

BANKING AND INTEREST IMPLICATIONS OF THE NEW
ACCOUNTING RULES

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1 The existing legal provisions, ethical principles and proper practices now require attorneys to accept and act on the basis that they have fiduciary responsibilities for the property and money of their clients which come into their custody or control. The new Regulations will emphasize and reinforce the principles that clients' money is trust money, should be kept in a trust account and should never be commingled with the attorney's own money.

A. WHAT IS CLIENTS' TRUST MONEY?

2 Clients' trust money includes:

(i) money that belongs to the client or is held for and on behalf of the client.

Examples are:

- (a) part payment of purchase price of house which money belongs to the client/vendor;
- (b) payment of judgment debt or proceeds of execution by bailiff which money belongs to the client/judgment/creditor;
- (c) money received from estate's bankers' on instructions of client/executrix which money belongs to the beneficiaries and is held in trust by the executrix

(ii) disbursements not yet made.

Examples:

- (a) money received from client to pay stamp duty and transfer tax on sale of land and awaiting assessment by Stamp Commissioner for payment,

- (b) money received from client to pay bailiff to execute warrant of levy;
 - (c) money received from client to pay costs of opposing party.
- (iii) advance of fees for work to be done.

Examples:

- (a) a lump sum fee taken on account to cover preliminary consultation, conferences, opinion, settling of pleadings, filing of action;
- (b) a lump sum fee taken on account to cover taking instructions, applying for bail, attendance on mention days,
- (c) an advance of fees taken to represent client in a case without any indication as to what it should cover.

3 In respect of the examples at paragraph 2(i) and 2(ii) it is usually readily accepted that such moneys are clients' money and should be treated as such. The hesitancy or doubt relates to the examples at paragraph 2(iii) where advances or deposits on fees are collected. Yet, it has always been a sound and wise principle in all spheres of life that one should not spend money that one has not earned. It is necessary to treat an advance of fees as trust money for the simple reason that it is possible that it may never be earned and has to be refunded.

4 It is always possible that the attorney may fail or become incapable of carrying out the task for which the fee has been advanced. This may result from a number of causes such as:

- (i) the attorney finds that he or she has a commitment elsewhere which conflicts with the requirements of the fixture for the particular client for whom he or she has collected the advance;
- (ii) the attorney discovers that he or she is in a position of conflict of interests and must

cease to act on behalf of the client from whom he or she collected the advance;

- (iii) the attorney has to go abroad because he has an important legal or national assignment and the task for which he has been paid has to be carried out before his return;
- (iv) the attorney dies, becomes bankrupt, is struck off or suspended;
- (v) the attorney finds that on ethical grounds or because of a breakdown of mutual trust and confidence he or she can no longer represent the client from whom the advance has been collected
- (vi) his or her inability to work with co-attorneys indicates that the best interest of the client is likely to be served by his or her withdrawal from the representation.

5. Where the client changes his attorney in contentious business and an advance on fees has been paid for work to be done in the future, the attorney will not be able to retain all of the advance if he has been guilty of default, negligence or improper delay. Hals, *Laws* (4th ed.) Vol. 44, para. 101. Where an advance of the whole of the fees for work has been collected by one attorney and another has completed the work or done part of it, the Disciplinary Committee or the Court can order the attorney who received the advance to pay over a proportionate part to the other. *Re Barnard, Ex p. Bailey and Hope* (1851) 14 Beav. 18; 51 E.R. 192.

6. In most of these situations it may be necessary to refund the whole or part of the fee collected in accordance with the principles of the law of contract and the Canons of Professional Ethics. A serious problem arises if the advance or deposit has been spent by the attorney and he or she is unable to make the refund. To guard against this danger it is necessary to make arrangements for interim billing, agree with the client on the basis for such billings and bill on a regular basis so as to draw on

the advances which are kept as trust money in the client's trust account; but the attorney should never dispose of the funds before they are earned and indisputably becomes his or hers.

