



THE LAW SOCIETY
OF NEW SOUTH WALES

LEGAL PROFESSION UNIFORM LAW (NSW)
Legal Profession Uniform General Rules (2015)

FREQUENTLY ASKED QUESTIONS

TRUST ACCOUNTS DEPARTMENT
MARCH 2016

Contents

| | | |
|-----|---|----|
| 1. | INTRODUCTION / DEFINITIONS..... | 3 |
| 2. | GENERAL TRUST MONEY | 5 |
| 3. | SECTION 147 – RECORDKEEPING | 18 |
| 4. | RECEIPTS | 23 |
| 5. | CHEQUES | 26 |
| 6. | TRUST ACCOUNT CASH BOOKS | 31 |
| 7. | DEPOSITS | 32 |
| 8. | RECONCILIATION STATEMENT..... | 33 |
| 9. | TRUST ACCOUNT LEDGER | 34 |
| 10. | TRIAL BALANCE STATEMENT | 36 |
| 11. | TRUST ACCOUNT STATEMENTS | 38 |
| 12. | TRANSIT MONEY | 40 |
| 13. | POWER MONEY (MONEY SUBJECT OF A POWER)..... | 41 |
| 14. | WRITTEN DIRECTION MONEY..... | 42 |
| 15. | CONTROLLED MONEY | 43 |
| 16. | TRUST MONEY RECEIVED IN CASH..... | 45 |
| 17. | STATUTORY DEPOSIT | 46 |
| 18. | EXTERNAL EXAMINER'S REPORT | 47 |

1. INTRODUCTION / DEFINITIONS

The definitions below will be useful for understanding various terms used throughout the Frequently Asked Questions.

“Act” denotes the Legal Profession Uniform Law (NSW). All section references refer to this Act unless stated otherwise.

“ADI” means an authorised deposit-taking institution within the meaning of the Banking Act 1959 of the Commonwealth

“associate” of a law practice is defined in Section 6 of the Legal Profession Uniform Law (NSW) as a person who is one or more of the following:

- (a) a principal of the law practice;
- (b) a partner, director, officer, employee or agent of the law practice;
- (c) an Australian legal practitioner who is a consultant to the law practice;

“authorised ADI” is defined in Section 128 as an ADI authorised to maintain trust accounts to hold trust money under Section 149.

“Australian legal practitioner” is defined in Section 6 as an Australian lawyer who holds a current Australian practising certificate

“client” throughout the trust accounts sections of the Legal Profession Uniform Law (NSW) and Legal Profession Uniform General Rules (2015), the term “person on whose behalf the money is held” is used. This is because law practices regularly hold money on behalf of the client and another party or solely for another party. For example, in a conveyancing transaction, the vendor law practice receives a deposit from the purchaser. The money should be held on behalf of both parties and therefore the aforementioned term is used in the legislation. For the purposes of the Frequently Asked Questions, the term “client” will be used in lieu of “person on whose behalf the money is held”.

“general trust account” — is defined in Section 128 as an account maintained by a law practice with an authorised ADI for the holding of trust money, other than controlled money or transit money

“law practice” is defined in Section 6 of the Legal Profession Uniform Law (NSW) as

- (a) a sole practitioner; or
- (b) a law firm; or
- (c) a community legal service; or
- (d) an incorporated legal practice; or
- (e) an unincorporated legal practice;

The principal obligation to account for trust money in the Legal Profession Uniform Law (NSW) rests with the law practice, which is operated by a principal (legal practitioner).

“legal practitioner associate” of a law practice means an associate of the law practice who is an Australian legal practitioner

“principal” of a law practice is defined in Section 6 of the Legal Profession Uniform Law (NSW) as an Australian legal practitioner who—

- (a) in the case of a sole practitioner—is the sole practitioner; or
- (b) in the case of a law firm—is a partner in the firm; or

- (c) in the case of a community legal service—is a supervising legal practitioner of the service referred to in section 117; or
- (d) in the case of an incorporated legal practice or an unincorporated legal practice—
 - (i) holds an Australian practising certificate authorising the holder to engage in legal practice as a principal of a law practice; and
 - (ii) is—
 - (A) if the law practice is a company within the meaning of the Corporations Act—a validly appointed director of the company; or
 - (B) if the law practice is a partnership—a partner in the partnership; or
 - (C) if the law practice is neither—in a relationship with the law practice that is of a kind approved by the Council under section 40 or specified in the Uniform Rules for the purposes of this definition;

“Rules” denotes the Legal Profession Uniform General Rules (2015). All rule references refer to the Legal Profession Uniform General Rules (2015) unless stated otherwise.

“solicitor” means an Australian legal practitioner whose Australian practising certificate is not subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only. For the purposes of the Frequently Asked Questions, the term “legal practitioner” is used to include “solicitor”.

2. GENERAL TRUST MONEY

Question

- 2.1. **A legal practitioner (P Philpott) is the secretary of the local tennis club which is having a bordering/fence dispute with a neighbour at the end of court 1. The tennis club has decided to instruct Jones & Co (not the practitioner's law practice) to act in the matter. The club levies its members at \$50 per member and develops a "fighting fund" - all levies to be paid to the secretary (P Philpott) c/- Philpott and Associates.**

As it happens all members pay the levy on time and the legal practitioner receives the levies at the office. The \$3,000 representing the "full fighting fund" is received on the one day and tennis club receipts are issued.

What are the law practice's obligations to account for the money under the Legal Profession Uniform Law (NSW)?

Response

There are no obligations for the legal practitioner or the law practice to account within the Act as the money is clearly not entrusted to Philpott and Associates in the course of or in connection with the provision of legal services by the practice. Mr Philpott is acting in his personal capacity and not as a legal practitioner in this matter. It is suggested that for abundant caution the money should not be referred to the law practice address.

Question

- 2.2. **There are three elements of Section 129 which dictates whether money received by a law practice is money to which Section 129 relates. What are these elements?**

Response

The three elements that must be present are:

- money
- entrusted to a law practice
- in the course of or in connection with the provision of legal services by the practice

If the "money" has all the above elements, then it is "trust money" to which Section 129(1) applies. The term "entrusted" is not defined in the Act. However, the use of the word "entrusted" in the definition reinforces the general belief that trust money is not merely given or delivered to a law practice; it is placed in its "care and protection" to be held for or on behalf of another person.

Question

- 2.3. **What is "legal services"? Is that defined anywhere in the legislation?**

Response

Yes. The term is defined in Section 6 to mean work done, or business transacted, in the ordinary course of legal practice. The last part of the definition, "in the ordinary course of legal practice", is intended to invoke the common law meaning on what defines the practice of a legal practitioner. It requires consideration of the nature of the service provided, who it is provided by and in what circumstances.

The definition does not render a service a legal service simply because it is provided by a legal practitioner or by a law practice. The service must also be provided in "the ordinary course of legal practice". The notion of engaging in legal practice was considered in the Victorian Supreme Court case, *Orrong Strategies Pty Ltd v Village Roadshow Ltd* [2007] VSC 1.

In other words, if the law practice is not providing a legal service, the money received should not be deposited into the general trust account.

Question

- 2.4. **Money entrusted pursuant to Section 129 of Legal Profession Uniform Law (NSW) is often referred to as trust money,**
- (a) What are the types of trust money?**
- (b) What are the five types of money that can be received as outlined by Section 129?**

Response 2.4(a)

There are five types of trust money, they are:

1. Controlled money
2. Transit money
3. Money subject of a power (hereafter known as “power money”)
4. Written direction money
5. General trust money (other trust money not captured by the above four types of trust money)

A further subset of trust money is referred to as the “Investment of Trust Money”.

Response 2.4(b)

1. **Controlled money** – money received or held by the law practice in respect of which the practice has a written direction to deposit the money in an account (other than a general trust account) over which the practice has or will have exclusive control.
2. **Transit money** – money received (other than cash) by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice.
3. **Power money** – money received (other than cash) by a law practice subject of a power, exercisable by the practice or an associate of the practice, to deal with the money for or on behalf of another person. The power to the practice or associate may be exercisable by:
 - (a) the practice alone, or
 - (b) an associate of the practice alone (otherwise than in a private and personal capacity), or
 - (c) the practice or an associate of the practice jointly or severally, or jointly and severally, with either or both of the following:
 - (i) one or more associates of the practice,
 - (ii) the person, or one or more nominees of the person, for whom or on whose behalf the money may or is to be dealt with under the power.
4. **Written direction money** – money received (other than cash) by a law practice in respect of which the practice has a written direction by an appropriate person to deal with it otherwise than by depositing it in the account.
5. **General trust money** – any trust money received by the law practice that does not satisfy the above definitions

The requirements for the **investment of trust money** are as follows:

- the money must first be entrusted to or held by the law practice (in the above five types of trust money) in the ordinary course of legal practice, and primarily in connection with the provision of legal services at the direction of the client, and
- the investment is or is to be made in the ordinary course of legal practice and for the ancillary purpose of maintaining or enhancing the value of the money or property,
- a written direction is obtained from the client directing the investment to be made.

The finer detail of the above types of trust money will be discussed in the later sections.

It must be noted that if transit money, power money, written direction money or general trust money is received in the form of cash, the money must be deposited into the general trust account. This applies despite the client's direction to the contrary.

Controlled money received in the form of cash must be deposited in a controlled money account.

Question

- 2.5. **Philpott and Associates is representing Mr Thew in a family law dispute and it is agreed between both parties that the proceeds of the sale of the family home (\$100,000) shall be held in Philpott and Associates' general trust account pending satisfactory resolution of the agreement in relation to splitting of the sale proceeds. In what name should the trust ledger account be opened?**

Response

In terms of Rule 47 the ledger should be opened in the name of the person on whose behalf the money is held. In this case Philpott and Associates is holding the money on behalf of the husband and the wife, therefore the ledger should be opened in the name of both parties

Question

- 2.6. **Prior to the resolution of the dispute relating to the sale proceeds, Mr Thew requests that Philpott and Associates release \$33,300 which represents approximately one-third of the proceeds which he will certainly be entitled to receive once the dispute is settled. He requires the money so that he can purchase a home unit. Can Philpott and Associates agree to this direction by the client?**

Response

No, Section 138(1)(b) requires that the money held in the general trust account must be disbursed only in accordance with a direction given by the person (on whose behalf the money is held). In the present situation, the money is held on behalf of Mr and Mrs Thew and therefore directions from both parties are required prior to any disbursement of trust money.

Alternatively, Section 138(2) provides that the trust money may be disbursed subject to an order of a court. In other words, if there is a court order authorising such disbursement, the \$33,300 can be paid to Mr Thew's nominated account.

Question

- 2.7. **A law practice does not operate a general trust account and is acting in a conveyance matter for a client selling a property without a real estate agent involved. The practitioner requests information as to how to deal with the contract deposit and asks can a legal practitioner friend, who operates a separate practice with a general trust account, hold the deposit in that account.**

Response

No, the deposit must not be held by another law practice unless there is an agreement appointing the third party law practice as the stakeholder. In this situation the third party law practice would be required to open a file and retain the various instructions received as stakeholder in the matter. The agreement must be documented otherwise the third party law practice is not instructed in the matter and as such cannot receive proper instructions, particularly if a dispute arises.

The deposit can be held in the general trust account of the legal practitioner acting for the purchaser if the contract permits.

