



## **Bar Council response to the SRA 'Looking to the Future: Accounts Rules review' consultation paper**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Solicitors Regulation Authority (SRA) consultation paper entitled 'Looking to the Future: Accounts Rules review'.<sup>1</sup>
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **Overview**

4. The Bar Council views the SRA consultation paper with grave concern, particularly the section concerning changing the definition of 'client money'.

**Question 1:** Do you consider that the draft Account Rules (Annex 1.1) are clearer and simpler to understand and easier to comply with?

5. The Bar Council do not have a response to this question.

**Question 2:** Do you agree with our proposals for a change in the definition of client money? In particular, do you have any comments on the draft definition of client money as set out in the draft Rule 2.1 (see Annex 1.1)?

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<sup>1</sup> Solicitors Regulation Authority (2016) 'Looking to the Future: Accounts Rules Review'.  
<http://www.sra.org.uk/documents/SRA/consultations/accounts-rule-consultation.pdf>

6. The Bar Council views with grave concern the proposed change to the definition of 'client money'. That concern is based on four reasons:

- The proposal relies on too narrow a conception of what is in the best interests of the client.
- The factual basis of its analysis of the process of paying counsel (and other third parties) is significantly incomplete.
- It over-estimates the effectiveness of the protection currently given to the treatment of professional disbursements by the existing Solicitors Accounts Rules (notably Rule 17.1).
- The proposal replaces a clear and useful rule in the existing SAR with a less clear duty set out in another document - the proposed new Code of Conduct.

### **The proposed change and its rationale**

7. The change proposed under draft SAR 2.1 involves excluding from that definition 'payments to third parties for which you [i.e. firms of solicitors] are liable'. Paragraph 16 of the Consultation Paper ('the Paper') explains that examples of those third parties include counsel.<sup>2</sup>

8. The rationale for the change, explained at paragraphs 18 to 25, is not easy to understand. It is apparently based on the distinction between the existing rules' treatment of fees paid in advance (which are client money) and fixed or agreed fees (which are not). The Paper notes that Multi-Disciplinary Practices regulated by the ICAEW as well as by the SRA have 'issues' - which are not spelt out - because ICAEW rules do not treat fees paid in advance as client money.<sup>3</sup> The Paper says that 'money paid for all fees and disbursements for which the solicitor is liable (for example counsel fees)' should be treated as the firm's money,<sup>4</sup> that keeping a separate client account just for these payments adds to a firm's costs,<sup>5</sup> and that the existing rules 'may encourage or normalise the business practice of requiring consumers [i.e. clients] to pay in advance for services and before the costs have been calculated'.<sup>6</sup>

9. The Paper regards the level of protection currently applied to payment of fees in advance under the existing Accounts Rules as 'significant'. The purpose of that protection is acknowledged: 'It ensures that this money is kept separate from the firm's money and in the event of the firm's insolvency is capable of being returned back to the client if the work has not been done (by the appointed insolvency practitioner or through use of [SRA] intervention powers.'<sup>7</sup> Payment by credit card is identified as a way for clients to take advantage of protections in consumer legislation which mean that 'we [the SRA] can safely reduce the current high levels of consumer protection provided in relation to fees paid in advance.'<sup>8</sup>

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<sup>2</sup> Together with experts and couriers.

<sup>3</sup> At para 18.

<sup>4</sup> See para 7, second bullet point.

<sup>5</sup> See para 23.

<sup>6</sup> See para 24.

<sup>7</sup> Para 23.

<sup>8</sup> See para 25.