B. BANKING CLIENTS' TRUST MONEY

7. Where an attorney receives trust money, which the Regulations require him or her to place in a clients' trust account, it will be necessary to have such an account opened or maintained at a licensed Bank. Where an attorney holds client's money, which by reason of the amount and/or the duration for which it will be held, ought to be placed in an interest-bearing-account, it will be necessary to open or maintain such an account. So as to avoid inter-mingling clients' money with the attorney's money, which is strictly prohibited, and is a serious act of professional misconduct, the attorney should maintain an Office/Personal Account and a separate Client's Trust Account. The office account will be used to meet personal and office expenses, receipts and disbursements.

8. Where the attorney receives client's money in varying sums, some to be kept for a specific period and others for varying lengths of time, he or she should in addition to the client's current and savings account, place certain sums on fixed deposit. However, the Regulations do not require the attorney to shop around for the best rates of interest or to give investment advice to clients for which he or she is not licensed but only in the appropriate cases to place client's money in an interest-bearing account. If the attorney does this he or she can only be required to pay to the client interest actually earned on the client's money.

9. While the basic requirement of the Regulations assumes the existence of two accounts they permit the attorney to operate several different accounts in connection with his or her practice. In cases in which appreciable sums of varying amounts are held for varying times it may be convenient to maintain four or more accounts. The following is an example of the type of banking arrangement

which may be used.

(a) Personal/Office Current Account

Into this account may be paid: (i) all fees already earned/billed; (ii) G.C.T. collected on such fees, (iii) personal funds and (iv) general and special retainers, strictly so called.

From this account are paid: (i) office expenses, (ii) staff remuneration, attorney's salary, drawings and share of net profits of the practice, (iii) advances to clients; and (iv) G.C.T. to the Collectorate.

(b) Clients' Current Trust Account

Into this account will be placed: (i) sums received for use for and on behalf of clients within the short term; (ii) mixed funds, being a cheque to cover fees as well as clients' funds and (iii) moneys received for the purpose of being paid over to the client.

From this account are paid moneys to meet the clients' expenses and disbursements (i) attorney's fees earned/billed, (ii) amounts needed to meet client's liabilities, (iii) amounts due to clients, (iv) amounts to be paid out on client's instructions, and (iv) transfers to clients' savings trust account.

(c) Clients' Savings Trust Account

Into this account are paid (i) all sums exceeding \$200,000 received for and on behalf of a client which is not expected to be disbursed within 30 days of receipt or if a greater sum if having regard to the amount and the duration for which it will be held it is reasonable to place it on an interest-bearing account, (ii) such sums as in all the circumstances should reasonably be placed in an interest-bearing account and (iii)

such funds as are specifically requested by the client to be paid into an interest-bearing account.

From this account are paid: amounts due to clients or to third parties in accordance with the clients' instructions and/or obligations.

N.B. The interest earned on this account should best be paid into the Office Savings or Deposit Accounts.

(d) Office Savings/Deposit Account

Into this account will be paid: (i) interest earned on clients' accounts which are not designated clients' accounts (ii) such other amounts belonging to the attorney as he or she thinks fit.

From this account are paid: (i) interest which in accordance with the Regulations should be paid to clients and (ii) moneys due to the attorney personally as remuneration or profit.

10 As indicated in particular circumstances or by reason of specific instructions it may be necessary to open an account in the name of particular client i.e. a designated account. This is treated in the same way as the general client's trust account, excepting that the interest earned on this type of account is not transferred to an office account but remains to be paid directly to the designated client.

C. CLEARING OF CHEQUES

11 Special attention needs to be paid to the clearing of cheques through the banking system.

Where a cheque is lodged to the clients' account for the credit of one client if a cheque is drawn against that payment before the cheque is cleared it results or may result in that withdrawal being a

use of other clients' funds. Further, regulation 4(3), proviso (ii) requires that where a cheque containing mixed funds (i.e. client's money and the attorney's fees or reimbursement) is paid into the client's account, the attorney's portion of the money must be withdrawn within a specified time. This should not be done before the cheque is cleared for payment as again it may result in the use of other clients' money if eventually the cheque is not paid by the paying bank on which it was drawn.

