in place without exercising powers conferred pursuant to the amendments?
24. One of the difficulties that can (and will in my respectful opinion!) arise is what exactly are "satisfactory arrangements"? Although *ex facie* it might appear easy for one to say what these should be, it appears to me that there are likely to be many instances where an attorney and the GLC have differences of opinions as to these.

NOTICE FROM THE GLC TO ATTORNEY

25. **Section 20D (1)**- *"...the Council may serve on any person or entity in possession or control of any money entrusted to an attorney by a client, a notice in the prescribed form and duly authenticated by the Council, requiring that person or entity to pay to the Council the money held"*.

26. This provision is a precursor to intervention and, *ceteris paribus*, should be obeyed by the attorney (*after consultation with the client if he is still on speaking terms with the client!*) to avoid further action by the GLC. It is particularly useful to comply with the notice as the statute provides that the attorney will incur no liability if he does so.
27. **Section 20E** – the GLC is to pay money received into a separate account. This is understandable from an accounting perspective.

POWER TO SEIZE DOCUMENTS, RECORDS ETC.

28. **Section 20F:** The Bill cloaks the GLC with very broad powers to:
- “...take possession of any records or documents belonging to or in the possession, or under the control, of the attorney in the course of his practice and may for that purpose enter and search premises pursuant to a warrant issued....”*
29. The above-mentioned warrant is issued by the /Court in application by the GLC. The Bar’s said sub-committee in its June 2012 report felt that the law should *“....require an undertaking from the GLC in all instances where client property or Attorney’s records and documents are seized. There should be a provision that the GLC must provide the Attorney or his personal representative or committee with an inventory of all documents and records that have been seized.”* In my view, the sub-committee’s recommendations in the Report are eminently reasonable.
30. **Section 20G (1)** – Under this provision the GLC may apply to the Court for an order re-directing postal articles or articles deliverable by courier to the Council. This provision

is consistent with the scheme of the Bill and makes eminent good sense from a practical standpoint. I would only add that consistent with the provision of a "notice" in other sections of the Bill, that the GLC should provide details to the attorney, client (or any other "interested" party as the justice of the case merits) of the articles so re-directed or delivered.

31. **Section 20H (1):** *"The Council on taking possession of any money, record, document, postal article or article deliverable by courier...shall serve... a notice..."*. This provision is desirable and self-explanatory.

RIGHT TO SEEK DIRECTIONS FROM COURTS

32. **Section 20I:** This provision gives the GLC the right to *"....apply to the Court for an order for directions in relation to any matter in which the Council may exercise functions..."*. I humbly recommend that where it will not be inimical to the interests of the parties concerned this provision be used as often as possible to avoid rancour etc.
33. **Section 20J:** - speaks to an attorney, or anyone *"adversely affected by the removal of records or documents"* applying to the courts for the return of the same.
34. The Bar's sub-committee's 2012 report stated:

"...the provision that a person who is adversely affected may apply to the court places an unjustifiable burden and expense on would-be affected persons such as clients. While the right for affected persons to apply should be preserved, in our view the GLC should, even before such application is made, where appropriate, act to remedy any complaint of adversity on the part of affected persons and where that right

is in doubt or is disputed either by the GLC or by the Attorney or some other party, it is the GLC that should, within 21 days of that dispute or contest, make an application to the court for directions and or determination of the issue in dispute. This preserves the right of the affected client to change his Attorney at law and to call for his file or copy file to be given to his new Attorneys while preserving the right of the Attorney to claim a lien for unpaid fees. It also should allow for an affected person to claim conflict of interest in relation to the seizure by the GLC or its agent.”

OTHER CONCERNS REGARDING INTERVENTION

35. Many attorneys have a number of concerns regarding intervention and, in my humble view, many of these are justified. Some of the concerns highlighted by the Bar, regional Bars and “independent” practitioners include the following:
- (a) Should intervention be restricted to sole practitioners vis-à-vis an association, partnership or firm?
 - (b) Will the GLC be “*taking over*” a practice or just helping a client to get back his files, money etc ?
 - (c) Normally, undertakings are given by a party who obtains a “without notice” court order. Having regard to the immunity given by the statute to the GLC, does the GLC have to give such undertakings to get such orders? If so, how is this reconcilable within the context of the statute?
 - (d) How will the “compensation fund” be funded and/or maintained? Will it be sufficient to protect or reimburse

a client where, for example, an attorney has “*migrated*” with funds?

- (e) Who will be intervene on behalf of the GLC? Will it be another attorney ? Does it **have to be** an attorney? If an “agent” can this be a lay person?
- (f) If it is another attorney must this attorney come from the same “geographical area”?
- (g) Will the GLC select an “expensive” lawyer vis-à-vis a “cheaper” or more reasonable one?
- (h) How will costs be kept down, especially when there are repeated visits to the Courts ?
- (i) Will an attorney be able to track the status of a particular file after intervention?
- (j) Will the GLC give the attorney a proper chance to deal with, or remedy, any problem prior to intervention?
- (k) Who will decide on the selection? Should possible agents be put before a court for a judge to decide in the interests of the attorney or client?
- (l) What measures will be implemented to avoid conflicts of interest, particularly if the attorney who will be managing the practice in the GLC’s behalf has the same area of practice?
- (m) After intervention then what happens to the affected attorney especially if he is not suspended or disbarred? Will he be in limbo?

- (n) Should intervention be a last resort (*as in many judicial review matters!*) all other remedies or courses having been exhausted?
- (o) Regarding an attorney who has died testate, what are the rights of an executor in all the circumstances vis-à-vis the GLC?
- (p) Who is to bear the cost of the intervention (*bearing in mind the above-mentioned immunity of the GLC*), particularly if the intervention proves unjustified and there is no money in the compensation fund?

RECOMMENDATIONS ON THE WAY FORWARD

36. Having regard to the foregoing, particularly the concerns expressed, the following are some suggestions as to the way forward:
- (a) Pursuant to **section 20 L**, Rules/regulations providing guidelines as to how intervention is to operate should be passed and/or promulgated plugging all conceivable lacunae, circulated to all lawyers and published for the benefit of every citizen/client;
 - (b) Whether in the proposed legislation or the substantive Act, “*intervention*” should be properly defined;
 - (c) Provision should be made, and/or a mechanism established, for the compensation of attorneys who suffer losses as a result of unjustified intervention;
 - (d) time periods should be set for the duration of any intervention. Of course, each case will depend on its own facts but intervention should not be “*open* -

ended” as this can result in, inter alia, escalating costs to the attorney affected and also the client.

- (e) A public education programme be launched to inform and sensitise the public and attorneys about the imminent legislation and its salutary effect.

CONCLUSION

- 37. The time for “Intervention” has come! This concept or tool is one which is very useful and should be utilized in the best interests of the parties concerned. It should not be used by the GLC as a hammer to crack a small nut. Similarly, persons coming under its scope, especially attorneys, should co-operate as much as possible to protect the good name of our noble profession. The GLC should be supported as much as is possible within the parameters of the law to make this tool work. I believe that this can help to “clean up” the profession.
- 38. Because the Bill is not yet law and this paper is just a “*primer*”, I have not delved into the germane case law or compared Jamaica’s draft provisions with those from other jurisdictions where “intervention” has existed for some time. I intend to do a “*sequel*” to this paper after the Bill has sojourned through the House of Representatives and eventually become law.

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