Where the paid-for work is not completed and payments were not made by credit card, then the client still has access to redress through the Legal Ombudsman.<sup>9</sup>

10. The effect of reduced protection for counsel is dealt with at paragraphs 27, 28 and 32. The SRA's approach is that 'payments for professional services for which the firm is liable should ... be treated as any other liability of the firm'.<sup>10</sup> The Paper accepts that 'the proposal removes some protections for those other than the clients (for example counsel and other experts)'.<sup>11</sup> However, it does not regard that removal of protection as significant. 'We consider that these risks in relation to payments for which the solicitor is liable are adequately addressed through clear duties to act in the client's best interests.'<sup>12</sup> These duties are apparently those identified earlier in the Paper<sup>13</sup> as forming part of the draft Code of Conduct: '[4.1] You properly account to clients for any financial benefit you receive as a result of their instructions; [4.2] You safeguard money and assets entrusted to you by clients and others.' The Paper explains how these duties are to be complied with in practice: 'We would therefore expect (a) sufficient accounting records of transactions kept by the firm including client transactions through the firm's business accounts; (b) firms to comply with the standards required in respect of giving adequate cost information, delivering bills, and returning any surplus costs or money promptly.'<sup>14</sup>

11. The SRA's Impact Assessment Note accompanying the consultation discusses how professionals may respond to the proposed change in definition of client money. 'Many professionals will have engaged with firms previously when providing their services and will be in a better position to negotiate their terms of business. These terms, in our view, should not be determined by us and reflected in the Accounts Rules.'<sup>15</sup>

### **The best interests of the client**

12. A significant number of client instructions will involve not only the solicitor but other third party professionals, including counsel, other lawyers and experts. They will need to work with the solicitor in order to achieve an outcome in the best interests of the client. The process is necessarily collaborative and dependent on trust. Confidence that the solicitor will comply promptly with the intended purpose of a payment made by or on behalf of a client is essential for the client. Confidence that payment will be made by the client to the solicitor, and then promptly by the solicitor to the third party, is essential for the third party. Where a solicitor is instructing third party professionals on behalf of a client, he is in effect creating and leading a team. He has a particular responsibility within that team, which its other members do not have, for handling the client's money and dealing with payments from the client to counsel and others. The team is unlikely to achieve the best outcome for the client if the solicitor is freed from the mandatory requirements of rule 17.1 and where his attitude to

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<sup>9</sup> Para 30.

<sup>10</sup> Para 28.

<sup>11</sup> Para 32.

<sup>12</sup> Para 32.

<sup>13</sup> At para 10

<sup>14</sup> Para 32.

<sup>15</sup> See Impact Assessment Note at para 19.

paying professional disbursements properly due to third party members of the team is based on the SRA-endorsed approach described at paragraph 28 of the Paper: 'payments for professional services for which the firm is liable should in our view be treated as any other liability of the firm.'

### **The proposal is founded on an inadequate appreciation of the facts**

13. Both the discussion in the Paper and in the Consumer Protection Analysis (at Consultation Annexe 1.4) focus on the position where solicitors ask for payment of counsel fees in advance while ignoring the position in relation to billing and payment of fees for work which counsel has *already* done. Although it is standard practice for solicitors to require clients to pay monies on account in advance of work being done, in a large number (and perhaps the majority) of cases involving counsel it is necessary for counsel to carry out work further to that originally covered by the initial payment on account. This can happen for any number of reasons. When drafting or advising, there may be further instructions or documents than those originally available, or further points may arise that need to be dealt with. In proceedings, where the work necessary will always need to respond to whatever points may be taken by other parties or by the court, the scope of work may ultimately be very different and significantly expanded in scope from what was originally contemplated. Despite the best efforts of rule-makers and judges, hearings get adjourned or overrun. Very often, and perhaps more often than not, the deadlines within which further work needs to be done do not allow for calculation of future fees and requests for and receipt of payments in advance.

14. The consequence of this is that in many cases a very significant part of counsel's fees is billed, at a level calculated on the basis of earlier agreement, after the work has been done. Counsel's clerk prepares a fee note which goes to the solicitor, and the solicitor issues a bill for professional disbursements in respect of counsel's fees which is sent to the client. Although the solicitor may properly issue a bill that covers both costs (i.e. his fees) and disbursements (e.g. counsel's fees), the circumstances of payment will show whether the client's intended purpose in making the payment was to pay some or all of the solicitor's costs or counsel's fees or expert's fees or other disbursements.