The law practice may hold the deposit in a controlled money account if the contract permits. In that case the practice must obtain a written direction from the parties, which may be achieved by an insertion of a special condition in the contract. The special condition should specify that the deposit is to be released to the vendor on exchange and make provisions for the share of interest received from the deposit. It should also nominate the ADI where the deposit is to be placed.

In addition, the law practice would be required to provide an annual External Examiner's Report in relation to any controlled money held by the law practice.

Alternatively, a deposit bond can be used if the contract permits.

The holding of the deposit as transit money is not considered prudent. The deposit is usually a personal cheque and a personal cheque would not be acceptable at settlement. Transit money held by bank cheque could still present a risk as the purchaser could request a stop payment during the contract period.

Question

- 2.8. **Section 138(1)(b) of the Legal Profession Uniform Law (NSW) states and in any case, "a law practice must ... disburse the trust money only in accordance with a direction given by the person" (on whose behalf it is held).**
- (a) Does the direction referred to above need to be in writing?**
- (b) What records are considered appropriate for the law practice to retain to ensure that the appropriate trust records are maintained for disbursements from the general trust account?**

Response

- (a) The direction by the person on whose behalf the money is held does not have to be in writing, however it is considered prudent practice that the law practice develop such office procedures to ensure that written directions are obtained and retained in the matter file for and on behalf of the person on whose behalf the money is held.

There are situations whereby the law practice must insist on a written direction such as the direction by a beneficiary of an estate not to draw the cheque to the beneficiary but to draw the cheque to a car yard for the purchase of a motor vehicle in the name of the beneficiary. In this situation the law practice would retain the written direction and the invoice evidencing the purchase of the motor vehicle in the name of the beneficiary.

- (b) (i) Written directions from the person on whose behalf the money is held or a file note to confirm the directions to pay.
- (ii) Invoice/source record (which may include a copy of the cheque) to support the payment from the general trust account.

Question

- 2.9. **On completion of the month end trial balance and reconciliation statement, it becomes apparent that due to the dishonour of a personal cheque received into the general trust account relating to the matter Thew, purchase from Smith, there is a debit balance of \$1,000.00 recorded. What should be done to rectify this problem?**

Response

- (1) The debit balance should be immediately rectified by the law practice by depositing the \$1,000 from the law practice's general account to the general trust account if funds cannot be immediately reimbursed by the client.

- (2) Advise the Chief Trust Account Investigator & Supervisor of the Trust Accounts Department, Law Society in writing of the situation and steps taken to rectify the error. (See Section 154 of Legal Profession Uniform Law (NSW))
- (3) Commence the appropriate recovery action from the client if reimbursement has not been received.

Question

2.10. **Do the following situations represent the receipt of trust money?**

- (i) **Money paid in accordance with a bill of costs and disbursements given by the law practice to a client which represents work done and disbursements which have been incurred and paid.**

Response

No. Section 129(2)(a) states that it is not trust money.

- (ii) **Money paid on account of barristers' fees yet to be incurred?**

Yes, as the money is received in anticipation of the disbursement.

- (iii) **Money received by a law practice, reimbursing barristers' fees incurred by the practice which were paid from the general account.**

No, as it is a reimbursement. It may be prudent for the law practice to ensure that the payment to the barrister has been presented to the bank statement.

- (iv) **Money paid on account of costs and stamp duty not yet paid by the law practice.**

Yes, as the money is received in anticipation of the disbursement. The money must be deposited into the general trust account or controlled money account belonging to person on whose behalf the law practice is holding the money.

- (v) **Money paid to the law practice by the principal's father, who is not a client of the law practice, for the purpose of discharging the father's debts which fall due while the father is overseas on three months' holiday.**

No, as there is no underlying legal matter. The law practice must ensure that the money is not deposited into the general trust account as a practice is not permitted to mix trust money with other money.

- (vi) **Money received by a law practice being rent on a flat jointly owned by the principal and his wife.**

Yes, provided there is an underlying legal matter and the money is accounted in accordance with Rules 49(2)(b).

- (vii) **Money received by the law practice in the principal's office for and on behalf of the local football club for which the practitioner is the treasurer.**

No, if the practitioner is not also acting for the club in a legal matter.

- (viii) **Money received from a client reimbursing the law practice for stamp duty which was paid by the practice directly from the practice's general account.**

No.

Question

2.11. **When is a law practice permitted to withdraw money from a general trust or controlled money account for legal costs?**

Response

Provided the law practice has disclosed costs in accordance with Part 4.3 Division 2 (Costs disclosure) of the Legal Profession Uniform Law (NSW), Rule 42 details the prescribed procedures for withdrawing costs and disbursements from a general trust or controlled money account. There are four methods where the practice may withdraw costs, they are as follows:

- **Method 1:** Rule 42(3) - Withdrawal on the issue of bill of costs. A law practice may withdraw money from trust if the law practice has given the person a bill relating to the money and referring to the proposed withdrawal. The term "*referring to the proposed withdrawal*" is a new concept to the withdrawal of trust money for legal costs. The Trust Accounts Department suggests that the term "*referring to the proposed withdrawal*" requires the law practice to include in the footer of the bill a statement to the effect "*It is intended to withdraw the above amount from money held in your trust ledger at the expiration of 7 business days from the date of this bill unless an objection is received.*" The trust money can be withdrawn seven **business** days after the client is given the bill if the person does not object to the bill (previously the timeframe was 7 calendar days)
- **Method 2:** Rule 42(4) Withdrawal with authority (same as Legal Profession Regulation 2005). The law practice may withdraw the trust money (whether or not the law practice has given the person a bill relating to the money)
 - a.) if the money is withdrawn in accordance with instructions that have been received by the law practice and that authorise the withdrawal; **and**
 - b.) if, before effecting the withdrawal, the law practice gives or sends to the person:
 - i.) a request for payment, referring to the proposed withdrawal; **or**
 - ii.) a written notice of withdrawal.
- **Method 3:** Rule 42(5) Withdrawal for reimbursement (same as Legal Profession Regulation 2005). The law practice may withdraw the trust money:
 - a.) if the money is owed to the law practice by way of reimbursement of money already paid by the law practice on behalf of the person; **and**
 - b.) if, before effecting the withdrawal, the law practice gives or sends to the person:
 - i.) a request for payment, referring to the proposed withdrawal; **or**
 - ii.) a written notice of withdrawal.

Rule 42(8) provides that money is taken to have been paid by the law practice on behalf of the person when the relevant account of the law practice has been debited. The Trust Accounts Department's view is that the cheque drawn to pay the disbursement must be debited to the law practice's office bank account. This is the same as the requirement under the Legal Profession Regulation, 2005.
- **Method 4:** Rule 42(6) Withdrawal for a commercial or government client (new concept). The law practice may withdraw the trust money if the law practice has given the person who is a commercial or government client a bill specifying the amount payable by the person; **and**
 - a.) the money is withdrawn in accordance with a costs agreement between the law practice and the person; **and**
 - b.) the costs agreement complies with the legislation under which it is made and authorises the withdrawal; **and**
 - c.) before effecting the withdrawal, the law practice gives or sends to the person a request for payment, referring to the proposed withdrawal.

Question

2.12. **Does the instructions referred to in rule 42(4) have to be in writing?**

Response

Rule 42(7)(b) provides that if the instruction is given in writing, it must be kept as a permanent record or if not given in writing, it must be confirmed in writing either before, or not later than 5 working days after, the law practice effects the withdrawal and a copy must be kept as a permanent record.

The word “confirmed” is not defined in the Legal Profession Uniform Law (NSW) or Legal Profession Uniform General Rules (2015). However, it is the Trust Accounts Department’s view that the law practice must initiate correspondence confirming the authority to disburse the money. A copy of that correspondence should be kept in the matter file.

Question

- 2.13. **What happens if the law practice has not disclosed costs pursuant to Section 309 of the Act?**

Response

Section 194 of the Legal Profession Uniform Law (NSW) states that the client is not required to pay the costs until it has been assessed by a cost assessor.

The law practice may not commence proceedings against the client until the costs have been assessed.

In the event where the law practice fails to disclose costs, gives the client a bill and the client objects to the withdrawal of trust money to pay the bill (within 7 working days after being given the bill), the law practice must initiate application for costs assessment and have the costs assessed before funds may be withdrawn from the general trust account or controlled money account.

Further information may be obtained from Section 194 of the Legal Profession Uniform Law (NSW).

Question

- 2.14. **A practitioner asks whether it is possible to leave the practice’s costs and disbursements in the general trust/controlled money account of the client (the person on whose behalf the money is held) until it suits the practitioner to transfer these fees.**

Response

Funds held in the general trust or controlled money account should only relate to current matters and are held on behalf of the client. Upon completion of the matter, the issue of the bill and the authorisation by the client, the fees must be paid from the general trust account to satisfy the debts of the person.

Rule 49 deals with funds of the law practice being held in the practice’s general trust account. It permits a legal practitioner to have a ledger account under the law practice’s name for the purposes of aggregating in the account, by transfer from other accounts in the trust ledger accounts, money properly due to the practice for legal costs (in other words, a costs ledger for the practice). The Rules stipulate that money must be cleared from the general trust account within one month after the date of the transfer to that ledger account.

In addition, the Rules permit a ledger in the name of a legal practitioner associate of the practice (e.g. the name of the legal practitioner) for the receipting and holding of money in which the associate has a personal and beneficial interest as a vendor, purchaser, lessor or lessee or in another similar capacity. The money must be cleared from that ledger account at the conclusion of the matter.

The retention of authorised agreed costs in the name of the client in the general trust account may be construed as a failure to record the true position in regard to the ledger, that is the balance is not held for the person in whose name the ledger is maintained but the legal practitioner (Section 147(2)(b)) and/or an attempt to tailor the law practice's income.

It should also be noted that if a balance is retained in the ledger a trust account statement is required to be provided to the client at June each year in accordance with Rule 52(4)(c).

Question

- 2.15. **The following statement has been advanced by some legal practitioners when asked about the failure to issue a bill to the client, I have obtained a blanket authority at the commencement of the matter which entitles me to transfer money on account of work completed without rendering a bill of costs. I have the client's authorisation. Is this considered a sufficient authorisation to transfer money pursuant to Rule 42(4) of the Legal Profession Uniform General Rules (2015)?**

Response

Rule 42 provides that a bill of costs or a request for payment be issued and the client authorises the transfer. The blanket authorisation is not considered sufficient as it does not refer to a definite sum which is to be transferred. It is considered that the authorisation needs to be an informed authorisation, and it is difficult to understand how an authority to transfer money for costs and disbursements can be informed if the amount of costs has not been disclosed to the client giving the authority. Therefore a bill must be issued and specific authorisation in relation to that bill is required.

Question

- 2.16. **A practitioner requests the client litigant to deliver the client's personal cheque, made payable to barrister X for Counsel's fees. The fees are due to be paid on Friday, 9 June. The client was late in sending the cheque (it arrives on the Friday morning) and, it is noted that the payee on the cheque is the law practice's trust account. The client is contactable whilst visiting Queensland relatives but cannot either (1) amend the cheque, or (2) issue a replacement cheque.**

The barrister must be paid that day, and the law practice is already on the limit of the overdraft facility.

- (a) Where does the practice deposit the cheque?
(b) Can the law practice pay the barrister that day?**

Response

The most appropriate solution is to contact the client and obtain a written direction to endorse the cheque to the barrister (Section 137(a)), the written direction may be obtained by facsimile. The direction must be kept as part of the law practice's trust records. It is also preferable for the practice to keep a copy of the endorsed cheque with the direction.

