THE CITY OF LONDON LAW SOCIETY

Legal Services Act: New forms of Practice and Regulation

Consultation Paper 4: changes to the Solicitors' Accounts Rules 1998

The City of London Law Society (CLLS) represents over 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. The CLLS Professional Rules and Regulation Committee have prepared this response in respect of the SRA's consultation regarding changes to the Solicitors' Accounts Rules 1998.

1. Controlled trusts

We welcome the changes proposed which will remove the distinction in the Rules between controlled trust and client money. The current distinction gives rise to confusion and, in practice, has been disproportionately burdensome to administer.

2. Rule 2 - interpretation

2.1 The definition of "principal" (2(2)(r)

The definition of "principal" in the current draft is flawed. It works in some applications but (due to the exclusion of members of an LLP and directors of a company from the definition) does not work in others. For example:

- The definition does not work in respect of rule 7(2) which says "in private practice, the duty to remedy breaches rests not only on the person causing the breach, but also on all the principals in the practice". In a recognised body the only "principal" as currently defined is the recognised body itself; we believe that this duty should expressly extend to the members or directors of that recognised body.

- The definition does however work in respect of the second sentence of rule 7(2) which says "the duty to remedy breaches extends to replacing missing client money from the principals' own resources". Here the inclusion of members or directors of a recognised body in the definition would be wrong, frustrating the purpose of limited liability - it is only the funds of the recognised body which should be used.

There are other anomalous examples in the draft rules.

We believe that this definition needs to be reconsidered in the context of its various applications. As currently drafted the definition is likely to give rise to considerable confusion, and could frustrate the purpose of some of the rules to which it is applied.

2.2 The definition of "solicitor" (2(2)(x))

Whilst appreciating that SAR 1998 does currently bind employees "in principle" by virtue of rule 4 note (i), we have concerns about the inclusion of employees in the definition of "solicitor" and the extension of the express application of the rules this entails.

We appreciate this is a mechanism designed to ensure the rules apply to all who work within a practice, however, we do not believe the consequences of this change have been properly thought through. For example, rule 1 (of the Solicitors' Code of Conduct 2007) says that the core duties must be complied with by a "solicitor", meaning all who work in the practice, whilst they only apply personally to solicitors in the narrowest sense under the Code. If the intention is to extend the regulatory reach of the Code to employees personally this should be made explicit through an amendment to rule 23 of the Code itself.

If the SRA is to extend its regulatory scope to non-solicitors it must be made very clear what is expected of them. Law firms will also need to gear up to meet the change and train their non-solicitor staff accordingly.

The rules should, as an overriding consideration, be proportionate. Rule 6 provides that the principals are responsible for compliance with rules by themselves and by their/its employees. On this basis there is an argument in favour of narrowing the express application of the rules rather than expanding it, leaving it to regulated principals to manage compliance by employees.

This matter is of great concern to our members; we would welcome the opportunity of discussing it further with you.

2.3 Employee

As discussed in 2.2, the definition of "solicitor" includes an employee of a recognised body or recognised sole practitioner; as a result, specific references to "employees" elsewhere in the rules are often superfluous. If the solicitor definition remains unaltered, specific reference to employees only where a provision expressly does not apply to them would be more appropriate.

The term "employee" is used in some of the definitions in rule 2, and throughout the rules, but is not defined. To avoid possible confusion we suggest that the terms "employee" and "employed" should be defined in rule 2.

3. Rule 15 - use of client account

We are concerned that the changes made to rule 15(2)(d), dealing with the circumstances where a sum in lieu of interest is paid into the client account, can be construed as more restrictive.

The accounting software is used by many firms to calculate and apply sums due to clients in lieu of interest periodically and to all balances qualifying for interest under rule 24; these sums are transferred from the office account into the client account contemporaneously although the capital and/or interest may not be disbursed immediately.

The amended rule says "only client money may be paid into or held in a client account except …… a sum in lieu of interest which is paid into a client account to enable the solicitor to make a single payment from the client account of all money

owed to the client". We would like to ensure that this change does not have the effect of only permitting such payments into the client account where they coincide with the immediate disbursal of the capital and/or the interest.

The new reference to "a single payment" is unnecessary and may also present practical difficulties; funds are not always disbursed as a single payment. More often multiple payments are made by the solicitor, to more than one recipient, on behalf of the client.

4. Rule 23 - method of an authority for withdrawals from client account

We are supportive of the proposal to extend signing right to all categories of person who are allowed to participate in a Legal Disciplinary Practice. The lawyers and non-lawyers share equal liability and any other approach would be unnecessarily restrictive. The fact that "managers" will have been subject to character and suitability checks will minimise the risks in such a move.

The restriction (contained in rule 23(1A)) placed on the signing authority of a non-lawyer manager in charge of the firm's accounts department is understood and has our support. Nevertheless, we do not believe that the risk it addresses only occurs when non-lawyer managers are involved; we propose that the same control should apply whenever the person in charge of the accounting function is given signing rights on the client account, whether he/she is a lawyer or non-lawyer.

We are also supportive of the proposal (contained in 4.1.A of the guidelines for accounting procedures and systems) that firms should have clear procedures and systems for ensuring that persons permitted to authorise withdrawals from the client account have an appropriate understanding of the rules. However, guidance from the SRA on what constitutes "appropriate understanding" would be appreciated.

We note that the draft rule continues to restrict signing rights on the client account to solicitors who hold a current practising certificate, registered European lawyers, Legal Executives and licensed conveyancers; the definition of "lawyer" in rule 2 also includes barristers, notaries, patent agents, trade mark agents and cost draftsmen. We do not understand the argument for restricting signing rights only to the four categories of "lawyer" referred to, or for excluding members of other professions, and believe the list of authorisers should be extended to include all "lawyers" as defined.

5. Rule 24 & 25 - interest provisions

We note that the Legal Complaints Service will deal with complaints relating to the payment of interest and are supportive of this move.

We also note that a consultation on the interest rules is anticipated; we would support a review of these provisions generally, and the opportunity that this will present to make proper provision for the client accounting products and services that are now offered by our bankers in particular.

6. Rule 38 - reporting accountant's rights and duties - letter of engagement

We note that the draft of rule 38(1)(i) gives an express duty to accountants to report evidence of fraud or theft immediately to the SRA. Whilst we agree with this in principal, we are concerned about the standard of evidence required.

There will be situations where the evidence will be wrong or misinterpreted, and a simple discussion with the law firm involved would resolve the issue. The use of "immediate" in the rule could prevent such a dialogue occurring.

We would like to see the draft rule amended by replacing "you must immediately report the matter……." in the last sentence with "having verified the evidence you should report the matter". This will permit the accountant sufficient latitude to exercise professional judgement before making such a report.