THE LAW SOCIETY
OF NEW SOUTH WALES

LEGAL PROFESSION UNIFORM LAW (NSW)

LEGAL PROFESSION UNIFORM GENERAL RULES 2015

FREQUENTLY ASKED QUESTIONS

TRUST ACCOUNTS DEPARTMENT
JANUARY 2020

Contents

1. DEFINITIONS

The definitions below will be useful for understanding various terms used throughout these 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 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(1) 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 the 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".

"***controlled money***" is defined in Section 128(1) as 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 trust account) over which the practice has or will have exclusive control.

"controlled money account" is defined in Section 128(1) as an account maintained by a law practice with an ADI for the holding of controlled money received by the law practice.

"general trust account" is defined in Section 128(1) 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 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 under the Act rests with the law practice, which is operated by a principal (legal practitioner).

"legal practitioner associate" of a law practice is defined in Section 6 as an associate of the law practice who is an Australian legal practitioner.

"***legal services***" is defined in Section 6 as work done, or business transacted, in the ordinary course of legal practice.

"***permanent form***" is defined in Section 128(1) as a term that relates to a trust record which is printed or, on request, capable of being printed, in English on paper or other material.

"principal" *of a law practice* is defined in Section 6 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.

"Section" denotes the Section of the Legal Profession Uniform Law (NSW). All Section references refer to the Legal Profession Uniform Law (NSW) unless stated otherwise.

"solicitor" is defined in Section 6 as 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".

"transit money" is defined in Section 128(1) as money received by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice.

"trust money" is defined in Section 129(1) as money entrusted to a law practice in the course of or in connection with the provision of legal services by the law practice.

"written direction money" is defined in Rule 34 as meaning trust money that is received or held by a law practice, in respect of which the law practice has a written direction to deal with the money otherwise than by depositing it in a general trust account, and is not controlled money.

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.**

All members pay the levy on time and the legal practitioner receives the levies at the office of Philpott and Associates. 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 Act?

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 (because another law practice, Jones & Co, has been instructed to handle the matter). 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. **What are the three elements of Section 129 that define "trust money"? .**

Response:

The three elements of trust money 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 law practice.

"Money" is not defined in the Act but is accepted as the normal definition of the current medium of exchange in the form of banknotes, coins, cheques and telegraphic transfers. 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. "Legal Services" is defined in Section 6 to mean work done, or business transacted, in the ordinary course of legal practice. (Refer to the next question 2.3 for further information on what comprises "Legal Services").

Question:

2.3. **What are "legal services"?**

Response:

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 is often referred to as trust money.**

(a) What are the types of trust money that are defined in Section 129?

(b) What other types of trust money are there that are not defined in Section 129?

Response 2.4(a):

Section 129(1) defines "trust money" to include:

1. Money received by the law practice on account of legal costs in advance of providing the services;

2. Controlled Money;

3. Transit money; and

4. Money subject of a power (hereafter known as "power money").

Controlled money is defined in Section 128(1) as 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 trust account) over which the practice has or will have exclusive control.

Transit money is defined in Section 128(1) as money received by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice.

Power money is referred to in Section 129(1)(d) as money received by a law practice that is the subject of a power exercisable by the law practice or an associate of the law practice, to deal with the money for or on behalf of another person. The power to the law 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.

Section 129(2)(d) also refers to the "Investment of Trust Money". The requirements for the investment of trust money are as follows:

- the money must firstly 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; and

- a written direction is obtained from the client directing the investment to be made.

Response 2.4(b):

Other types of trust money defined in the Act are:

1. General trust account money;

2. Written direction money.

General trust account money is any trust money that does not satisfy any of the definitions in Section 129, with the exception of legal costs received in advance of providing the services. This type of trust money must be deposited to a general trust account, which is defined in Section 128(1) 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. Section 136(1) states that a law practice that receives trust money (other than controlled money or transit money received in a form other than cash) must maintain a

general trust account in this jurisdiction. Section 137 states that a law practice must deposit trust money (other than cash) into the law practice's general trust account as soon as practicable after receiving it unless:

(a) the law practice receives a written direction by a person legally entitled to provide it to deal with the money otherwise than by depositing it in the account; or

(b) the money is controlled money or transit money; or

(c) the money is power money.

