Duty to account

It is common for a solicitor to hold a client’s money in trust while waiting for transactions to be settled (for example, sale of property). If your lawyer has property of yours in trust (including money), they have certain responsibilities. This is covered by the LPUL and the Legal Profession Uniform General Rules 2015 and includes the duty to:

- hold the money exclusively for you
- pay the money into a general trust account at an approved financial institution in NSW as soon as practicable (unless otherwise directed)
- pay the money as directed by you (sections 137 and 138 of the LPUL).

If your solicitor will be holding the money for any length of time, it may be worthwhile investing the money in a ‘controlled money’ account where it will earn interest until it is required. Solicitors can only invest their clients’ money in a controlled money account if the client directs them to do so.

The Legal Profession Uniform Law Application Act 2014 requires that all solicitors who operate a trust account deposit all interest on the money in a general trust account with the Law Society on account of the Public Purpose Fund (previously the Statutory Interest Account). Payments are made from the Fund to Legal Aid, the Office of the Legal Services Commissioner, the Professional Standards Divisions of both the Law Society and the Bar Association, the Law & Justice Foundation, and community legal centres, and has the ability to make discretionary payments for community legal education.

Solicitors also have an obligation to keep records:

- in the way specified by the LPUL
- so that they accurately reflect the true position of trust money received on behalf of other people
- in a manner which enables them to be conveniently and properly investigated (section 147).

Fiduciary duties

If a solicitor has property or money held for a client, there are certain responsibilities. These are called fiduciary duties. It means that they should avoid any conflict of financial interests. The Conduct Rules state that a lawyer must not:

- allow a conflict of interest between themselves and the client, or
- influence the client in any way which will benefit the lawyer (section 12).

The solicitor must not accept instructions to act for anyone in relation to property interests if they become aware that the person’s interests conflict with their own (or those of an associate).

Generally, solicitors are not allowed to receive substantial gifts from clients and are not allowed to draft a will or other document under which they receive substantial benefits (there are exceptions for members of a firm and immediate family). There are also certain guidelines if a solicitor acts as an executor of an estate (section 12.4).

Case study - 'loans' to solicitor

The Commissioner began investigating a solicitor, Ms McKern, following a complaint by a former client alleging that
Ms McKern owed him money. During the investigation it became clear that the solicitor owed money to other clients and 21 separate ‘loans’ to the solicitor totalling in excess of $1 million from 11 individual clients were discovered.

Before the NSW Administrative Decisions Tribunal, it was admitted that 20 of those ‘loans were improvident and contrary to lenders’ interests by reason of Ms McKern’s financial position at that time and her wilful or reckless failure properly to secure the loans adequately or at all but she nevertheless accepted the loans from the lenders without informing them of these matters and deliberately withheld them from them.

The remaining ‘loan’ was taken from an estate of which the solicitor was the executor and trustee, in breach of trust and without the knowledge or consent of the minor beneficiaries of the trust or their parents or guardians.

Borrowing from clients is contrary to Rule 12 of the (then applicable) Revised Professional Conduct and Practice Rules; and it was also admitted that the solicitor had misled the Legal Services Commissioner by stating (in writing) that she had only ever borrowed money from three clients.

A second count of misleading was also admitted. The solicitor misled a legal practitioner when she failed to disclose that money from a client had been used to her own benefit, and falsely advised that she had paid money into her former client’s bank account when that was incorrect.

An additional two counts dealt with the solicitor acting with a conflict of interests. In the first matter it was admitted she preferred her own interests over the interests of a client who was elderly and suffering from ill health and failing eyesight and was therefore in a particular position of vulnerability to exploitation by Ms McKern by reason not only of their solicitor/client relationship and the trust and confidence which he reposed in her but also because of his age and infirmity.

In a second matter, the solicitor created a conflict of interest between her own interests and her duty to her clients and preferred her own interests over her clients’ interests when, as vendor, lessor and lessee of a property, she also acted for the clients as purchaser and subsequent lessor.

The final count admitted by the solicitor was her failure to pay superannuation payments on behalf of 20 staff for a period of nearly two years.

In relation to all of the above matters a finding of professional misconduct was made and, as a result, the Tribunal ordered that Ms McKern’s name be struck from the Roll of lawyers.

The case reinforces the special relationship that exists between a solicitor and a client and the strict obligation of the solicitor to not take advantage of that relationship and to act at all times in the best interests of her clients.

Legal Services Commissioner v McKern [2008] NSWADT; reported in The Office of the Legal Services Commissioner, Annual Report 2009-2010.
Links