If the client does not authorise the endorsement, or if it is considered that the ADI may not accept the endorsement, then the cheque would have to be deposited into the general trust account and wait until the cheque has been cleared before the barrister is paid. Special clearances may be available to expedite the clearance of the cheque.

Question

- 2.17. **Client A has \$100,000 in the law practice's general trust account being proceeds of a sale of property pending a review of investment alternatives. While Client A is away for a week's holiday at a secret retreat, Client B seeks bridging finance of \$80,000 for three days. Security of a caveat over an unencumbered real property is**

offered. The law practice is aware that Client A is keen to maximise the return on his capital. The interest rate offered is 25% p.a. If Client B does not obtain the bridging finance, the settlement will not be completed and the deposit will be forfeited. Client B seeks the practice's assistance for bridging finance.

Can the law practice help Client B out of the predicament with the use of Client A's investment funds in the general trust account?

Response

No. Without A's instructions, no funds may be paid out of the general trust account (Section 138(1)). Also refer to Section 258(4) which provides that a law practice must not, in its capacity as the legal representative of a lender, negotiate the making of or act in respect of a mortgage unless:

- the lender is a financial institution; or
- the lender nominates the borrower and the borrower is not a person introduced to the lender by the law practice.

Question

2.18. **Mr Thew, a client, attends the office and advises that he is departing overseas for 12 months holiday and requests that the legal practitioner agrees to be a signatory on his personal bank account and pay expenses as and when required. A formal power of attorney is not prepared. The practitioner is simply authorised to operate on the account by registration of the signature with the bank. If the practitioner agrees to be and becomes the sole signatory to this account, is it considered to be trust money within the meaning of Section 128?**

Response

The practitioner has received an authority to operate over an existing account and as a result has direct control over the account. The transaction falls within the definition of trust money and is considered to be power money. The law practice is required to keep a record of all dealings with the money in that account in accordance with Rule 55.

Question

2.19. **Given the above fact scenario, is the law practice required to record an entry in the register of powers and estates?**

Response

As the practitioner is a sole signatory of the account, the law practice is required to record an entry in the register of powers and estates (Rule 60).

In this case, the date of the power would be the date of the practitioner being made as a signatory of the account.

An entry is not required if the practitioner is required to operate the account jointly with an external party.

Question

2.20. **Is a law practice required to open a general trust account?**

Response

No. A law practice is only required to open a general trust account if the law practice receives money which is required to be deposited to a general trust account at an Authorised ADI. A list of Authorised ADIs is available on the Law Society website.

Question

2.21. **How can a law practice operate without a general trust account?**

Response

A law practice that does not operate a general trust account normally arranges its affairs so that it does not receive money that is required to be banked to a general trust account at an Authorised ADI. They normally do this by the use of transit money (section 128), which is a cheque made payable to a third party. The law practice receives the cheque, holds it for the prescribed period and then passes it to the named third party as soon as practicable or at the expiration of the specified period instructed by the person. The law practice is required to retain a photocopy of the cheque and brief particulars sufficient to identify the transaction in the matter file to record the transaction.

Question

2.22. **Legal Practitioner - Sole Executor of Will**

Are monies realised in an estate of which a legal practitioner is the Sole Executor trust money and if so, what type of trust money is it? And what records is the law practice required to keep in order to comply with the relevant Rules?

Response

Section 128 imposes on a law practice the prescribed duties of accountability for money received on behalf of another person where that money is received "in the course of or in connection with the provision of legal services by the practice".

If a legal practitioner is the executor of the will of a deceased person and acts in his or her capacity as a legal practitioner for the purposes of administering the estate, Sections 128 and 137 will apply to money received by the law practice, in the course of or in connection with the provision of legal services by the practice.

It may be argued that if a legal practitioner/executor receives money on behalf of an estate, in the capacity as the legal personal representative of the deceased, the legal practitioner receives the money on the practitioner's own behalf. If, however, the legal practitioner is acting as legal practitioner for the estate as well as acting as the executor of the estate it could not be said that the legal practitioner receives the money, in the capacity as legal practitioner, as the agent for him/herself in his capacity as executor. It is a contradiction in terms to say that a person can act as his own agent. A person cannot be a trustee for himself although he can act as a trustee for himself and another party.

The legal practitioner/executor who receives money on behalf of an estate does not receive it beneficially or as the practitioner's own agent but rather receives the money for the purpose of administering the terms of the will of which the legal practitioner has notice. It would follow that the persons on whose behalf the legal practitioner receives the money would be those persons entitled under the trust of the deceased's will. If that is the case, Section 141 will require the law practice to account for the money as money subject of a power in accordance with the provisions of that Section. If the money is received into a separate estate account controlled by the legal practitioner/executor it would constitute power money, in terms of record keeping, the law practice would be obliged to comply with the Rules 55 and 60.

If the money is received into the law practice's general trust account, it will be trust money and the law practice will be accountable for it in accordance with the Rules 36 to 54.

In the alternative, it may also be treated as controlled money if the legal practitioner, on behalf of the estate, gives the law practice a written direction to invest the money in an

interest-bearing account pending distribution of the estate. The practice would then be required to comply with Rules 61 to 64 for controlled money.

Question

2.23. **Legal Practitioner Trustee**

I have some difficulty with the trust money requirements of the Act and Rules. I am presently the joint trustee of a reasonably large estate which is required to remain intact until at least 2020. I am also acting as Attorney for two people who are presently living overseas as the result of a work posting. I am employed full time as an Instructor at a University but in order to provide services to longstanding clients I am also employed as a part time consultant of a small legal practice. My present Practising Certificate entitles me to practice only as an employee and I have no desire to change this for the moment. While the original contact with the testatrix of whose estate I am trustee and with the persons for whom I am attorney were made while I was employed by my former employer in both cases it was clearly stated that the request for me to act in the relevant capacities was a personal one.

In the case of the estate all financial transactions are recorded by a firm of accountants who have initial dealings with receipts which are deposited by them to estate accounts with banks. Of course all cheques and transactions are authorised and executed by the two trustees. All tax returns and annual accounts are prepared by the accountants.

In the case of the attorney role this involves mainly attending to payment of outgoings relating to real property out of the peoples cheque accounts. Many of the payments are by direct debit.

The question seems to be whether I am receiving the money in the course of practicing as a legal practitioner. I am definitely not receiving them in the course of my employment at the University or by the law practice and it would be contrary to my instructions and the wishes of the other trustee and the beneficiaries for the practice to become involved. I am not presently carrying out any legal work for either in the usual sense.

Are the accounts considered to be controlled money accounts?

Response

You have already identified what appears to be the critical question in relation to your enquiry, that is, whether the money controlled by you in estate accounts of which you are a joint trustee and in accounts of persons overseas, for whom you hold power of attorney, should be considered as having been received by a law practice "in the course of or in connection with the provision of legal services by the practice".

You appear to indicate that you are not carrying out any legal work in respect of the affairs of the persons to whom the accounts relate and that you accepted your appointment to the relevant positions in a personal capacity, rather than in the course of your employment as a legal practitioner or in connection of you providing legal services as an employed legal practitioner.

If you are acting merely as the trustee and not as a legal practitioner/trustee in respect of the estate accounts, it would appear that the money deposited to or held in the accounts should not be regarded as trust money.

The provisions of the Act are directed to making the law practice and legal practitioners accountable for money they receive in the course of their practice notwithstanding that the

occasion for their receiving the money may be that they are acting in some additional capacity such as a trustee, stakeholder, bailee etc.

A practitioner who acts merely as a trustee and not in the dual capacity of legal practitioner and trustee would be accountable for money received or controlled in the sole capacity of trustee.

Question

2.24. **What is meant by the term “debit balance” in relation to trust accounting?**

Response

The term indicates that a trust ledger account has a debit balance disclosed on it. A debit balance indicates that the ledger account has insufficient funds to cover a transfer or payment and other funds have been used to cover this. Therefore, the legal practitioner is in breach of Section 148 in that the legal practitioner has caused a deficiency in any trust account or trust ledger account. All debit balances should be investigated and corrected by the legal practitioner immediately (see below regarding notification requirements).

Question

2.25. **Deficiency in Trust Accounts**
What should I do if I discover that there is a debit balance in my general trust account?

Response

Section 154 requires a legal practitioner associate (e.g. principal, partners, employed legal practitioner) to give written notice to the Law Society Council when the practitioner becomes aware that there is an irregularity (e.g. “debit balance”) in any of the law practice’s trust accounts or trust ledger accounts. It should be noted that Authorised ADI’s are also required by Section 154(1) to report any deficiency in a trust account to the Law Society Council. Therefore you must notify the Trust Accounts Department in writing as soon as you become aware of the deficiency.

A form for notification has not been designed and the Trust Accounts Departments requests a letter be issued to the Chief Trust Account Investigator and Supervisor advising of the reason(s) for the debit balance(s) and evidence of rectification.

Question

2.26. **Money in Dispute**

I acted for a client in a sale of property. The settlement monies were deposited into my practice’s general trust account. Today, I received notice from my client’s legal practitioner (another law practice) that the money is subject to a property settlement. I am unsure whether proceedings have been initiated.

I have made every effort to resolve the dispute by recommending that the money be deposited to one of the party’s law practice general trust account. However, the parties’ legal representatives cannot reach an agreement. Can I send the money to unclaimed monies?

Response

No. You can only send unclaimed monies to the Office of State Revenue if you cannot locate the client. In this scenario, you are able to locate the client but you cannot receive instructions as to where the money should be disbursed. Section 138 stipulates that the law practice must disburse the trust money only in accordance with a direction given by the person.

However, Section 138 qualifies the above requirement by stating that the money can be disbursed subject to a court order or as authorised by law.

Section 95(1) of the Trustees Act 1925 (NSW) allows the trustee to pay the money into court. The relevant rules can be found in Part 55 Division 3 of the Uniform Civil Procedure Rules 2005. You must satisfy yourself that the money is disputed by the parties and that reasonable efforts have been made to resolve the matter.

3. SECTION 147 – RECORDKEEPING

Question

- 3.1. **What are the basic requirements for the maintenance of trust records detailed in Section 147?**

Response

The basic requirements detailed by Section 147 are that the records:

- (a) Disclose at all times the true position in relation to trust money received for or on behalf of any person.
- (b) Be kept in a manner that enables the records to be conveniently and properly investigated or externally examined.
- (c) Be kept in accordance with the Rules.

Question

- 3.2. **How does the Legal Profession Uniform General Rules (2015) assist a legal practitioner in the running of a legal practice?**

Response

The Legal Profession Uniform General Rules (2015) are a very good basic accounting guide. It guides the practitioner by detailing:

- The records to be maintained if trust money is received.
- The information that is required to be recorded in these records.
- The accounting reports that are required to be produced.

Question

- 3.3. **A fellow practitioner seeks your assistance in understanding Sections 128 and 137. He advises he issues receipts for all trust money received and writes cheques when needed. He is of the opinion that these are the only records required and that is sufficient in order to comply with Section 147 of the Legal Profession Uniform Law (NSW). Why do the actions of the practitioner not comply with the Legal Profession Uniform General Rules (2015)?**

Response

Section 147(2)(a) requires trust records to be kept in such manner as the Rules prescribe. The practitioner is not maintaining trust ledger accounts in accordance with Rule 47, cash books in accordance with Rule 44 & 45 and not producing the month end reports as required by Rule 48.