Written direction money is referred to in Section 137 as money that is not to be deposited to a general trust account pursuant to a written direction provided by a person legally entitled to provide it. This is consistent with the formal definition of written direction money in Rule 34, being "trust money that is received or held by a law practice, in respect of which the law practice has a written direction to deal with the money otherwise than by depositing it in a general trust account, and is not controlled money." Section 142(1) states that a law practice that receives a written direction to deal with trust money (other than cash) in a particular way must comply with that direction within the period specified in the direction, or otherwise, as soon as practicable after it is received.

Trust money received in the form of cash

It must be noted that the provisions of Section 143(1) require that if transit money, power money or written direction money is received in the form of cash, the money must be deposited into the general trust account even if the law practice has a written direction to deal with it in some other way. Once deposited, the money may be dealt with in accordance with the written direction.

Controlled money received in the form of cash must be deposited into 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 ($100,000.00) shall be held in Philpott and Associates' general trust account pending satisfactory resolution of the agreement in relation to the splitting of the sale proceeds. In what name should the trust ledger account be opened?**

Response:

Rule 47(2)(a) requires that the trust ledger account 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 trust ledger account 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 $33,300.00 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 of competent jurisdiction or as authorised by law. In this matter, the $33,300 can be paid to Mr Thew's nominated account if there is a court order authorising this payment from the general trust account.

Question:

2.7. **A law practice does not operate a general trust account and is acting for the vendor in a conveyancing matter, without a real estate agent involved. The practitioner asks a legal practitioner friend, who operates a separate practice with its own general trust account, to hold the deposit from the contract for sale in that account. Is the legal practitioner friend permitted to hold the deposit in that account?**

Response:

No, the law practice is required to deposit the trust money to its own general trust account pursuant to Section 137, which states that a law practice must deposit trust money (other than cash) into the law practice's general trust account as soon as practicable after receiving it unless the money is:

(a) written direction money;

(b) controlled money or transit money; or

(c) power money.

Section 136(1) states that a law practice that receives trust money (other than controlled money or transit money received in a form other than cash) must maintain a general trust account in this jurisdiction.

The deposit can only be held by another law practice if 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 for sale permits.

The law practice may hold the deposit in a controlled money account if the contract for sale permits. To comply with Section 139(1), the law practice must obtain a written direction from the parties, which may be achieved by an insertion of a special condition in the contract, which should also nominate the ADI where the deposit is to be placed. To comply with Section 139(3), the special condition should specify that the deposit is to be released to the vendor on exchange and make provision for the sharing of interest received from the deposit.

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

The holding of the deposit as transit money is not considered prudent.

Question:

2.8. **Section 138(1)(b) states that "*a law practice must … disburse the trust money only in accordance with a direction given by the person*" (on whose behalf it is received).**

(a) Does the direction referred to above need to be in writing?

(b) What records are considered appropriate for the law practice to retain for payments from the general trust account?

Response 2.8(a):

The Act does not require that the direction given by the person on whose behalf the money is held must be in writing. However, it is considered prudent that the law practice develops such procedures to ensure that the written directions they do receive are retained in the matter file for the person on whose behalf the money is held.

There are situations in which the law practice is advised to obtain a written direction for payments from a general trust account. Such situations include where the law practice is directed to pay a third party on behalf of the beneficiary of the proposed payment, instead of paying the trust money directly to an account held by the beneficiary or drawing a trust cheque in their favour. An example is where the law practice receives a direction to draw a cheque on behalf of the beneficiary 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.

Response 2.8(b):

The records that are considered appropriate for the law practice to retain for payments from the general trust account are:

(i) Written direction from the person on whose behalf the money is held or a file note to confirm the direction to pay;

(ii) Invoice/other documentation from the payee (such as a receipt or acknowledgment of the payment) and the source record (which may include a copy of the cheque or the EFT payment requisition).

Question:

2.9. **On completion of the month-end trust trial balance statement and trust reconciliation statement, it becomes apparent that due to the dishonour of a personal cheque received into the general trust account relating to the matter of the Thews' 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 must be immediately rectified by the law practice by depositing $1,000.00 from the law practice's general account to the general trust account, if

funds cannot be immediately obtained from the client or any other relevant external source;

(2) Pursuant to Section 154(1), advise the Chief Trust Account Investigator of the Trust Accounts Department, Law Society of NSW in writing of the situation and the steps taken to rectify the error. The email address to write to is tad@lawsociety.com.au.

(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?

Response:

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.

Response:

No, as it is a reimbursement of a disbursement already paid by the law practice and is therefore not trust money.

(iv) Money received for stamp duty not yet paid by the law practice.

Response:

Yes, as the money is received in anticipation of the disbursement. The money must be deposited into the general trust account or into a controlled money account for the 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.

