USING CLIENT ACCOUNT AS A BANK – NEW SRA CASE STUDIES

The origin of the rule against using client account as a bank dates back to 2003 when the Solicitors Disciplinary Tribunal decided that offering a cheque-cashing service to clients and third parties was a step too far in terms of diversification of legal services writes Jayne Willetts Solicitor Advocate of Jayne Willetts & Co Solicitors Limited.

Of the two partners in the Merseyside firm responsible for this innovation one was struck off and the other suspended .

The rule was subsequently incorporated in the 2011 and then the current 2019 Accounts Rules. It is a rule that has been challenged and contested more times than any of the other Accounts Rules. It is a rule that requires the exercise of professional judgment unlike most of the Accounts Rules which tend to be well defined and prescriptive.

The reason for the debate is that solicitors have traditionally used client account to assist their clients by receiving and making payments. Provided there was no connection to money laundering or insolvency, solicitors tended to service their clients' needs. The SRA Warning Notice (2014 and updated in 2019) makes it very clear that "the client's convenience is not a legitimate reason" for using client account in this way. The SRA also flags up the dangers of pressure from valuable or long standing clients to hold client money improperly. The risk of offending such clients should not stand in the way of carrying out an objective consideration of what is being asked.

RULE 3.3
The current rule is found at Rule 3.3 of the SRA Accounts Rules 2019:
"You must not use a client account to provide banking facilities to clients or third parties. Payments into, and transfers or withdrawals from a client account must be in respect of the delivery by you of regulated services". "Regulated services" is defined as "the legal and other professional services that you provide that are regulated by the SRA and includes, where appropriate, acting as a trustee or as the holder of a specified office or appointment."

SRA CASE STUDIES
Because of the myriad of financial transactions undertaken by solicitors on a daily basis which might fall foul of the rule, the SRA augmented its 2014 Warning Notice with ten Case Studies.

Some of these examples comply with the rule and some do not.

The SRA has recently updated these Case Studies by adding five more examples to assist the profession and these are examined below.

LENDER'S CONDITION ON MORTGAGE OFFER
There is often a condition on a re-mortgage requiring the firm to pay off certain debts and credit card balances owed by the borrower before the balance is released to them. The SRA views these payments as a condition of completing the transactions so does not view these as a breach of the rule.

"LEGAL ADVICE ONLY" RETAINERS
A firm provides specialist tax advice but does not act in the purchase of a property bought by the same client. The client wants to pay the SDLT to the firm to forward the tax to HMRC. The SRA considers this scenario to be a breach of Rule 3.3 as there is no reason obvious or otherwise for the firm to hold the money as it did not act in the purchase.

SALE OF THE MATRIMONIAL HOME AS PART OF DIVORCE PROCEEDINGS
A firm acts for a husband and wife in connection with the sale of the former matrimonial home. Separate firms act in the divorce proceedings. The parties cannot reach agreement as to the division of the net proceeds of sale. The firm is concerned that it may be in breach of Rule 3.3. by continuing to retain the funds. The SRA says that it can do so until the parties reach agreement or there is a court order.

The other question which arises is whether the firm can settle a third-party debt from the net proceeds of sale. The example given is that of a backlog of school fees. The SRA also approves this payment from client account as it is part of sorting out the clients' matrimonial affairs.

PARENT PAYING CHILD'S LEGAL FEES
The firm acted for a client in the sale of commercial premises and is holding the net proceeds of sale on client account. The client's son has instructed another solicitor in the same firm to act for him in buying a flat. The father has asked the firm to retain enough money to cover his son's legal fees and to send the balance to him. The SRA view is that this is not a breach of the rule provided that the firm has clear instructions and that there are no "red flags" such as to suggest money laundering or insolvency.

CONVEYANCING AND RETENTIONS
It is not uncommon for part of the purchase price to be retained by the buyer's solicitors until such time as an outstanding issue has been resolved. Examples include where the seller has agreed to undertake work or in a new development where the developer deals with a snagging list or the local authority adopts the road. The SRA recognises that until outstanding issues have been resolved the retainer has not been completed and therefore holding money in this way would not be in breach of Rule 3.3.

GENERAL CONSIDERATION FOR FIRMS
The SRA Warning Notice makes clear that whether there is a proper connection between the holding of money and any underlying transaction is always going to depend on the individual facts surrounding the case. The SRA says that it expects solicitors to consider the following when receiving client money and being given instructions on its use:

• Throughout any retainer, being alert to why they are receiving money. The further the instructions deviate from normal legal instructions or professional services, the more likely they are to risk breaching rule 3.3.

• Why the client cannot receive money and make any payment directly themselves to the recipient. Is it simply for the client's convenience? Requests to pay substantial sums to family members, corporate entities or overseas should raise concerns.

• Being wary of being asked to hold onto money after the end of a transaction with no further legal instructions attached as to its use. Remember the obligation to account promptly (Rule 2.5) when a retainer completes.

The fact that we now have 15 Case Studies with more in the pipeline demonstrates that this is a problematic issue that is unlikely to go away. Firms must make sure that they instil in their partners and fee earners a general awareness so that they are alert to the risk of falling foul of this rule. It is not just a matter for the accounts department. It is a fee earner responsibility. Partners and fee earners alike should be encouraged to seek advice in-house from the COLP or COFA and if necessary to seek external specialist advice to avoid future problems.