

**CLIENT'S MONEY : ETHICAL LEGAL CONSIDERATION IN MISAPPROPRIATION
AND IN CRIMINAL BREACH OF TRUST**

*Rohani Mohd Shah, Faculty of Law, Universiti Teknologi MARA Malaysia,
rohanimohdshah@salam.uitm.edu.my*

ABSTRACT

The role of advocates and solicitors in society is to ensure competence and discipline in the legal process and to contribute to society by serving the public interest to their utmost good faith in behavior. The relationship with the client is either in the express trusteeship or of fiduciary in nature. Unfortunately, advocates and solicitors have of late been the subject of criticism in matters involving client's money. Advocates and solicitors hold money in a variety of circumstances, including possession of settlement checks, the purchase price, deposits for transactions, and advances for attorneys' fees and costs. The funds usually are not secured only the profession's reputation, and the honor of the individual advocates and solicitor's words provide for the security. The Legal Profession Act 1976 and the Etiquettes Rules require that client funds should be deposited and maintained in a separate bank account apart from funds belonging to the lawyer or law firm. When the advocates and solicitors violate the Etiquette Rule, the appropriate penalty for this behavior is not determined by the legislation but by the Bar Council Disciplinary Board. It is essential to note the types of relationship determined the type of sanction imposed. Determining the penalty in misappropriation of client's money is one of the most frequent bases for disciplinary action against advocates and solicitors. If the same matter is pursuing to the criminal prosecution, the advocates and solicitors may be faced with criminal breach of trust. Furthermore the Bar Council, can after they are found guilty, barred them from the legal profession. This paper will address some enhancement measures that the Bar Committee may learn from Singapore case law. It is clear that justice and prudent are the tools necessary for the Bar Council or the Court when attending to the ethical consideration of the legal professional.

Keywords: *Ethics for The Legal Profession; Client's Money; Misappropriation; Criminal Breach of Trust.*

Introduction

An act of professional misconduct is said to be committed by a lawyer when he does something which is ‘dishonourable’ to him as a man or dishonourable in his profession. If the ethical principles to which a lawyer should adhere were capable of being encapsulated in this single notion, there would be little more to say about ethics and this article would not perhaps have needed writing. Certain basic standards of professional behaviour do exist. These had been regarded as sacrosanct for so long that they may be as relevant in the 21st century as they were when they were first identified in medieval times. When the legal profession first emerged during the reign of Edward I in the late 13th century it may perhaps have been clear enough to say merely that a lawyer must behave with ‘honour’. Acting for the ‘benefit of a friend in need’ for free is considered, then, as an act of honour. However, those were times when honourable conduct was, easier to identify than is the case when dealing with the complexities of the practice of law today. Such are the intricacies of the modern world that it can no longer simply be said that, if it seems right, it probably is right, but if it feels wrong, it is probably unethical.

The Importance of Ethical Consideration in The Legal Profession

Ethical consideration becomes important because of these considerations as explain by Peter MacFarlane, 2006 in three reasons. Firstly, because lawyers are integral to the working-out of the law and the Rule of Law itself is founded on principles of justice, fairness and equity. If lawyers do not adhere and promote these ethical principles then the law will fall into disrepute, and people will resort to alternative means of resolving conflict. The Rule of Law will fail with a rise of public discontent. Secondly, lawyers are professionals. This concept conveys the notion that issues of ethical responsibility and duty are an inherent part of the legal profession. It has been said that a profession's most valuable asset is its collective reputation and the confidence which that inspires. Third reason is because lawyers are admitted as officers of the court and therefore have an obligation to serve the court and the administration of justice. Finally because, lawyers are a privileged class for only lawyers can, for reward, take on the causes of others and bring them before the courts.

The Application of Ethical Principles to The Legal Profession

There are a number of applications of ethical responsibilities so far as the practice of law is concerned. It is common to divide these ethical obligations into duties owed to the client and duties owed to the court. It should be noted that a breach of these ethical obligations may lead to criminal proceedings by the client, for criminal breach of trust while at the same time may be grounds for disciplinary proceedings under the relevant Legal Professional legislation. By virtue of S. 94(3) of the Legal Profession Act 1976 (“LPA”), “misconduct” means conduct or omission to act by an advocate

and solicitor in a professional capacity or otherwise which amounts to grave impropriety. The instances of misconduct are listed under S. 94(3)(a) till (o) of the LPA which include misappropriation of client's money or criminal breach of trust in handling client's money.