Response:

No, as there is no underlying legal matter, the money does not relate to the provision of legal services and is therefore not trust money, pursuant to the definition in Section 129(1). 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.

Response:

Yes, the money may be accounted for in a trust ledger account in the name of the legal practitioner, in accordance with Rule 49(2)(b).

(vii) Money received by the law practice for and on behalf of the local football club for which the practitioner is the treasurer.

Response:

No, if the practitioner's role as treasurer does not relate to the provision of legal services.

Question:

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

Response:

Provided the law practice has disclosed legal costs in accordance with Division 3 of Part 4.3, Sections 174 to 178, and for the purposes of Section 144(2)(b), Rule 42 details the prescribed procedures for withdrawing costs and disbursements from a general trust account or controlled money account. There are four methods where the practice may withdraw costs, as follows:

- **Method 1:** Rule 42(3) - Withdrawal on the issue of a 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.

- **Method 2:** Rule 42(4) - Withdrawal with authority. 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.

  Rule 42(7)(a) provides that where the authorisation referred to in subrule (4)(a) authorises the withdrawal of only part of the money:

(i) the law practice may withdraw the money to that extent only; and

(ii) if the law practice has given the person a bill in accordance with Method 1, then subrule 4(b) is taken to apply for the remaining part of the amount specified in the bill.

- **Method 3:** Rule 42(5) - Withdrawal for reimbursement. 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 EFT payment or cheque drawn to pay the disbursement must be debited from the law practice's general account or the payment must be debited to its credit card (whichever is appropriate).

- **Method 4:** Rule 42(6) - Withdrawal for a commercial or government client (a 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 (as defined in Section 170) 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. **Do 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 Act or the Rules. 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 a law practice has not disclosed costs pursuant to Division 3 of Part 4.3 of the Act?**

Response:

Section 178(1) includes that, if a law practice contravenes the disclosure provisions –

(a) the costs agreement concerned (if any) is void; **and**

(b) the client or an associated third-party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority; **and**

(c) the law practice must not commence or maintain proceedings for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been determined by the designated local authority or under jurisdictional legislation; **and**

(d) the contravention is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

Section 174(4) states that disclosure is not required if the total legal costs in the matter (excluding GST and disbursements) is less than the lower threshold, which is stated to be $750 in Rule 72.

Question:

2.14. **A practitioner asks whether it is possible to leave the practice's costs and disbursements in the general trust account/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 account 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, pursuant to the requirements of Rule 42.

Rule 49(2)(a) permits a legal practitioner to have a trust ledger account in the law practice's name for the purposes of aggregating in the account, by transfer from other accounts in the trust account ledger, money properly due to the practice for legal costs (in other words, a costs ledger for the practice). The Rules stipulate that the money must be cleared from the general trust account within one month after the date of the transfer to that trust ledger account.

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 relation to the trust ledger account, pursuant to Section 147(2)(b). That is, the balance is not held for the

person in whose name the trust ledger account is maintained but the legal practitioner, due to an attempt to tailor the law practice's income.

It should also be noted that, if a balance is retained in the trust ledger account, a trust account statement is required to be provided to the client as soon as practicable after 30 June in 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 from the general trust account pursuant to Rule 42(4) of the Rules?**

Response:

Rule 42(4) provides for the money to be withdrawn in accordance with instructions received which authorise the withdrawal and if the law practice gives or sends the client a request for payment referring to the proposed withdrawal or a written notice of withdrawal. A 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 request for payment or notice of withdrawal must be issued and specific authorisation in relation to that request for payment or notice of withdrawal is required. Alternatively, the legal practitioner may follow the requirements of Rule 42(3), by giving the person a bill relating to the (trust) money and referring to the proposed withdrawal.

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 its general account's overdraft facility. How does the law practice handle this cheque and what other action can the law practice take to ensure that the barrister is paid promptly?

Response:

The most appropriate solution is to contact the client and obtain a written direction to endorse the cheque to the barrister, pursuant to Section 137(a)**.** The written direction may be obtained by email or in hard copy. The direction must be kept as part of the law practice's trust records. It is also strongly recommended that the practice keep a copy of the endorsed cheque.

If the client does not authorise the endorsement, or if it is considered that the authorised 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. The law practice must check with their authorised ADI to ascertain the number of days that they have to wait before being able to draw on the funds from the deposit of the cheque to the general trust account, with or without the special clearance (depending on which is applicable).