15. The solicitor's presentation of a bill to a client for counsel's fees will normally amount to a representation or warranty that the client's payment of such fees will be used to pay counsel. Any failure by the solicitor to do that will be a breach of the representation or warranty as well as a failure to comply with the instructions of the client. If, because counsel's fees and other disbursements are no longer regarded as client money, the client's payment of those fees and disbursements goes into an office account where it reduces the overdraft and where the balance is not sufficient to pay counsel at once or for some time, the solicitor will be unable to act in accordance with his representation or warranty and will be unable to carry out the client's instructions. The distinction under the current SAR between office money and client money, and the requirement to operate an office account and a client account, are necessary and sensible. They work in the best interests of the client and serve to uphold the solicitor's integrity and the reputation of the profession. The removal of counsel's fees from this process appears illogical and should not be done without compelling reason.

**The protection currently given to the treatment of counsel's fees and professional disbursements by the existing Solicitors Accounts Rules.**

16. The existing SAR (August 2016 edition) provide:

Rule 17: Receipt and transfer of costs

*17.1 When you receive money paid in full or part settlement of your bill (or other notification of costs) you must follow one of the following five options:*

- (a) determine the composition of the payment without delay, and deal with the money accordingly:
  - (i) if the sum comprises office money and/or out-of-scope money only, it must be placed in an office account;*
  - (ii) if the sum comprises only client money, the entire sum must be placed in a client account;*
  - (iii) if the sum includes both office money and client money, or client money and out-of-scope money, or client money, out-of-scope money and office money, you must follow rule 18 (receipt of mixed payments); or**
- (b) ascertain that the payment comprises only office money and/or out-of-scope money, and/or client money in the form of professional disbursements incurred but not yet paid, and deal with the payment as follows:
  - (i) place the entire sum in an office account at a bank or building society branch (or head office) in England and Wales; and*
  - (ii) by the end of the second working day following receipt, either pay any unpaid professional disbursement, or transfer a sum for its settlement to a client account; or*
  - (c) pay the entire sum into a client account (regardless of its composition), and transfer any office money and/or out-of-scope money out of the client account within 14 days of receipt.....; or*
  - (d) on receipt of costs from the Legal aid Agency, follow the option in rule 19.1(b)...**

17. The intended effect of Rule 17 (and Rule 18) is to ring-fence client money so that it is placed at once, or no later than the end of the second working day after receipt (Rule 17.1(b)), into client account for onward payment to the party – whether counsel, other lawyer or expert – to whom it is due. That was the client's intended purpose in making the payment in response

to a solicitor's bill for costs and disbursements, including professional disbursements yet to be paid.

18. Commenting on the operation of Rule 17.1(b) and compliance with it, the authors of *The Solicitor's Handbook 2015* say this:

"It is a well-known but wholly improper practice in such circumstances to credit the whole sum to office account and to withhold payment of the unpaid disbursements so that the office overdraft is reduced by the amount owed to counsel and others, possibly many thousands or tens of thousands of pounds."<sup>16</sup>

19. Given the description of this practice and the reference to it in *The Solicitor's Handbook*, which carries the imprimatur of The Law Society, it is surprising that the Paper has no discussion of it. Conduct of this nature not only delays payment to counsel and other third parties but can, if the firm becomes insolvent, prevent such payment being made at all. That defeats the intended purpose of the client in making the payment and limits the scope and level of recovery by counsel or the third party to the payment of a dividend calculated by the liquidator, trustee or insolvency practitioner at the end of the administration of the insolvency and after deduction of the fees charged for the administration. Unlike the client, counsel has no recourse to the Legal Ombudsman for compensation; and the client (having no contractual liability to counsel) cannot approach the Legal Ombudsman for compensation which he can then pass on to counsel.