The Recent Statistics from the Malaysian Bar

The majority complaints received by the Board are against lawyers who are the sole proprietors of a legal firm. The statistics below indicate the number of advocates and solicitors struck off and suspended in accordance to their practice status.

Table 1 : Legal Professional Struck Off the Rolls

	2003	2004	2005	2006	2007	2008	Total
Sole Proprietor	18	31	25	17	9	15	115
Partner	7	23	23	3	13	16	85
Legal Assistant	0	0	0	0	1	0	1

Table 2 : Legal Professional Suspended

	2003	2004	2005	2006	2007	2008	Total
Sole Proprietor	21	10	20	5	0	0	56
Partner	13	14	6	4	1	0	38
Legal Assistant	2	0	0	0	0	0	2

Table 3 : Statistic according to States

State	Total Members (As At 4.6.09)	Total No Struck Off	% Struck Off In Relation To Total Membership	Total No Suspended	% Suspended In Relation To Total Membership
Kuala Lumpur	5487	69	1.26	39	0.71
Selangor	2571	41	1.59	16	0.62
Perak	652	13	1.99	8	1.23
Penang	1002	15	1.48	5	0.50
Kedah	389	9	2.31	5	1.29

<i>Perlis</i>	29	1	3.45	1	3.45
<i>Pahang</i>	296	7	2.36	2	0.68
<i>Terengganu</i>	191	3	1.57	1	0.52
<i>Negeri Sembilan</i>	343	13	3.79	3	0.87
<i>Melaka</i>	318	6	1.89	5	1.57
<i>Johor</i>	1003	19	1.89	7	0.70
<i>Kelantan</i>	300	5	1.67	4	1.33
<i>TOTAL</i>	12581	201	1.60%	96	0.76%

It is necessary to record some important factors that contribute to there being a large number of complaints against individual lawyers and criticism of the legal profession. Sothi, 1995 pointed out that some of the factors. First, complaints against lawyers are due in part to the very nature of the work that the legal profession is involved in. Even those quick to criticize lawyers ultimately rely on them. They come to the legal profession seeking justice, and though some may argue that this is the very reason for the existence of the judicial system, when we take into account the attitude and stance taken by today's society towards the courts and the lawyers, this is an incredible compliment. Second, the increase in the number of complaints against lawyers is due to the improved levels of education among the public. We now deal with people more aware of their rights as consumers, and more ready to question the judgments and decisions and to hold us accountable for them. Third, the unfavourable mass media coverage and lawyer-bashing have created public antipathy to lawyers and an atmosphere conducive to lodge complaints. Fourth is the willingness of the profession to permit the participation of lay persons in its Investigating and Disciplinary Tribunals. Again it must be emphasized that it is also only in the legal profession that an open and centralized register is maintained of all complaints received.

The increasing number of complaints against lawyers may be conveniently classified under two heads: conduct of dishonesty (misconduct) and incompetence (breach of duty) on the part of the lawyer. The public has a tendency to fuse the two aspects into a general complaint. The complaints are based on two natures of relationships owed by the advocates and solicitors to their client. The misconduct is associated to the fiduciary relationship, and the incompetence is related to breach of trust, both complaints are serious in nature and will disbar them from legal practice.

The Fiduciary Relationships

Solicitors owe fiduciary duties to clients and others in the course of their duties. These fiduciary duties are similar to those owed by trustees. This fiduciary duty is best demanded in relation to the client's money. Solicitor and his client stand in a fiduciary relationship where the duty to act in utmost good faith and ensure that client's interest is well protected should be the prime consideration especially when money is handed over to solicitor for any legal task.

The courts viewed mismanagement of money as serious misconduct that could not be tolerated. The ethical issue that arises is the duty in relation to operating and maintaining the client's money in a bank account operated by the solicitors. There are many issues regarding the failure of solicitors in operating and maintaining bank accounts for the purpose of their clients. One of them is the duty not to misappropriate client's money. Solicitor must perform his duty according to the client's instruction and to only use the money for the client's purposes.