Section 147(2)(b) requires the law practice to maintain records that disclose the true position in relation to money received on behalf of another person. Without the maintenance of a trust ledger account, the law practice is not showing the true position in relation to money held for each matter.

Section 147(2)(c) requires the trust records to be kept in a manner that enables them to be conveniently and properly investigated or externally examined. This requires that the records required by the Rules be kept up to date, the entries be posted on a regular basis and the reports produced upon request.

Question

- 3.4. **Section 147(2)(b) requires that a law practice must keep trust records that disclose at all times the true position in relation to money received. In order for the trust ledger account to disclose the true position in relation to client's funds held, would you please advise:**
- (a) **how often should the entries be posted to the trust ledger account?**

(b) when should a trust account receipt be issued for trust money received?

Response:

- (a) Ideally, the trust ledger should be posted on a daily basis, however with the exigencies of running a busy practice this may not always be possible. Rules 44(3) 45(2)(b) and 47(4)(b) requires that in respect of a receipt, payment or transfer of trust money, transactions must be recorded in the respective cash book or ledger within 5 working days. It would be clearly inappropriate for a law practice with a reasonable number of entries per day to do anything but post on a daily basis.
- (b) The trust account receipt should be made out on receipt of trust money or as soon as practicable thereafter (Rule 36(1)(a)).

Question:

3.5. What procedures should a practitioner personally conduct on a regular basis to ensure that the provisions of Legal Profession Uniform Law (NSW) and Rules are complied with?

Response:

The practitioner should address the following areas:

- Ensure that trust records are maintained and are up to date.
- Ensure that the information contained in the trust records is accurate.
- The above will be achieved by regular review (at least monthly) of the trial balance, reconciliation statement and trust account cash book.

Question:

3.6. What issues need to be addressed when commencing a new law practice and opening a set of records for a general trust account?

Response:

- Ensure that the account name contains the name of the Law Practice and the expression "law practice trust account" or "law practice trust a/c" (Rule 35(2)(b)) and that cheques issued by the AADI show the name of the law practice and the words law practice trust account on the cheque.
- Within 14 days after establishing a general trust account, a law practice must give the Law Society Council written notice of that fact (Rule 50(1)) – a form is available on the Law Society website for download.
- Within 30 days after first receiving trust money (other than transit money), a law practice must give the Law Society Council written notice of the external examiner appointed by the law practice as its external examiner (Rule 66(2)(a)) – a form is available on the Law Society website for download.
- Ensure that receipts and cheques also contain the same proposed trading name of the law practice.
- Ensure that both office and trust accounting systems are defined prior to the commencement of the law practice.
- Ensure that the appropriate registers in relation to the filing of matter files, wills and security documents are in place prior to commencement of the business.
- Ensure that discussions have been held with the external accountant as to the office account records to be maintained.

Question:

3.7. When disposing of a law practice what are the issues that need to be addressed?

Response:

The following areas need to be addressed:

Files

- Ensure that authorisation has been obtained to transfer current client files to the purchasing law practice as directed by the client. Also see Rule 6 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015.
- Ensure provision for the retention/storage of completed client files.
- Ensure that records relating to the transfer of wills and securities packets are adequate.

Trust

- The general trust account should be closed as soon as practicable after disposing the law practice or ceasing to engage in legal practice in NSW, and within 14 days after closure of the general trust account, a law practice must give the Law Society Council written notice of that fact (Rule 50(3)).
- A law practice that ceases to hold trust money because it ceases to exist as a law practice, to engage in legal practice or to practise in such a way as to receive trust money must give the Law Society Council notification within 14 days of so ceasing to hold trust money (Rule 51(1)).
- Ensure that the authorisations to transfer trust and controlled money balances to the new law practice have been obtained from the client.
- Review the inactive matter balances prior to transfer.
- Close any statutory deposit account and return the funds to the trust account.
- Complete a trial balance and bank reconciliation on the day of the transfer and ensure sufficient funds are retained in the trust account to meet unrepresented cheques.
- Ensure that provision for the storage/retention of trust records is appropriate for a period of not less than seven years.
- Ensure that the statutory provisions relating to the submission of an external examiner's report are complied with.

Question:

- 3.8. **The Legal Profession Uniform General Rules (2015) provides a time limit for the completion of controlled money statements (listings), monthly trial balances, reconciliation statements, and as a consequence the trust account cash book balance. What is the time limit?**

Response:

Fifteen working days from each month end.

Question:

- 3.9. **Rule 42(3) states that a bill is to be given to the person. Is this term defined?**

Response:

Rule 73 provides for the "giving of a bill" in terms of Section 189. The bill may be given:

- personally to the person or an agent of the person
- by post to the person or agent of the client at the usual or last known business or residential address of the client or an agent of the client
- by post to the address nominated to the law practice by the client or an agent of the client
- by leaving a copy of the bill addressed to the client at the usual or last known address of the client or an agent of the client
- by leaving a copy of the bill addressed to the client at the address nominated to the law practice by the client or an agent of the client
- by sending it by facsimile transmission to a number specified by the person
- by DX
- by email

- in the case of a corporation by serving a copy of the bill on the corporation in any manner in which the service of a notice or document may, by law, be served on the corporation.

Question:

- 3.10. **Rule 42 states a law practice has given a bill of costs in accordance with Section 144(2)(b). Is a bill of costs defined?**

Response:

Section 186 provides that a bill may be in the form of a lump sum bill or an itemised bill.

Sections 187 and 188 prescribe the provision for or with respect to the form of and the particulars to be included in the bill.

Question:

- 3.11. **How long must trust records be maintained?**

Response:

Section 147(2)(d) defines the period as seven years after the last transaction entry in the trust record or the finalisation of the matter to which the trust record relates, whichever is the later.

Question:

- 3.12. **Do the records have to be retained in printed form?**

Response:

For law practice using a computerised accounting system Rule 38(2) states:

- (2) A law practice must maintain and keep, in printed form or in readable and printable form, the following copies of trust records:
- (a) a copy of trust account receipts and payments cash books as at the end of each named month,
 - (b) a copy of reconciliation statements as at the end of each named month,
 - (c) a copy of lists of trust account ledgers and their balances as at the end of each named month,
 - (d) a copy of lists of controlled money accounts and their balances as at the end of each named month.

Rule 38(3) also provides:

- (3) A law practice must:
- (a) print a paper copy of trust ledger accounts, the register of controlled money and the trust account transfer journal before they are deleted from the system,

However, when considering the storage of records in a form other than printed form the law practice must ensure that the information will be accessible over the period of seven years. The Trust Accounts Department suggests that cash books are retained in printed form for at least 12 months to avoid the necessity of the law practice having to print records during an external examination or routine investigation.

Question:

- 3.13. **What are the responsibilities in relation to the use of computer software for the maintenance of trust records?**

Response:

Prior to the use of software, the law practice must ensure that the software complies with the Rules, in particular compliance with Rule 40 which specifically relates to the maintenance of records on computer.

The Law Society's Trust Accounts Department has issued certificates of examination for a number of software programs. This list is available from the Law Society's Website <https://www.lawsociety.com.au/ForSolicitors/professionalstandards/Trustaccounts/Trustaccountingsoftware/index.htm>

Question:

- 3.14. **What are the minimum general trust records that need to be maintained by the Act and Rules?**

Response:

Deposit record (Rule 37)
Trust Account Receipts and Payments Cashbook (Rule 44, 45)
Trust Transfer Journal (Rule 46)
Trust Ledger Account (Rule 47)
Trial Balance Statement (Rule 48)
Reconciliation Statement (Rule 48)
Trust Account Statement (Rule 52)
Duplicate trust receipts (Rule 36(3)) unless exempted by operation of Rule 36(3)
Cheque/EFT Payment Record (Rule 43)

Question:

- 3.15. **The Rules requires the form in which trust money is received, i.e. cash, cheque or direct credit to be recorded in three areas, these being the receipt (Rule 36(2)(d)), the trust account cash book (Rule(2)(c)), and the deposit slip (Rule 44(1)(d)). Why is the legislation so particular in relation to the recording of the form in which the funds are received?**

Response:

It is important to the trust accounting system that the funds received are deposited intact and the legal practitioner should not be cashing cheques from trust money received. An essential control that should be implemented by law practice over the trust records is that the receipt should be compared to the deposit slip to ensure that the funds are deposited as received and there are no general/office account, employee or other cheque deposits which have been substituted in the deposit to the general trust account. A method adopted for misappropriating trust money is for receipts to be issued for cash, the cash is not deposited and cash or cheques relating to another person are substituted in lieu of the cash received. The law practice must be on guard for this type of transaction, and the Rules prompts the control by insisting on the form of funds being recorded in each of the records.

4. RECEIPTS

Question:

- 4.1. **How long must a law practice wait prior to drawing against a cheque receipted into the general trust account?**

Response:

There is not a Rule which dictates that a cheque should not be drawn against in a certain number of days.

The guidance is Section 129 which dictates that funds are entrusted to the law practice for or on behalf of another person, therefore a cheque should only drawn against cleared funds.

The period is set by the Authorised ADI. It is suggested that each law practice consult with the Authorised ADI to determine the period applicable, and if a cheque is to be drawn urgently, prior to the expiration of the period set by the Authorised ADI, then a special clearance should be obtained.

Question:

- 4.2. **What information is a trust receipt required to disclose?**

Response:

- The date of the receipt of money,
- The date of issuing the receipt (if the date of issuing the receipt is different to the date of the receipt of money),
- Amount of money received,
- Form in which the money was received,
- The name of the person from whom the money was received,
- Name of the person on whose behalf the money is held,
- Matter description,
- Matter reference (or the trust ledger reference, whichever is applicable),
- The reason for the receipt,
- Discloses the law practice's name,
- The expression "Trust account" or "Trust A/c",
- The name of the person who made out the receipt,
- Receipts shall be consecutively numbered and issued in consecutive sequence.

Question:

- 4.3. **Is it required for a receipt to be given for money received into the general trust account other than by way of a cheque?**

Response:

The answer is "yes". A receipt must be given on request to the person from whom the trust money was received, whether it be by way of cash, cheque or direct deposit.

Question:

- 4.4. **Section 147 requires that information recorded on the receipt is accurate. What controls should a legal practitioner implement to ensure that information entered on the receipt is accurate?**

Response:

Some of the controls that may be implemented are:

- The principal responsible for the law practice should either prepare the receipt or prepare a receipt requisition, including all required details.
- Where a legal practitioner is unable to be directly involved in the recording of general trust money received, it should be ensured that this task is carried out by competent experienced personnel in accordance with set procedures.
- If receipts are issued by persons other than the legal practitioner responsible for the matter, then a regular file review comparing the file to the trust ledger should be completed by the practitioner responsible.
- Partners should be responsible for opening all mail.
- The principal (or the managing partner) reviews the month end cash book balance, reconciliation statement and trial balance statement.

Question:

4.5. **What is a “Cancelled receipt”?**

Response:

A cancelled receipt is a receipt which is made out and prior to its issue, it is realised that the content of the receipt is incorrect. Such occasions may be that the receipt was made out for trust moneys in error, when the money received related to the office account, or an incorrect name from whom the money was received is shown. It is permissible for these receipts to be cancelled. A receipt should not be cancelled unless the original receipt has been retained.