Another alternative is that the law practice deposits the cheque to the general trust account, but immediately pays the barrister from the law practice's general account. At a later date, the legal practitioner can be reimbursed by withdrawing the money from the general trust account to the general account, pursuant to Rule 42(5).

Question:

2.17. **Client A has $100,000.00 in the law practice's general trust account, being the 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 $80,000.00 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, a real property settlement will not be completed and the deposit will be forfeited. Client B seeks the law 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 agree 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 129?**

Response:

The practitioner has received an authority to operate an existing bank 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, which is referred to in Section 129(1)(d). Pursuant to Rule 55(2), the law practice is required to keep a record of all dealings with

respect to the money in that account and all supporting information in relation to those dealings, in a manner that enables the dealings to be clearly understood.

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(1)).

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

An entry in the Register 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 with an authorised ADI if the law practice receives money which is required to be deposited to a general trust account, pursuant to Section 137. (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 must arrange its affairs so that it does not receive money that is required to be deposited to a general trust account opened with an authorised ADI. For example, it must not receive money on account of legal services in advance of providing the services, which is identified as a type of trust money in Section 129(1)(a). The absence of a general trust account does not preclude the law practice from receiving or holding other types of trust money. This includes transit money (received in the form of a cheque) which, pursuant to the definition in Section 128(1), is money received by a law practice subject to instructions to pay or deliver it 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 should retain a photocopy of the cheque and brief particulars sufficient to identify the transaction in the matter file to record the transaction.

A law practice which does not maintain a general trust account can also receive or hold trust money in other types of accounts, namely controlled money accounts and accounts which hold power money. The normal Rules related to these accounts would apply, despite the law practice not maintaining a general trust account. For controlled money accounts, the law practice would be required to have an appropriate written direction to deposit the money to the account and exclusive control over the account (refer to the

definition in Section 128(1)). For an account holding power money, a legal practitioner associate of the practice must have a power to deal with the money (refer to Section 129(1)(d)).

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? What records is the law practice required to keep in order to comply with the relevant Rules?

Response:

If a legal practitioner is the executor named in the will of a deceased person and acts in his or her capacity as a legal practitioner for the purposes of administering the estate, then any money handled by the practitioner on behalf of the estate would fall under the definition of trust money in Section 129(1). Therefore, the handling of this trust money would come under the requirements of Section 137.

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. It would follow that the persons on whose behalf the legal practitioner receives the money would be those persons named as beneficiaries in the deceased's will. If that is the case, Section 141 requires the law practice to account for the money received on behalf of the estate 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, and, in terms of record-keeping, the law practice would be obliged to comply with Rules 55 and 60. If the money is received into the law practice's general trust account, the law practice would be required to keep records in accordance with Rules 36 to 54. If the money is received into a controlled money account pursuant to a written direction to the law practice by the legal practitioner/executor to, say, invest the money in an interest-bearing account pending distribution of the estate, the law practice would be required to keep records in accordance with Rules 61 to 64.

It should be noted that if the legal practitioner is a joint executor of the deceased estate with one or more parties external to the law practice, and acts in his or her capacity as a legal practitioner for the purposes of administering the estate, then the same requirements with respect to the handling and recording of trust money that are noted above would apply, except there would be no requirement for an entry to be made in the register of powers and estates.

Question:

2.23. **Legal Practitioner Trustee**

I am presently the joint trustee of a reasonably large estate which is required to remain intact until at least 2025. 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 to a small legal practice. My present Practicing 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 a 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 joint 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 people's 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 practising as a legal practitioner. I am definitely not receiving it 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.

Would the money in these accounts be considered to be trust money?

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 with your provision of 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. 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 only.

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 or bailee.

Therefore, based on the information you have provided, the money in the accounts you have noted in the question is not trust money, pursuant to the definition in Section 129(1).

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 in it because the account is overdrawn. A debit balance indicates that the trust ledger account has insufficient funds to cover a transfer or payment previously effected and funds held in the general trust account for other trust ledger accounts 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 identified promptly and then corrected immediately by the legal practitioner. To ensure the prompt identification of any debit balances, the legal practitioner must review the trust account records regularly. The Trust Accounts Department advises that this review should be conducted at least once per month. (See Question 2.25 regarding notification requirements).