The underlying principle is that a solicitor should not place himself in a position where his duty and interest may conflict. This is because the fiduciary relationship with a client requires a solicitor to act in the utmost good faith, in the interest of the client. In the *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736 court held, clients must be able to rely upon the professional advice of their solicitor and to place him in the fullest confidence that he will protect them and handle their affairs in their interests. Nevertheless, the solicitor may continue to act for a client, notwithstanding that he or the prescribed parties has an interest in the matters or interests adverse to the client's, provided that the solicitor makes full and frank disclosure of such interest to the client or "the client having been fully informed, and advised that he should seek independent legal advice, consents to advocate and solicitor acting or continuing to act on his behalf". Furthermore, it is also the solicitor's duty to explain to his client his dual responsibilities and how the client would or might be prejudiced by engaging him as his solicitor. Only then can a client give his informed consent. Despite having obtained the client's informed consent, the solicitor will still be liable for a failure to discharge his duty to the client.

The Client's Money

Basically, there must be a solicitor-client relationship first before the money received by a solicitor can be regarded as client's money. A solicitor-client relationship can be established by signing of a retainer form. It is a written document prepared by a solicitor that includes the particulars of service and if agreed upon by the client will be executed before a solicitor. By executing a retainer form a solicitor-client relationship is established.

Despite what appears to be a clear definition, discussions with lawyers will indicate an alarming variety of opinion as to what constitutes client's money, and what should and should not be entered into the client's account. Client's money can be defined as a current or deposit account at a

bank in the name of a solicitor in the title of which the word “client” appears. In the Rule 2 of Solicitor’s Account Rules 1990 states that Client’s money literally means money paid by the client for the purpose of disbursement and the solicitor or the advocate has to hold the money in the capacity of trustee in Rule 4.

To reinforce the duties of solicitors in relation to client’s money the Legal Profession Act 1976 (LPA) has provided that solicitors must maintain and operate client’s account. Rules have been made under section 78 and section 79 of the LPA and other current rules which is applicable are Solicitors Account Rules 1978, Accountant’s Report Rules 1990 and Solicitors Account (Deposit Interest) Rules 1990. The Solicitors Account Rules 1978 govern the manner in which clients monies are to be dealt with. The Accountant’s Report Rules 1990 deals with the manner by which the operation of clients account’s are to be audited. Meanwhile, the Solicitors Account (Deposit Interest) Rules 1990 govern the manner in which the interest earned on the client’s money is to be treated. The Solicitors' Account Rules 1990 defines what constitutes client's money and requires that this be maintained in the client's account and be audited annually.

Advocate and Solicitor Duty towards the Client’s Money

There are three components elements in this duty. First, he must distinguish the principal’s money from his own. Second, he must keep it in a separate account in the bank and third he must never use the money for his own purposes. A breach of section 79 LPA renders the solicitor liable to disciplinary proceedings which stipulated under section 79(8) of LPA.

i) When solicitor receives client’s money, client’s account must be opened.

This client account is subject to a yearly audit and an accountant’s report must be issued certifying that the account has been properly conducted before the partners of the firm will be entitled to renew their practising certificates. The obligation to maintain such report must relate to previous twelve months of practice. Solicitors have no right to use the client’s money even if in a position to replace it immediately.

ii) Solicitor must use the client’s money strictly for or on behalf of the client.

The solicitor must use the money for his client’s benefit and not for his own purposes. In Singaporean case, Law Society of Singapore v VCS Vardan, [1999]2 SLR 229, a solicitor is making unauthorized payments out of the client’s account with unauthorised withdrawals. In April 1998, the Commercial Affairs Department received information that the respondent had made unauthorised withdrawals of client’s money. Upon investigations, it was found that the respondent while practising as an advocate and solicitor had made various unauthorised withdrawals of client’s funds from the

client's account of the law firm. The respondent had dishonestly misappropriated a large sum from the client's account by making unauthorised withdrawals. The funds withdrawn were used to pay staff salaries and central provident funds contributions, his income tax, office rental and other expenses, still the court held that the advocates breach his fiduciary duty of misappropriation of client money.

iii) Solicitor must keep Client's money in a separate account in the bank

A solicitor has a duty to keep client's money in different and a separate account. A solicitor's does not keep his client's money intact and uses any part of it for purposes unconnected with the client, is guilty of misappropriation during that period of time even though the full amount due to the client is to him. In the case of *Re S Fung*, [1941] MLJ 142, the respondent in this case failed to maintain a separate client's account with his bank as required by the Rules of Practice and Etiquette of the Singapore Bar. He carried out a series of financial transactions after banking money meant for the client's account into his own personal account. The cheques had not yet cleared when the respondent drew on the money, resulting in the account being overdrawn. The money owed to the client was eventually paid in full, but the court was of the view that the misappropriation, although temporary amounts to grave breach of the Rules governing professional misconduct, and warranted suspension of the respondent for a period of nine months.