12. It must be appreciated that entries in bankers' books are not conclusive of whether there has been a decision to pay, given the provisional nature of such entries, and even an entry in the customer's bank statements will not necessarily constitute a representation on which the customer can confidently rely. Under the Banks' clearing house system, where a local cheque is drawn on and paid into another Bank it will take 7 days to be cleared. If the cheque is a foreign cheque it will take upwards of 4 weeks to be cleared. Until then the Bank will treat it as a "hold funds" cheque and may not pay out money on the strength of that cheque. If it is not cleared but the account was credited the credit will be reversed. The result of drawing a cheque against the anticipated proceeds would be that the payment might have been made from other clients' funds in the account or the account would be overdrawn.

13. So as to avoid the problem of the delay in the clearing of funds, the attorney may insist on obtaining payment by manager's cheque or banker's draft and, in the case of foreign remittances, by Bank to Bank transfers. Otherwise the attorney must await the clearing of the cheque for payment and the unconditional crediting of the proceeds to the client's account before making disbursements therefrom on behalf of the client.

have been strident. It is feared that unless positive action is taken the position could worsen. The Bar Association has resolved that comprehensive accounting rules be brought into operation. The new Regulations are in response to this great need and repeated demands.

4. In order to emphasize the fiduciary nature of the attorney/client relationship under the new Regulations the accounts in which clients funds are to be lodged must be designated as "clients' trust accounts". Most trust account problems and disciplinary offences in relation to clients' money have their genesis in poor management and lack of knowledge and/or training. Most of these problems can be avoided by following simple rules. It is not only sad but silly for an attorney to jeopardise his or her professional future by failing to adhere to the basic principles and standard rules.

5. The ethical as well as legal responsibilities of the attorney in relation to trust accounts result from the fundamental principles of agency, trust and professionalism from which certain basic duties emerge:

- (1) The duty to account to the beneficiary (client).
- (2) The duty to give information to the client.
- (3) The duty to act with honesty.
- (4) The duty to safeguard the client's property.
- (5) The duty of confidentiality.
- (6) The duty to act with utmost good faith and to avoid conflicts of interest.

2. The legal obligation of the attorney as prescribed by the new Regulations and the practical compliance with the requirements will be dealt with separately. However, there are Ten

Commandments of Good Attorney Trust Accounting:

- (1) Have a Trust Account.

D. AVAILABILITY OF CLIENTS' MONEY

14. It is a cardinal rule that where an attorney has client's trust money in his custody he or she should be able to pay it to the client without delay. Unless therefore the client gives specific written instructions (e.g. to place it on fixed deposit or in Treasury Bills) despite the requirement to place client's money in an interest bearing account, it is wise to make such arrangement as will ensure that the money is readily available on the client's demand. A useful device where there is a general clients' savings account as well as a general clients' current account is to arrange with the Bank to refer drawings on the current account to the savings account whenever the current account would otherwise be overdrawn. By this means a cheque can be immediately delivered to the client even if there is insufficient funds in the clients' current account. It is also possible to arrange with some Banks a type of savings plan in which interest is calculated on daily balances at a specified rate and become payable monthly. In some cases the Bank can be asked to give a calculation of the amount earned on a particular sum from the date it was credited to the account to the date it was withdrawn. There are various options offered by commercial banks which permit interest to be earned on money which is on call sometimes at pre-determined rate, which permit electronic access to bank statements and provide instant calculation of balances and interest earned. The new Regulations will encourage attorneys to take advantage of these options bearing in mind the benefits to be derived from residual interest earned on general clients' accounts.

- (2) Place money belonging to the client in the clients' trust account as soon as practicable after you receive it.
- (3) Ensure that a qualified attorney signs on your trust account.
- (4) Immediately notify your client every time something is added to the client's account balance and every time something is taken from the client's account balance.
- (5) Treat unearned fees, advances for fees and unexpended costs as belonging to the client and as part of the trust account until earned or spent.
- (6) Do not co-mingle your funds with clients' funds in the trust account or anywhere else.
- (7) Be sure you understand the exact nature of the item debited or credited to the trust account and that you can justify every item withdrawn therefrom.
- (8) Reconcile the bank trust account monthly and individual client's trust account whenever it is reasonable to do so.
- (9) Be alert to third party claims and pay out money on behalf of the client promptly whenever it is proper to do so.
- (10) Promptly pay to the client money properly due to be paid over and do not pay out money to yourself from the client's money until it is properly due and documented.

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