The essential controls for cancelling a receipt are:

- (i) The original and duplicate of the cancelled receipt must be retained.
- (ii) The original and duplicate of the cancelled receipt must be marked cancelled.
- (iii) The receipt number is recorded in the trust account receipts cash book in receipt number sequence with the notation reading "cancelled" and the reason for cancellation shown. A nil amount will then be recorded.
- (iv) The entry is not posted to a trust ledger account under a manual accounting system.

This entry is also often referred to as a nil value receipt. It is imperative that the original of the cancelled receipt is retained and suitably notated.

In a computerised accounting system, the printed receipt must be retained as the system will show the cancelled receipt as a reversed receipt.

Question:

4.6. **What controls should be in place over the unissued trust accounts receipts of a law practice?**

Response:

On receipt of the printed trust account receipt books, the law practice should ensure that:

- The receipts should be checked to ensure that the sequence for all books is intact.
- Each book should be registered in a suitable register, and controls placed over the storage and issue of the receipt books i.e. they be retained in a secure place and signed for on issue.
- The receipt book in use be constantly checked for missing receipts, both original and duplicate.
- The current receipt book in use should be stored in a secured place.
- The original and duplicate of any cancelled receipt is retained and suitably marked.
- The trust account receipts cash book is reviewed by the legal practitioner to ensure that the receipts sequence has been accounted for.

For law practices using a computerised accounting system with pre-printed receipts the controls are as stated above.

For law practices using computerised accounting systems that print the original receipt then the above controls are not applicable. However, the law practice must ensure that they retain the original of any receipt that is not issued by the law practice due to printer problems etc. as these receipts would be processed as reversals to the accounting system and the receipt has never been issued. The original receipt must be retained.

For computerised accounting software under either of the above methods the practice should ensure that the printed receipts are reviewed against the trust account receipts cashbook for missing receipt numbers.

Question:

4.7. **Why should such controls be in place?**

Response:

Security over unissued trust account receipts is essential to the integrity of the trust account system. If trust account receipts are obtained by unauthorised persons, the receipts may be issued to the clients or other person and the funds may never be accounted for.

Control over unissued receipts assists the legal practitioner to ensure the completeness of the accounting system, that is, all cash received by the law practice is accounted for within the accounting system. For an example, if an employee has unauthorised use of trust account receipts, and clients pay by cash, then the employee can receipt the cash using the unauthorised receipts and the funds may never be accounted for within the trust accounting system. The client is satisfied in that a receipt has been issued.

Question:

4.8. **Are original receipts required to be given?**

Response:

Rule 36(4) requires that the receipt must be given, on request, to the person from whom the trust money was received.

Question:

4.9. **To whom must the receipt be given?**

Response:

The receipt must be given to the person from whom the money was received.

5. CHEQUES

Question:

- 5.1. **What are the essential elements required to be shown on the source record which is required to support the payment of money from the general trust account?**

Response:

The essential elements are:

Cheques shall be numbered in series,

- The date the cheque was drawn,
- The name of the person on whose behalf the cheque was drawn,
- The payee of the cheque,
- If a trust cheque is made payable to an ADI, the name of beneficiary (e.g. payee on a bank cheque) must also be recorded. For example, if a CBA trust account cheque is made to CBA to obtain a bank cheque made payable to the Office of State Revenue, the records must include "CBA B/C Office of State Revenue".
- The amount of the cheque,
- The purpose/reason for payment,
- Details identifying the ledger account to be debited,
- Matter description.

Question:

- 5.2. **Can a legal practitioner draw a general trust account cheque payable to cash or open a cheque to cash at the direction of the client?**

Response:

A legal practitioner is unable to draw a cheque to cash or open it to cash. Rule 43(1)(a) prohibits a cheque drawn on the general trust account being made payable to cash. The client is unable to direct the practitioner to breach the provisions of the applicable legislation. The reason for this rule is that for a cheque drawn to cash or opened to cash there is no audit trail in regard to who received the cash.

Question:

- 5.3. **In respect of the above, what about if the law practice draws an office account cheque to cash and gives it to the client and obtains a reimbursement from the general trust account?**

Response:

The Trust Accounts Department does not condone this method as the law practice may be seen to circumvent the legislation by avoiding the trust account rules. The law practice should advise the client that the instructions cannot be acted upon and make alternative arrangements on this matter.

Question:

- 5.4. **A legal practitioner acting for a purchaser has been advised by the AADI that a trust cheque issued by the law practice to purchase a bank cheque for settlement will not be accepted unless the trust cheque is opened to cash.**

What can law practice do as Rule 43 precludes any trust cheques being drawn payable to cash?

Response:

The purpose of this rule is to provide an audit trail and drawing cheques to cash defeats the audit trail. Some Authorised ADIs have changed their requirements for the purchase of bank cheques and require the trust cheque to be drawn to cash. In these circumstances it

is the Trust Accounts Department's recommendation that if the Authorised ADIs allows the words "Cash – *name of Authorised ADI B/C named payee*" to be inserted in the Payee section of the trust account cheque, the Department would accept such wording as compliant with the rules. For example, if a trust cheque was made payable to Westpac Bank to obtain a bank cheque in favour of the Office of State Revenue, the words "Cash – Westpac Banking Corporation – B/C Office of State Revenue" must be inserted in the Payee section of the trust cheque.

A copy (front and back) of the cheque drawn must be kept and the name of the Authorised ADI and payee on the cheque including the name of beneficiary (e.g. OSR) are recorded in the relevant cheque butt, trust account payments cashbook and trust ledger account. This is to ensure that in the event the term "Cashed Cheque" is shown on the Authorised ADI statement, a copy of the cheque can be produced to substantiate the entry in the trust records and that no physical cash was in fact withdrawn from the trust account to obtain the Authorised ADI ("bank") cheque.

Question:

5.5. **Who is permitted to sign trust cheques?**

Response:

A sole practitioner or principal of a law practice is permitted to sign general trust account cheques. If the sole practitioner or principal of a law practice is not available other persons can be authorised to sign general trust account cheques and controlled money withdrawal records pursuant to Rule 43. This authorisation must be in writing and must be to any of the following persons:

- Authorised legal practitioner associate (which includes supervised principals and employed legal practitioners),
- An Australian authorised legal practitioner who holds an unrestricted practicing certificate authorising the receipt of trust money, or
- Two or more authorised associates jointly (e.g. legal secretaries or bookkeepers employed by the law practice).

The law practice must keep a record of persons who have been authorised to sign general trust account cheques as the law practice pursuant to Rule 50(2) during July each year must give the designated local regulatory authority written notice of the associates and Australian legal practitioners (including their names and addresses) who are authorised, as at 1 July in that year, to sign cheques. Notification is not required during July to the extent that this information has already been provided (or that the law practice reasonably expects to be included) in an external examiner's report under Section 159. The information will need to be recorded so that the law practice can complete the Law Practice Confirmation and Trust Money Statement – Part B.

If the law practice has an internal control procedure whereby the accounts clerk (or office manager) is authorised to sign the cheque jointly with a principal of the practice, the Law Society is not required to be notified of such authorisation as the principal's signature would always be on the cheque.

Question:

5.6. **Can a law practice stop payment on a general trust account cheque that has been issued?**

Response:

Yes.

Question:

- 5.7. **What procedure should be followed in stopping the payment of a general trust account cheque and recording the reversal in the trust records?**

Response:

The law practice should:

- (i) Contact the authorised ADI and request the issue of a stop payment order.
- (ii) Contact the person to whom the cheque has been issued and advise of the problem.
- (iii) Enter the reversal in the cash book by rewriting the entry in the cash book, adding the reason for the reversal and entering the amount as a negative amount. This has the effect of cancelling the original entry.
- (iv) Posting the entry to the credit side of the ledger (the opposite side to the original cheque).
- (v) If applicable, a replacement cheque is issued in a normal manner.

Question:

- 5.8. **What are the procedures which should be adopted when signing a general trust account cheque?**

Response:

- (i) Ensure that the cheque is marked "Not Negotiable" and on signing the cheque the "or bearer" is struck out and initialled.
- (ii) Ensure that the trust account records are up to date.
- (iii) Ensure that there are sufficient trust funds to the credit of the trust ledger account from which the cheque is to be drawn.
- (iv) Ensure that the cheque is accompanied by supporting documentation to support the payment.
- (v) Ensure that the payment relates to the matter.
- (vi) Ensure that the document that is produced supporting the payment is appropriately marked to indicate that payment has been made.
- (vii) Ensure that adequate authority is obtained for the payment of trust money for costs and disbursements.

Question:

- 5.9. **Cheque Endorsement**

I am the legal practitioner for a collection agency. As a result of this activity I receive cheques which are made payable to my law practice rather than the creditor.

I hold a written direction from my client to endorse all such cheques received by me direct to my client, and I now follow that instruction.

I am unclear as to this situation and on my reading of Section 140, such monies would be "transit monies".

Response:

The cheques, which you endorse after receipt from a debtor of your client and pass on directly to your client in accordance with your client's instructions, would properly be regarded as "written direction money" to which Section 142 would apply.

It is recommended that the cheque should be copied and placed on the matter file with the written direction and a note explaining what has occurred with the cheque. This procedure creates a reasonable audit trail in relation to the cheque involved.

In the absence of a written direction the cheque should be dealt with in accordance with the legislation pertaining to trust money. It should also be emphasised that if written

direction money is the only type of trust money received the law practice is still required to obtain an External Examiner's Report.

Question:

5.10. **Can a withdrawal be made from the general trust account by using electronic funds transfer?**

Response:

There is nothing to prevent a law practice from using the electronic funds transfers from the general trust account provided the appropriate records are maintained. The appropriate records to be maintained to record electronic fund transfers are contained in Rule 43 of the Legal Profession Uniform General Rules (2015).

Attention is directed to Rule 43(2) in regard to who can authorise an electronic fund transfer. The same controls must be implemented for electronic fund transfers as those adopted when signing trust cheques.

Before adopting electronic fund transfers the liability clauses must be clearly understood. A transaction is authorised by a password. The control of password security by a legal practitioner is essential and is the basis upon which the system is built. If the Authorised ADI receives a valid transaction that is the correct passwords have been entered, then the transaction will be processed without question. The person who enters the transaction may never be identified if there is a lack of control over the use of security passwords.

It must be remembered that there is no such thing as a "forged cheque" with electronic fund transfers. The Authorised ADI will only pay on an authenticated transaction that is one that contains correct passwords which the practitioner is expected to control.

Also audit trails must be reviewed to ensure transaction referencing in the trust account cash books and Authorised ADI statement enables a transaction to be traced through the records. Original Authorised ADI statements must be retained. It is suggested that before electronic fund transfers are used within a legal practice, the processes are documented, fully understood by all principals and staff and the processes are regularly reviewed.

A further control to be exercised by the law practice is to ensure that it reviews the Authorised ADI statements at least once a day to ensure that only authorised payments are made from the trust and office accounts. It is critical that there is minimal time between the unauthorised transaction and reporting the incident to the Authorised ADI.

The practice should also ensure that adequate software applications, such as firewalls and virus protection are installed and kept up to date in order to prevent the computers being subject of unauthorised access and/or malicious activity. Purported emails from your bank requesting personal details and password must not be opened or replied to.

Section 154 requires a legal practitioner of the law practice to notify the Law Society in writing when the practitioner becomes aware that there is an irregularity (e.g. deficiency) in the practice's trust account(s) or trust ledger account(s).