Meanwhile [1941] MLJ 217 to call upon the respondent to show cause why he should not be struck off the rolls. It was proved that he did not keep a separate client's account with a bank and that he received moneys due to a client who was a beneficiary of an estate. He improperly retained such moneys despite objection of the guardian of the beneficiary. He denied that he had received such moneys. The court concluded that the respondent's conduct was “extremely reprehensible”. He failed to discharge his professional duty to maintain a separate account for his client. For his deceitful conduct, the respondent was struck off the rolls advocate and solicitors.

iv) Client's Money is for the client's benefit

In the case of *Law Society of Singapore v Wei Wei Fen*, [2000] 1 SLR 234, it concerns with misappropriation of client's money by way of cheating and forgery to have use the money for the solicitors personal used. The court in this case stated, “There was no doubt that the gravity of the offences for which the respondent was charged was serious. No hesitation that the only appropriate order in this case was to strike the respondent's name off the roll of advocates and solicitors”.

In *Marzaini bt Zainuddin v Majlis Peguam Negara*, [2007] 8 MLJ 697, the client solicitor entered into a sale and purchase agreement to sell the property for RM 162,000.00 which he later received the full purchase price. The solicitor then issued a cheque of RM145, 800.00 being the balance 90% of the purchase price to her client. The cheque was found to be dishonoured, and the

client demanded the payment due from the solicitor. The solicitor requested for an extension of the time which was agreed upon. The solicitor however failed to honour her undertaking and her client then lodged a police report as well as a complaint with the Bar Council. The solicitor later attempted to pay her client a sum of RM 150,000.00 by way of two cheques from two different banks from another person unknown. The appellant admitted having used monies in her client's accounts and that the cheques were due to insufficient funds in her client's account. The disciplinary board made an order suspending the solicitor from continuing her legal practice as an advocate and solicitor for misappropriation of client's fund.

The Express Trustee's Relationship

The general duties and obligations of an advocate and solicitor that must be mentioned at the outset is that he is to uphold the interest of his client, the interest of justice and the dignity of the profession. If a solicitor receives money in the trustee's capacity, it is very likely because money serves as a medium of exchange and title passes with possession that he will be found to be an express trustee. Hence, in *Burdick v Garrick* (1870) LR 5 Ch App 233, where a solicitor received his client's money under a power of attorney, it was held that he only hold the moneys on trust for his client and the client's widow and not for him to decision of how the money is to be spent by the client's widow.

i) Misconduct in Treatment of the Client's Money

According to Solicitors Trust Account Rules 1985, when the solicitors receive money to be held by him as express trustee, he must pay it into a separate trust bank account. According to Section 77 Legal Profession Act 1976 (LPA), Bar Council can make rules for regulating the professional practice, etiquette, conduct and discipline of advocate and solicitors with the approval of the Attorney General. Any advocate and solicitor who fail to comply with any rules may be liable to disciplinary proceedings for misconduct.

Section 94(3)(d) of the (LPA)1976 define misconduct as to means conduct or omission by an advocate and solicitor in a professional capacity which amounts to grave impropriety and includes; breach of any rule of practice and etiquette of the profession made by Bar Council.

In the case of, *Yong & Co v Wee Hood Teck Development Corporation*, [1884] 2 MLJ 39. The facts showed that the appellant is a firm acted on behalf of developer, purchaser and the financier. The respondent agreed to lend RM70, 000.00 with the condition that the land will be charged to them. The appellant later on charged the land to another party. The respondent sued appellant for negligence and breach of contract. The Court held that there was ample evidence that Appellant hold duty to the client. The appellant had acted in favour of the developer as the instruction directly conflicted with the

respondent. There was a conflict of interest on the part of the Appellant. The Appellant had failed to perform the obligation and had abused the confidence of the client and committed misconduct.