20. There is, equally, no discussion of how widespread is the incidence of firms' insolvency in circumstances where fees due to counsel are outstanding, either where those fees or part of them have earlier been paid by the client to the now-insolvent firm or where they still remain to be paid at the time the insolvency begins. In principle, the insolvency practitioner should pursue the client for any fees unpaid by the client and there should be no loss to counsel. It is certainly the case that counsel have lost and continue to lose fees as a result of firms' insolvency. Anecdotal evidence <sup>17</sup> suggests that the losses may be considerable and may happen on a regular basis.

21. Further research about these matters would be useful and should be undertaken by the SRA and the Bar Council to provide an informed basis for discussion. Pending the outcome of that research, the conclusion must be that while Rule 17.1 is not difficult to understand and apply, there are evident limitations on the protection it confers on counsel (and experts) for payment of fees for work already done.

22. There is no good case for diluting that protection by excluding counsels' fees from the definition of client money. The exclusion will mean that future protection will rely on a Code of Conduct duty instead of a clear mandatory rule in the SAR. The operation of the duty may be open to doubt where the SRA as regulator is saying that payments for professional services

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<sup>16</sup> At p.125. The authors are Andrew Hopper QC and Gregory Treverton-Jones QC. As at the time of writing, the 2015 Handbook appears to be the most recent edition.

<sup>17</sup> Several instances of loss due to insolvency are known to the Bar Council's Remuneration Committee.

for which a firm is liable should be treated in the same way as any other liability of the firm. One possible consequence of exclusion is foreshadowed at paragraph 19 of the SRA's Impact Assessment Note:<sup>18</sup> that counsel will need to re-negotiate their contractual terms with solicitors.

### **LAA payments and SAR Rule 19**

23. The Bar Council notes the statement at paragraph 45 of the Paper that the SRA is discussing with the Legal Aid Agency to determine whether Rule 19 of the existing SAR can be safely dispensed with relating to LAA payments.

24. Rule 19.1(b) is engaged when the circumstances described in rule 17.1(d) arise – i.e. when the solicitor receives a payment of costs from the LAA. Rule 19.1 provides:

*“Two special dispensations apply to payments (other than regular payments) from the Legal Aid Agency:*

*(a) An advance payment, which may include client money, may be placed in an office account, provided the Legal Aid Agency instructs in writing that this may be done.*

*(b) A payment for costs (interim and/or final) may be paid into an office account at a bank or building society branch (or head office) in England and Wales, regardless of whether it consists wholly of office money, or is mixed with client money in the form of:*

*(i) advance payments for fees or disbursements; or*

*(ii) money for unpaid professional disbursements; provided all money for payment of disbursements is transferred to a client account (or the disbursements paid) within 14 days of receipt.”*

25. The current Rule 19 provisions therefore allow for LAA payments for counsel's unpaid fees to be paid into an office account provided that the element of it comprising those fees is transferred within 14 days to client account. If a firm's insolvency occurred within those 14 days and before LAA payments for counsel had been transferred to client account, then counsel has no guarantee of receiving those payments either during or at the end of the administration of the insolvency. Like Rule 17.1(b), Rule 19.1(b) is important and useful but provides less than full protection to counsel for payment of their fees once those fees have been invoiced to the client and paid. Where the client is the LAA and a statutory body charged with the spending of public money, there is an overwhelmingly strong public interest in that money being received by the party for whom it is intended. There would need to be compelling reasons for the SRA, itself a statutory regulator, to dispense with Rule 19. The Paper gives no indication of what such reasons may be.

26. The Bar Council wishes to be informed of the outcome of those discussions and will comment on the issue in the light of that outcome.

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<sup>18</sup> See para 11 above.

## Remaining Consultation Questions

27 The Bar Council do not have a response to Questions 3 to 14.

**Bar Council<sup>19</sup>**  
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<sup>19</sup> Prepared for the Bar Council by the Remuneration Committee.