Question:

5.11. **A practitioner friend told me this morning that he was advised by another practitioner that it is a requirement on general trust account cheques that the pay to section on the cheque which currently reads "Pay to the order of" should be altered to "Pay to" to conform with the Law Society requirements. Would you please advise me if this is correct?**

Response:

No. Rule 43 requires all payments by cheque to:

- (a) be made payable to or to the order of a specified person or persons and must not be made payable to bearer or cash,
- (b) be crossed "not negotiable",
- (c) include the name of the law practice or the business name under which the law practice engages in legal practice, and
- (d) the expression "law practice trust account" or "law practice trust a/c" (this specific requirement does not apply to general trust accounts opened prior to 1 October 2005).

In other words, both "Pay to the order of" and "Pay to" would comply with the above rule.

6. TRUST ACCOUNT CASH BOOKS

Question:

- 6.1. **What are the trust account receipts and payments cash books (“cash books”) used for and why do the cash books need to be maintained within the trust accounting system?**

Response:

The cash books are designed as a summary of receipt and payment transactions.

The cash books are used within the accounting system to record all financial transactions, that is, receipts, receipt reversals, receipt cancellations, cheque, cheque reversals and cheque cancellations. The cash books should provide control over the receipt/cheque sequencing, banking (for receipts) and monthly totals for the receipts and payments.

Question:

- 6.2. **How is the trust account cash book balance achieved?**

Response:

Rule 48(2)(a)(i) requires that the general trust account balance as shown in the Authorised ADI statement is reconciled with the practice’s trust account cash books. The balance should then be carried forward to the commencement of the next month, or the balance is carried forward to a ledger account maintained for that purpose. Therefore the methods used to arrive at a cash book balance are:

- (i) Cash book summary.

This method requires that at month end the receipt book and payments book is totalled to obtain the total receipt and total payments for the month. The following statement is then recorded on the last page of the chosen record. It is desirable that the summary is recorded in the same record each month.

Cash book summary.
Opening balance as at --/--/-- \$
Plus receipts for the month of \$
Less payments for the month of \$
Closing balance --/--/-- \$

The opening balance is the closing balance from the previous month.

- (ii) Cash book balance.

This method records the opening balance as the first entry of the receipts cash book. The bookkeeper/practitioner at month end then totals the cash book. The difference between the opening balance plus receipts, less payments, gives the balance to be carried forward. This figure is carried forward as the opening balance for the next month.

- (iii) A control account ledger.

Under this system, the monthly total of receipts and the monthly total of payments are each posted (recorded) in a ledger account. The receipts total will be added to the balance at the end of last month and the total payments deducted. This will result in a month end cash book balance.

7. DEPOSITS

Question:

7.1. **What are the requirements for the deposit of trust money?**

Response:

Section 137 requires that trust money received by a law practice must be deposited in a general trust account as soon as practicable after the receipt of trust money. In other words, the money should be deposited before the end of the next banking day after the day of its receipt, or if that is not practicable, as soon as possible after that day.

Question:

7.2. **What information should be recorded on the copy of the record maintained to record a deposit to the general trust account?**

Response:

Rule 37 requires the deposit record to include:

- (a) The date of the deposit.
- (b) The amount of the deposit.
- (c) The cheque, notes and coin content.
- (d) For cheques, the name of the drawer, bank (Authorised ADI) and branch and the amount of each cheque.

The person responsible for completing the deposit should ensure that the Authorised ADI stamp and teller's initials are also recorded on the duplicate record kept by the law practice. It is not a requirement that this be shown, however it is considered to be good internal control that the depositor of the funds ensures that the Authorised ADI's receipt, that is the stamp and initials are shown on the duplicate copy of the deposit slip.

Question:

7.3. **Do the Legal Profession Uniform General Rules (2015) permit the depositing of money by use of "Quick Banking" style deposit system?**

Response:

The Rules does not preclude the use of this method of depositing money. However, before using this method of depositing money the liability in the event of a lost deposit must be understood. The Authorised ADI usually disclaims all losses of cheques deposited through the quick banking facility.

The Trust Accounts Department advises that this method of deposit should not be used if the deposit contains cash or Authorised ADI cheques (e.g. bank cheques). The reason for this is in the event of a lost deposit the practitioner/law practice must cover the lost cash and bank (Authorised ADI) cheques are extremely difficult to cancel and have them reissued.

8. RECONCILIATION STATEMENT

Question:

- 8.1. **Why is the monthly reconciliation statement procedure considered to be such an important procedure within the trust account rules?**

Response:

It is considered to be an important document because it is the procedure that compares the internal records (the law practice's records) with the external records (the Authorised ADI's statement) in regard to the amount of trust money held in the general trust account. Satisfactory completion of the procedure at month end should ensure that both records agree. Any variances shown in the reconciliation statement should be thoroughly investigated to ascertain why they are shown, for example if an outstanding deposit is shown in the reconciliation, the law practice should ensure that this money has been deposited on the first available banking day after month end.

Question:

- 8.2. **What are the procedures for completing a reconciliation statement?**

Response:

The procedures for completing a reconciliation statement are:

- (i) Ensure that all receipts and payments are entered into the trust account receipts and payments cash books prior to month end closure.
- (ii) Total the receipts and payments cash books to disclose the closing cash book balance.
- (iii) Obtain the month end Authorised ADI statement.
- (iv) Compare the Authorised ADI statement with the cash book:

1. In respect of receipts:

- 1.1 Tick entries that are common to both in the Authorised ADI statement and trust account receipts cash book.
- 1.2 List entries which appear in the Authorised ADI statement that are not recorded in the trust account receipts cash book, on a list appropriately headed.
- 1.3 List items in the trust account receipts cash book that do not appear in the Authorised ADI statement on a list appropriately headed (usually undeposited receipts).

Thoroughly investigate the items shown above in lists 1.2 and 1.3 to ascertain the reason for the discrepancy between the records. Ascertain the method of correction required. Some items will need to be corrected by the Authorised ADI, other items will need to be corrected in the trust records.

2. In respect of payments:

- 2.1 Tick the entries that are common to the Authorised ADI statement and trust account payments cash book.
- 2.2 List the entries that appear in the Authorised ADI statement that are not recorded in the trust account payments cash book on a list appropriately headed.
- 2.3 List the items that are recorded in the payments cash book that are not recorded in the Authorised ADI statement on a list appropriately headed.

Items listed as per 2.2 and 2.3 above need to be thoroughly investigated as to their nature and if necessary corrective action be taken.

3. Complete the reconciliation statement by commencing with the Authorised ADI statement balance, adjusting this to agree with the trust account cash book balance.
Note: Monthly reconciliation statements must be prepared within 15 working days of each month end.

9. TRUST ACCOUNT LEDGER

Question:

9.1. **What is the purpose of the trust ledger account in the trust accounting system?**

Response:

The trust ledger account is the accounting record that draws together all entries relating to a particular matter. It provides the history in relation to that matter and when maintained on a regular basis will provide the balance of funds held by the law practice on behalf of the client (person on whose behalf the money is held).

Question:

9.2. **What information should the trust ledger account provide?**

Response:

The trust ledger account title is required to disclose the name of the person on whose behalf the money is held, the person's address and particulars sufficient to identify the matter in relation to which the trust money was received. The law practice is required to keep these details up to date on the ledger.

The particulars of each transaction must include:

- The date of the transaction (e.g. date of issuing the receipt or date of payment), and if different the date of receipt of money,
- Receipt/cheque/EFT number and journal reference,
- Name of the person whom the money is received or paid to. In the case of a cheque made payable to an ADI, the name or BSB number of the ADI and the name of the person receiving the benefit of the payment,
- The amount of the transaction,
- The resulting balance of account arising from the transaction,
- For payments by EFT, the name and number of the payee account.

Question:

9.3. **Can a law practice maintain a trust ledger account in the practitioner's own name?**

Response:

The answer is yes, if the transaction is one that falls within the provisions of Rule 49 which are:

- (a) The law practice maintains an account for the purpose of aggregating by transfer from other accounts in the trust ledger, money properly due to the practice for legal costs.
- (b) An account in which the legal practitioner has a personal and beneficial interest as a vendor, purchaser, lessor, lessee or in other similar capacity.

Question:

9.4. **If the law practice maintains a trust ledger account to record the purchase of a property in the legal practitioner's name, how long can the funds be held in this particular account?**

Response:

The funds can be held by the law practice in this trust ledger account until completion of the purchase matter. On completion of the matter the law practice must ensure that the money is withdrawn from the general trust account.

Question:

- 9.5. **If the law practice operates a clearing account in the law practice name for the purposes of transferring costs and disbursements from individual trust ledger accounts, how long can the funds be held in the clearing account?**

Response:

The law practice must ensure that the money in the trust ledger account is withdrawn from the general trust account not later than one month after the day on which the money was transferred to the account.

Question:

- 9.6. **Rule 47(3)(c) requires that the trust ledger account records "*particulars sufficient to identify the reason for the transaction*". What information is required to be recorded to comply with this rule of the Legal Profession Uniform General Rules (2015)?**

Response:

The accounting system should be designed to provide management information to the manager of the business, therefore it is considered that the information that should be recorded as:

For receipts - e.g: on account of costs and disbursements, on account of stamp duty, on account of barristers fees.

For payments by cheque or EFT - e.g. Supreme court filing fee, building report, distribution of an estate.

For journals - e.g. transfer from sale to purchase to cover anticipated disbursements.

By recording this information in the trust ledger account, any person reviewing the records is not required to access any other record to obtain the reason for the receipt, payment or journal entry.

Question:

- 9.7. **A client pays the law practice trust money on account of costs and disbursements, as to \$400.00 for a purchase matter and \$500.00 for a third party matter. The money is paid in the form of one cheque for \$900.00. In terms of the trust ledger account, how should the receipt of these funds be handled?**

Response:

The monies received should be credited to individual ledger accounts for each matter, i.e. \$400.00 to the purchase matter and \$500.00 to the third party matter.

Rule 47(1) requires a separate trust ledger account for each person in each matter for which trust money has been received by the practice.

Question:

- 9.8. **A client has a third party matter with a current trust ledger account balance of \$10.00 and has authorised the law practice to pay a doctor's report fee of \$120.00. The client has another unrelated matter with surplus balance of \$500.00. Can the balance be paid from the unrelated matter?**

Response:

The payment should not be made from the unrelated matter account. The client (person on whose behalf the money is held) should be contacted and authority obtained to transfer sufficient funds from the unrelated matter to the third party matter. The report fee should then be paid from the third party matter account.

10. TRIAL BALANCE STATEMENT

Question:

10.1. What is a “trial balance” called in the Rules?

Response:

The term “trial balance” is no longer existent in the Rules. Rule 48(2)(a) and 48(2)(b) requires the law practice to prepare a statement reconciling the balance of the trust ledger accounts with the balance of the practice’s trust account cash books and containing a list of the practice’s trust ledger accounts.

As the above requirement effectively refers to a trial balance statement, the Trust Accounts Department considers the term “trial balance statement” is appropriate to distinguish it from the bank reconciliation statement.

Question:

10.2. What is the purpose of the trial balance statement?

Response:

The trial balance statement is used in an accounting system to ensure the principle of double entry accounting has been followed correctly, i.e. the system is in balance.

The trial balance statement is designed to highlight any errors with the law practice’s internal records. Such errors may be failure to post both sides of the transaction, posting an entry to the wrong side of the ledger, incorrect calculation of the balance, and transmission errors in posting; that is \$15.00 as \$51.00.