Section 94 of the LPA 1976 empowers the Disciplinary Board to take action against any advocate and solicitor for misconduct including suspending or striking off the rolls. Section 94(3) of the LPA 1976 defines misconduct as conduct by a lawyer "in a professional capacity or otherwise" which amounts to grave impropriety. It includes being "guilty of any conduct which is unbecoming of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute". By virtue of Section 94(3)(1) of the LPA 1976, all advocate and solicitor are subject to disciplinary actions if guilty of any misconduct conviction of a criminal offence which makes him unfit to be a member of his profession. The misconduct is constituted by conviction of an offence. It looks at the capacity in which he was convicted of the offence. Based on Section 100(1) of the LPA 1976, it is based on his professional capacity. The test is that the conviction must be of such a character that is expedient for the protection of the public and the profession. This could lead the advocate and solicitors to commit criminal breach of trust when acted of misconduct in handling the client's money.

ii) Criminal Breach of Trust

The offence of criminal breach of trust (CBT) and its variations is described and set out under ss. 405 to 409 of the Penal Code. According to *Sathiyadas V Public Prosecutor* (1970) 2 MLJ 241 at page 243, the gist of this crime is entrustment and dishonest misappropriation. Loss as a consequence of the act is not a factor. It was the solicitor who was empowered with dominion over said money, evidence was clear that the 1st Accused as the CE at the material time had the dominion and as such entrusted with CCB's property. The evidence was clear that the 1st Accused at the material time had the dominion and as such entrusted with CCB's property.

Section 405 Penal Code describes the person who may be guilty as one being in any manner entrusted with property or dominion over it. And if that person dishonestly misappropriates that money, he commits "Criminal breach of trust". So soon as the accused certified, approved and paid out the loan, or any part of it, notwithstanding whether to an outside body or to another account within his organization and such payment was either outside the ambit of his responsibility or was unlawful, he committed the crime of Criminal Breach of Trust. It does not matter whether the pay-out was for a split second, or the amount was paid back within a few days. To hold otherwise will be to encourage officials who have dominion over money or property to misuse their positions and gamble or play the stock and shares. The punishment extends to 20 years' imprisonment and also liable to fine.

While it was not necessary for the accused persons to convince the Court of the truth of their explanation, it can only be sufficient if the explanation may reasonably be true. *Murugiah V Public Prosecutor* (1941) MLJ 16. The Court did not have to believe the defence story so long as the defence

can raise some doubt. In *Mahadi V Public Prosecutor* (1970) 1 MLJ 16 or that the explanation was consistent with innocence. In *Osman Khan V Public Prosecutor*, (1948) 14 MIJ 56. when the Court found that no case against the accused had been made out, the Court recorded an order of acquittal.

iii) *Theft*

At some point, it is necessary for the brief discussion to differentiate between theft and CBT. The mode of acquisition in theft property is acquired without the consent of the owner. In criminal breach of trust property is acquired with the consent of the owner. With the brief description, it is enough to exclude the advocate and solicitor from theft when they misappropriate the client's money. It was urged upon the Court that the Solicitors were an integral part of the whole process, and their role was crucial. They had been entrusted with the responsibility to protect the client's interests. In the case of *Law Society of Singapore v VCS Vardan* (1999) 2 SLR 229, it concerns with unauthorized withdrawals. In April 1998, the Commercial Affairs Department received information that the respondent had made unauthorized withdrawals of client's moneys. It was found that the advocate and solicitor had made various unauthorized withdrawals of clients' funds from the clients' account. Since the solicitor was not authorized to do such withdrawals, therefore it becomes an ethical issue as it was not in accordance with the Bar Council Rulings 1977.

In *Law Society of Singapore v Wee Wei Fen* (2000) 1 SLR 234, the respondent was practicing as a legal assistant in a certain law firm. A complaint was made against her on various offences of forgery and cheating. She was convicted on two counts of forgery and one count of cheating. The cheating charge was due to the unauthorized transfer of moneys from one client account to another by the respondent. Here, the ethical issue involved was that the Solicitor had made an unauthorized transfer of moneys from the client's account and therefore, and this was not in accordance with her professional duties, hence she was struck off as a Solicitor.