Question:

10.3. What are the procedures for preparing a trial balance statement?

Response:

The procedures required to be followed when completing a trial balance are:

- (i) Ensure all entries for the month in question have been entered into the trust account cash books and posted to the relevant trust ledger accounts. This procedure is completed prior to reviewing the AADI statement.
- (ii) Ensure all journal entries have been posted to the relevant trust ledger accounts.
- (iii) Ensure each ledger account has been balanced.
- (iv) On a separate sheet of paper, appropriately headed as required by the Rules, list the month end balance of each individual trust ledger account. Ledgers showing Nil balances may be excluded from the trial balance statement. A statutory deposit account, if opened, should be included.
- (v) Add the trial balance.
- (vi) Compare the total of the trial balance with the trust account cash book balance. For the accounting system to be in balance the reconciled trust account cash book balance (as per the reconciliation statement), control account/cash book balance and the total of the trial balance statement should all agree. In some systems, the statutory deposit may also have to be brought to account in the comparison.

Question:

10.4. What information is the trial balance statement required to show?

Response:

The trial balance statement is required to show the following information:

- The month to which the trial balance statement refers.
- Matter description.
- The name of the person on whose behalf the money is held.

- Reference number or other identification.
- Balance of the trust ledger account at month end.
- The total of all trust ledger account balances.
- The date of preparation (within 15 working days of month end).
- A comparison between its total and the reconciled cash book balance.

Question:

- 10.5. **Rule 48(2)(b)(i) requires that the trial balance statement show a comparison between its total and the balance of the practice’s trust account cash books (reconciled cash book balance). What is the purpose of this Rule and where should the comparison be shown?**

Response:

The purpose is to document the comparison. This ensures that the trial balance statement is in balance with the reconciled trust account cash book balance (the balance recorded after completing the bank reconciliation statement). A control feature that should be exercised by each and every law practice is to ensure that the comparison is completed and the figures that are shown in the comparison agree back to the original records. If the comparison is completed and recorded then the records should not be out of balance or if the records are out of balance the error should be highlighted within 15 working days of month end when the comparison is required to be completed.

The comparison is required to be shown on the trial balance statement. An example is as follows:

Rule 48(2)(b)(i) Comparison

| | |
|------------------------------------|----------|
| Total Trust Ledger Accounts | \$ _____ |
| Add | |
| Statutory deposit | \$ _____ |
| Reconciled Trust Cash Book Balance | \$ _____ |
| Variance (should be nil) | \$ _____ |

11. TRUST ACCOUNT STATEMENTS

Question:

- 11.1. **When is a trust account statement for general trust money required to be forwarded to the person on whose behalf the trust money is held?**

Response:

As soon as practicable after:

- completion of the matter - (Rule 52(4)(a))
- the person for whom or on whose behalf the money is held or controlled makes a reasonable request – (Rule 52(4)(b)),
- 30 June each year (Rule 52(4)(c)), unless exempted by the provisions of Rule 52(5) and 52(6). The exemptions are:

Pursuant to Rule 52(5) if

- ✓ the balance of the account is zero and no transactions affecting the account has taken place within the previous 12 months, (Rule 52(5)(a))
- ✓ a trust account statement has been furnished within the previous 12 months and no transaction affecting the account has taken place since the last statement was furnished, (Rule 52(5)(b)).

Pursuant to Rule 52(6) if

- ✓ (a) the ledger account or record has been open for less than 6 months, or
- ✓ (b) a trust account statement has been furnished within the previous 12 months and there has been no subsequent transaction affecting the ledger account or record,
but this subrule expires on 1 July 2016.

Pursuant to Rule 53 if;

- ✓ (a) Rule 52 does not apply to a commercial or government client to the extent to which the client directs the law practice not to provide trust account statements under that rule.
- ✓ (b) If the commercial or government client directs the law practice to provide trust account statements on a basis different from that prescribed by Rule 52, the law practice must provide those statements as directed, except to the extent to which the direction is unreasonably onerous.

Question:

- 11.2. **Which types of trust money am I required to issue trust account statements?**

Response:

- general trust money
- controlled money
- power money (where practicable)
- investment of trust money

The law practice is not required to issue trust account statements for written direction money or transit money.

Question:

- 11.3. **The Rules require the law practice to “give as soon as practicable” a trust account statement to the person on whose behalf the money is held or controlled. How can I furnish the trust account statement?**

Response:

The terms “given” or “soon as practicable” are not defined in the Legal Profession Uniform General Rules (2015). It is the Trust Accounts Department’s view that the method of giving a bill to a client as regulated by Section 189 and Rule 73 may be used to define how

a trust account statement can be given to the person on whose behalf trust money is held or controlled. Rule 73 provides:

- (1) *For the purposes of section 189 of the Uniform Law, a bill given by a law practice to a client is to be given:*
 - (a) *by personal delivery to the client or an agent of the client, or*
 - (b) *by sending it by post to the client or an agent of the client:*
 - (i) *at the usual or last known business or residential address of the client or an agent of the client, or*
 - (ii) *at the address nominated to the law practice for that purpose by the client or an agent of the client, or*
 - (c) *by leaving a copy of the bill, addressed to the client:*
 - (i) *at the usual or last known business or residential address of the client or an agent of the client, or*
 - (ii) *at the address nominated to the law practice for that purpose by the client or an agent of the client, or*
 - (d) *in the case of a client whose address includes a DX address in Australia—by leaving a copy of the bill, addressed to the client, in the DX box at that address or in another DX box for transmission to that DX box, or*
 - (e) *in the case of a client who has consented to receiving bills by means of a fax sent to a fax number specified by the client—by faxing a copy of the bill, addressed to the client, to that fax number, or*
 - (f) *in the case of a client who has consented to receiving bills sent electronically to the client or an agent of the client by means of:*
 - (i) *the client's usual email address or mobile phone number (or another email address or mobile phone number specified by the client)—by transmitting the bill electronically, addressed to the client, to that address or number, or*
 - (ii) *different arrangements agreed to by the client or an agent of the client—by transmitting the bill electronically in accordance with those arrangements, or*
 - (g) *in the case of service on a corporation—by serving a copy of the bill on the corporation in any manner in which service of a notice or document may, by law, be served on the corporation.*

In relation to the term “as soon as practicable” the following provides some guidance to the meaning of the phrase. The trust account statement is a reflection of the transactions in the ledger and the validity of the ledger is generally not confirmed until the authorised ADI reconciliation and trial balance statements have been completed. These are required to be completed within 15 working days of month end. It is therefore reasonable that the statement that is required to be given “as at 30 June” would not reasonably have to be given until mid to late July each year. A law practice’s ability to give statements promptly will depend on factors including:

- ✓ size of ledger
- ✓ accounting facilities
- ✓ staff numbers.

12. TRANSIT MONEY

Question:

12.1. **Does a law practice have to keep records for transit money?**

Response:

Yes. In respect of transit money received by the law practice, Section 140(2) requires the law practice to record and retain brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received.

It must be noted that transit money received in cash must be deposited into the general trust account of the law practice or a controlled money account before the money is otherwise dealt with in accordance with the instructions relating to the money.

When third party cheques are received, a law practice should ensure where possible, that copies of the cheques are retained. Copies of other documentation received for example, settlement directions from the vendor, directions from an incoming mortgagee or directions to an agent, should also be retained. Together, these kinds of records will assist a law practice to discharge its obligation in respect of Section 140(2) to “*record and retain brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received*”.

Question:

12.2. **Where should I keep the records for transit money? Should I keep them in a central register?**

Response:

No. Transit money records should be kept in the relevant matter file.

Question:

12.3. **What happens if the law practice cannot pass on the third party cheque or the instructions had expired?**

Response:

The law practice must contact the client (or the drawer of the cheque) to make other arrangements. It must be noted that the law practice cannot deposit the third party cheque into its general trust account without written instructions from the client or the drawer of the cheque.

For example, the client provides the law practice with a cheque payable to the Office of State Revenue for stamp duty. It was later determined that the cheque was no longer required. The law practice must contact the client and return the cheque or make other arrangements. For instance, the client may open the cheque or provide a written direction to the practice to deposit the cheque to the general trust account, however this is subject to Authorised ADI accepting the direction.

13. POWER MONEY (MONEY SUBJECT OF A POWER)

Question:

13.1. What is power money?

Response:

Power money is defined in Section 129(d) as trust money that is to be dealt with subject of a power (which includes authority) given to the practice or an associate of the practice to deal with the money for or on behalf of another person.

The definition is elaborated in Section 128(3) which states that a power given to a law practice or an associate of the practice to deal with money for or on behalf of another person is a reference to a power exercisable by:

- the practice alone,
- an associate of the practice alone (otherwise than in a private and personal capacity), or
- the practice or an associate of the practice jointly or severally, or jointly and severally, with either or both of the following:
 - (i) one or more associates of the practice,
 - (ii) the person, or one or more nominees of the person, for whom or on whose behalf the money may or is to be dealt with under the power.

Question:

13.2. In a family law matter, my law practice was appointed by the Court to operate an interest bearing account jointly with another law practice pending resolution of the matter. Is that power money?

Response:

Yes. The law practice is given a power (the Court order) to deal with trust money jointly with another law practice.

Question:

13.3. In this case, who bears the responsibility to keep trust records?

Response:

Both law practices will be required to keep trust records in accordance with Rule 55. However, if there as there is normally only one ADI statement and one cheque book , the law practices can by agreement, allocate the task of recordkeeping to one law practice and ensure that the other law practice gets a copy of records at least monthly.

Question:

13.4. What are the record keeping requirements for power money?

Response:

If a law practice is given a power to deal with money for or on behalf of a person (e.g. power of attorney, grant of probate or signatory to a bank account), whether alone or jointly, the practice is required to keep records in accordance with Rule 55.

The law practice must keep:

- a copy of the instrument giving the power,
- a record of all dealings with the money to which the practice or associate is a party, and
- all supporting information in relation to the dealings,
- in a manner that enables the dealings to be clearly understood.

It is suggested that the record of all dealings be kept in the form of a ledger.

14. WRITTEN DIRECTION MONEY

Question:

14.1. What is written direction money?

Response:

Written direction money refers to trust money subject of a written direction from a person legally entitled to provide the written direction to deal with the money which directs the money to be deposited to an account other than a general trust account. The law practice is obliged to follow the written direction of the person legally entitled to provide the directions (subject to a court order or as required by law). It must be noted that written direction money received in cash must be deposited into the law practice's general trust account before it is otherwise dealt with in accordance with the direction.

The phrase "*a person legally entitled to provide the written direction*" is not defined in the Legal Profession Uniform Law (NSW), however the operation of Section 137(a) provides for a person, other than the person on whose behalf trust money is received, to give binding written directions to a law practice with regard to trust money provides that person is "legally entitled" to do so.

An example is where the law practice received a cheque payable to the practice being proceeds from the sale of a property. Before the cheque is deposited into the practice's general trust account, the client was made bankrupt and the trustee in bankruptcy served a sequestration order on the practice and a written direction requiring the practice to endorse the cheque made payable to the trustee. The law practice must act in accordance with that direction.

Question:

14.2. What are the record keeping requirements for written direction money?

Response:

The law practice must keep the written direction as part of its trust records for a period of seven years after the finalisation of the matter to which the direction relates.

A folder containing the original written direction and a copy of the endorsed cheque should be kept and a copy placed in the relevant file.

Question:

14.3. My legal practitioner friend told me that it is permissible under the Legal Profession Uniform Law (NSW) to deposit money received on account of costs and disbursements in my practice's general (office) account provided the client's written consent is obtained. Is that correct?

Response:

No. The Legal Profession Uniform Law (NSW) clearly provides in Section 129(1) that money entrusted to a law practice on account of costs and disbursements is trust money. Upon receipt, the money must be deposited into a general trust account or controlled money account in accordance with Section 137.

The client's written direction cannot change the character of the money from trust money to non-trust money. Section 146 of the Legal Profession Uniform Law (NSW) prohibits a law practice from depositing trust money into an account with other money (e.g. a law practice general account).

15. CONTROLLED MONEY

Question:

15.1. What is controlled money?

Response:

"Controlled Money" means money received or held by a law practice in respect of which the practice has a written direction to deposit the money in an account (other than a general account) over which the practice has or will have exclusive control.

Question:

15.2. My practice was directed to hold money on behalf of a client who has directed in writing that the money is to be deposited to a controlled money account. What records are required to be maintained in respect of this account?

Response:

The controlled money records that are required to be maintained are:

- Written direction from the client in regard to the deposit and withdrawal, (Section 139)
- A controlled money receipt (Rule 62)
- Controlled money register (Rule 64),
- Payment record (Rule 63(5)),
- Record of Controlled money movements (ledger format),(Rule 64(3))
- Controlled money listing of accounts as at the end of each month (Rule 64(8)).

It must be noted that the statement required to be prepared each month under Rule 64(8) is required to be reviewed by a principal of the law practice who is authorised to receive trust money and that review must be evidenced on the statement – (Rule 64(9)).

- Controlled money Trust Account Statement (Rule 52)

Question:

15.3. If controlled monies are held at the end of any given month, then how many days after month end should the controlled monies listing of accounts be prepared?

Response:

Within 15 working days after month end.

Question:

15.4. Controlled Money - Joint Signatories

During the course of a litigation matter, there are instances where the Court directs an amount in dispute to be deposited into an interest-bearing account to be operated jointly by the law practices representing the parties.

In the cases mentioned above the monies are held jointly by two different law practices in trust for the two parties and one of them holds the passbook. Neither can be said to have received the monies and while vendor's law practice would usually hold the passbook, this is not always the position.

Please advise whether and, if so, how and by whom the above monies are to be dealt with as controlled money.

Response:

By virtue of Section 153(1)(c) a law practice will be deemed to have received money to which the practice "*is given a power or authority to deal with the money for or on behalf of another person*", that is a power money account.

If the law practice (or the legal practitioner) of one party, had the right to operate on the account solely, that is, the account can be operated by either the legal practitioner's signature or the other side's practitioner's signature, that would mean that the practitioner could operate on the account independently. The money received would be considered as money subject of a power because a controlled money account must be exclusively controlled by the law practice or its associates.

In terms of recordkeeping, if the two law practices are joint signatories of the account and there is only one bank statement/passbook, the law practices can by agreement, allocate the task of recordkeeping to one law practice and ensure that the other law practice gets a copy of records at least monthly. It must be noted that an External Examiner's Report is required for power money accounts.

Question:

15.5. **Can we hold controlled money in a foreign currency account?**

Response:

Yes, provided the account is held at an ADI and the account is clearly identified as a foreign currency account in the:

- Controlled money receipt,
- Controlled money movement record (ledger), and
- Controlled money monthly statement listing of accounts.

16. TRUST MONEY RECEIVED IN CASH

Question:

- 16.1. **What are the requirements according to the Legal Profession Uniform Law (NSW) and Legal Profession Uniform General Rules (2015) in relation to trust money received in cash?**

Response:

Trust money (other than controlled money and money subject of a power) received in the form of cash must be deposited in a general trust account of the law practice concerned. (Section 143(1))

If the law practice has a **written direction** from a person legally entitled to provide the written direction to deal with trust money in the form of cash by otherwise depositing it in a general trust account of the practice, the trust money must be deposited in the general trust account before it is otherwise dealt with in accordance with the direction, despite anything to the contrary in the direction.

Controlled money received in the form of cash must be deposited to a controlled money account in accordance with Section 143(2).

Transit money received in the form of cash must be deposited in a general trust account of the law practice concerned before it is otherwise dealt with in accordance with the instructions relating to the money, despite anything to the contrary in the instructions.

Money subject of a specific power (power money) that is received in the form of cash must be deposited in a general trust account (or a controlled money account in the case of controlled money) of the law practice concerned before it is otherwise dealt with in accordance with the power, despite anything to the contrary in the power or any relevant direction.

When a law practice receives cash in a transaction valued at AUD \$10,000 or more, it is required by the *Financial Transactions Reports Act 1988 (Cth)* to report the transaction to Austrac. The law practice must contact Austrac on 1300 021 037 or by email on help_desk@austrac.gov.au to enquire about how to report significant cash transactions.

17. STATUTORY DEPOSIT

Question:

17.1. **How do I calculate the amount to be held in the statutory deposit account?**

Response:

Please refer to the Electronic Statutory Deposit Calculator published on the Law Society Website at <http://www.lawsociety.com.au/statutorydepositcalculator/>

Question:

17.2. **After doing the statutory deposit calculation, my practice cannot pay the required amount into the statutory deposit account. What can my practice do?**

Response:

A form titled "Request for Determination of Statutory Deposit" is available for download from the Law Society of NSW website for completion. This form should be completed and an estimate made as to whether a portion of the required statutory deposit can be made. Please ensure that you determine the amount that you consider is appropriate to be held before submitting the form to the Trust Accounts Department.

18. EXTERNAL EXAMINER'S REPORT

Question:

18.1. Who is required to have its records externally examined?

Response:

Section 155(1) requires that a law practice must have its trust records externally examined at least once each financial year and the Law Society Council have determined the reporting period to be 1 April to 31 March each year.

Section 155 provides an exemption to the above, that if the only trust money received or held by a law practice is transit money, an External Examiner's Report is not required.

If the law practice ceases to be authorised to receive trust money or ceases to engage in legal practice and has held a trust account during the reporting period, the practice must have its trust records externally examined for the period since an External Examination was last completed. The External Examiner's Report must be lodged with the Designated Local Regulatory Authority – The Law Society within 60 days after the end of the period to which the report relates.

If practitioners are unsure as to whether their law practice is required to submit a External Examiner's Report, they should contact the Trust Accounts Department for guidance.

Question:

18.2. If I was a principal of two law practices during the reporting year, do my practices have to lodge separate Reports?

Response:

Yes. The report is a law practice based report and a practitioner has been the principal (whether equity or salaried) of more than one law practice during the reporting period then an External Examiner's Report must be lodged for each law practice.

The law practice (and the practitioner) must ensure that all principals' names are included in the External Examiner's Reports. Any principal that left the practice during the reporting year must also be included.

Question:

18.3. Who can be appointed as an external examiner?

Response:

Rule 65 defines the class of persons who are eligible to be appointed as an external examiner of a law practice. The classes are:

- A member of CPA Australia who holds a current public practice certificate, or
- A member of the Institute of Chartered Accountants in Australia who holds a current certificate of public practice, or
- A member of the National Institute of Accountants in Australia who holds a current certificate of public practice, or
- Registered as an auditor under Part 9.2 of the Corporations Act 2001 (Cth),

AND

has successfully completed a course of education approved by the Legal Services Council.

A course of education has not as yet been approved by the Legal Services Council.

Question:

18.4. **How do I locate an external examiner?**

Response:

A data base of External Examiner's is available on the Law Society's website at <https://www.lawsociety.com.au/ForSolicitors/professionalstandards/Trustaccounts/External examinations/FindanExternalExaminer/index.htm> . An external examiner can be located by Surname, Location or Postcode.

Question:

18.5. **Do I have to notify the Law Society if I appoint an external examiner to examine my trust records?**

Response:

Rule 66(2) provides the following Notifications be made to the Designated Local Regulatory Authority – The Law Society in regard to the appointment, cessation and termination by a law practice of an external examiner. The Notifications required by the Rule are:

- (a) within 30 days after first receiving trust money (other than transit money) in the jurisdiction concerned—written notice of the external examiner appointed by the law practice as its external examiner, and
- (b) within 7 days after an external examiner ceases to be the external examiner of the law practice—written notice of that fact, and
- (c) within 30 days after an external examiner ceases to be the external examiner appointed by the law practice—written notice of the successor external examiner appointed by the law practice as its external examiner.

Question:

18.6. **Who is responsible for lodging the completed External Examiner's Report with the Law Society?**

Response:

The external examiner is responsible for giving a written report of the examination to the Designated Local Regulatory Authority – The Law Society.

Question:

18.7. **When is the External Examiner's Report required to be lodged?**

Response:

The date of submission of the External Examiner's Report is determined by the Legal Services Council. The date of submission for the Report is usually on or before 31 May each year for the reporting period ended 31 March.

Question:

18.8. **What is the role of the External Examiner and what are the reports used for?**

Response:

To answer this question an overview of the legislative scheme relating to the Financial Assurance Scheme in New South Wales is required. The legislative regime to ensure that appropriate records are maintained and that the records are accurate was developed as a result of a detailed study of the Legal Profession by the Law Reform Commission. The study assessed the proposition of full audit as against some other system.

The regime adopted was that the “audit” objectives would be effectively satisfied if the functions were split between External Examiners and Law Society Trust Account Investigators.

The External Examiners were identified as being best suited to conduct yearly compliance and accuracy testing by completing an annual examination of the records and reporting on the compliance and accuracy of the records.

The Law Society Trust Account Investigators were considered best suited to test the completeness of the records by random trust account investigations.

The roles of the External Examiner and the Law Society Trust Account Investigators therefore complement each other in a manner that ensures that each “audit” objective is satisfied by the people most capable and in the best position to do so.

If a trust account investigator detects a substantial non-compliance issue then they may review the External Examiner’s checklist and/or work papers to ascertain whether or not the matters were reported or should have been reported by the External Examiners.

Therefore it is expected that the External Examiner’s Report (“the Report”) is supported by appropriate working papers that indicate:

- that the examination has been planned, that is; what is required to be done?
- the type of tests conducted to support the various sections of the checklist and the extent of the tests conducted.
- that the tests have been completed satisfactorily.
- the results have been communicated to the law practice.

It is stressed that the Report forms an integral part of the Law Society’s function in determining the appropriate routine investigation cycle to be adopted for each law practice or any other appropriate action that is deemed necessary.

The Legal Profession Uniform General Rules (2015) represent the minimum level of controls that should be present in a law practice’s trust money accounting system. If they are adhered to it is considered the accounting records will be reasonably reliable. However, with the infinite variations in size of a law practice together with the variations in types of services offered and consequently transactions involved, it impossible to prescribe a completely standard accounting system. The Rules recognise this and calls upon the External Examiner to utilise their skills and determine whether additional internal controls and accounting procedures would be appropriate to the particular practice they are reporting upon and if so whether they have been implemented.

The external examiner is required to confirm the accuracy of the information completed by a principal of a law practice in the Law Practice Confirmation and Trust Money Statement and provide an opinion on whether the trust records:

- have been properly kept in accordance with the provisions of the Act and Rules;
- in a way that at all times discloses the true position in relation to the trust money received;
- can be conveniently and properly externally examined;

and submit this opinion to the Law Society of New South Wales.

The Law Society has been careful to ensure that it does not dictate to the accountancy profession what has to be completed in forming the above opinion. This role has been left to members of the accountancy profession.