In *Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* (2009) 1 MLJ 794, the appellant in this case was the solicitor acting for both the purchaser and vendors in the sale and purchase of a single storey terrace house. The property was charged to the government and therefore for it to be freely transferred to the Respondent, the charge must be redeemed. The respondent paid a sum of RM21, 223.83, but since this sum was not sufficient to fully redeem the charge, it was not paid to the government but was paid into and kept in a client account in respect of the respondent. The respondent still had to pay RM18, 776.17 to settle the outstanding amount of RM40, 000 of the purchase price. The appellant then discharge himself from acting for the Respondent and wrote to the Bar Council seeking advice as to whether he would be in breach of the Legal Profession Act 1976 if he applied the sum of RM21, 238.83, which was still in the client account, towards satisfying the outstanding fees. Chief Justice Tun Zaki Azmi hold that for as long as the sale and purchase

agreement remained alive, the Solicitor is under a duty to hold the money paid for the client's purpose and not to misappropriate the money for his own purpose.

This ethical rule prescribes that an advocate and solicitor have to be accountable to each client. The purpose of this rule is to ensure that the client is aware of every course of action that an advocate and solicitor had made for their case. The reality is most advocates, and solicitors conceal the progress on their clients' work due to two main reasons. Firstly, it is due to prioritisation of other client's dealings over the current client. Secondly, it is due to escaping the client for the incomplete work. As a result, advocates and solicitors that do not exercise precaution by ensuring that they are accountable to their client could be subjected to complaints and invite the risk of getting disbarred. Hence advocates and solicitors must exercise precaution by being accountable to their clients. Therefore, where the solicitor knows full well that he is not in a position to wholeheartedly protect the interests of the client he should decline to act for that client.

Conclusion

The maxim of "*Salus Populi Supreme Lex*" or the welfare of the people is the supreme law of the land, requires that advocates and solicitors must confer the greatest good upon the greatest number of the public especially to the client. This maxim is not always possible to meet. The advocate and solicitor are not immune from disciplinary action. Any misconduct will lower the dignity of the profession and weaken the sense of confidence of the public to the administration of justice.

Perhaps, more detailed guidelines are necessary to ensure that misconduct is not mistaken for dishonesty and incompetency. It is also necessary to revamp the current system of auditing the client's account. It has been suggested that merely auditing the client's account without a simultaneous audit of the firm's other accounts is meaningless since amounts that should have been paid into the client's account are often not entered into account but instead diverted into the firm's account. If this is the basis for suspicion and criticism, it would perhaps be preferable to have all the accounts of a firm audited together. It is also crucial that the audit that is conducted be thorough. A system of independent auditors appointed by the Bar Council to carry out random checks of both the client's and the firms' accounts would lead to a more efficient and thorough auditing system.

Where a solicitor mixes client's money with his own in a bank account, seems to have led to the ground of misconduct. Since a client's money mixes with solicitor money could be trace, the tracing should first be initiated by the Bar Council Disciplinary Committee, prior to any of the complaint is investigated. If the mixed fund is exchanged for a substitute product, the client will be entitled to trace into that product and allowed to claim on the product. It will only not possible to trace client's money only in following circumstances; if the money has been dissipated where the defendant

is a bona fide purchaser for value without notice or where the money cannot be disentangled as where it has been expended by a third party on alterations or improvements.

Misappropriation of client's monies has been a major concern for the Bar Council it holds an inherent responsibility to ensure that the standards of the profession are maintained at all times. The Bar Council will continue to play a significant role to educate members. There is a proposal to amend the Legal Profession Act 1976 in a combated move to restrict lawyers from misappropriating clients funds to uphold the integrity of the legal profession as a whole. This Bill is currently with the Parliamentary Draftsman at Chambers.

The questions considered in this article are complex. However, the lawyer is aided by common sense. Conscientious lawyers should be able to avoid disloyalty and loss of independent professional judgment, even in the maze of trusteeship or/and fiduciary relationships in the legal practice. Justice and prudence are not at war in the legal profession. Upholding justice and being prudent are two basic ethical considerations of advocates and solicitors required in the present global trends facing new challenges in financial crimes of the new economic order.