Question:

1.25. **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(1) requires a legal practitioner associate (e.g. principal, partner, employed legal practitioner) to give written notice to the designated local regulatory authority (the Law Society Council) as soon as practicable after the practitioner becomes aware that there is an irregularity. The word "irregularity" is not defined in the Act or other related legislation but it is advised that this word can be interchanged with the word "deficiency." Debit balances can relate to individual trust ledger accounts or the actual balance of the general trust account. With respect to the latter, it should be noted that authorised ADI's are also required by Section 154(1) to report any deficiency in a trust account that they become aware of to the designated local regulatory authority (the Law Society Council).

A form for such notifications has not been designed. In the New South Wales jurisdiction, such notifications are to be made to the Law Society's Trust Accounts Department advising of the details and reason(s) for the debit balance(s) and evidence of rectification. The email address for the Trust Accounts Department is tad@lawsociety.com.au.

Question:

1.26. **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 parties' 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 Revenue NSW 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(1) stipulates that the law practice must disburse the trust money only in accordance with a direction given by the person (on whose behalf the money is held).

However, Section 138(2) 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 – RECORD-KEEPING

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 must be kept in permanent form, and:

(a) Be in accordance with the Rules; and

(b) Disclose at all times the true position in relation to trust money received for or on behalf of any person; and

(c) Be kept in a way that enables the trust records to be conveniently and properly investigated or externally examined; and

(d) Be kept for a period of 7 years after the last transaction date or the finalisation of the matter, whichever is the later.

Question:

3.2. **How do the Rules assist a legal practitioner in the running of a legal practice in relation to trust money?**

Response:

The Rules are a very good basic trust accounting guide. They guide the practitioner by detailing with:

- The records to be maintained if trust money is received;
- The information that is required to be recorded in these records;
- The timeframe for the preparation of the records prepared;
- Requirements for the storage of records, including backup copies;
- Requirements for the withdrawal of trust money for the payment of legal costs.

Question:

3.3. **A fellow practitioner seeks your assistance in understanding Sections 128 and 137. He advises that he maintains a general trust account and issues receipts for all trust money received and writes cheques when needed with respect to this account. He is of the opinion that these are the only records required and that is sufficient in order to comply with Section 147.**

Why do the actions of the practitioner not comply with the Act?

Response:

Section 147(2)(a) requires trust records to be kept in accordance with the Rules. The practitioner is not maintaining trust ledger accounts in accordance with Rule 47, trust account receipts and payments cash books in accordance with Rules 44 and 45 and is 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 any person. Without the maintenance of a trust ledger account and the month-end reports, 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 the records required by the Rules be kept up to date, the entries be posted on a regular basis and the reports be produced upon request, which enables a Law Society investigator or external examiner to properly conduct their investigation or examination of the records.

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 made out for trust money received?

Response to 3.4(a):

Rules 44(3), 45(2)(b) and 47(4)(b) require that in respect of a receipt, payment or transfer of trust money, transactions must be recorded in the respective trust account cash book and/or trust ledger account within 5 working days of the receipt being made out, the payment being made or the transfer being effected. Ideally, the transactions should be recorded on the date of the receipt of the money or the date of the payment from the general trust account. However, with the exigencies of running a busy practice, this may not always be possible. The legal practitioner must implement procedures which ensure that the transactions are recorded within the timeframes required by the Rules.

Response to 3.4(b):

The trust account receipt should be made out as soon as practicable after trust money is received (Rule 36(1)(a)), or, in the case of trust money received by direct deposit, after the law practice receives or accesses notice or confirmation of the deposit from the authorised ADI concerned (Rule 36(1)(b)).

Question:

3.5. With respect to trust money, **what procedures should a practitioner personally conduct on a regular basis to ensure that the provisions of the Act and the Rules are complied with?**

Response:

The practitioner should address the following areas:

- Ensure that trust records are maintained. are up to date, are accurate, and are compliant with the Rules;
- Ensure that trust money is handled in accordance with the provisions of the Act and the Rules;
- Ensure that all irregularities and deficiencies with respect to trust money are promptly identified and then corrected and reported in writing to the Law Society's Trust Accounts Department.

The above will be achieved by regular review (at least monthly) of the trust trial balance statement, trust reconciliation statement, trust account receipts and payments cash books, trust transfer journal and trust ledger accounts.

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 or the business name under which the law practice engages in legal practice, and the expression "law practice trust account" or "law practice trust a/c" (Rule 35(1)(b)), and that cheques issued by the authorised ADI also include this information;

- Within 14 days after establishing a general trust account, a law practice must give the designated local regulatory authority (the Law Society Council) written notice of that fact (Rule 50(1)) – a form is available on the Law Society website for download. The completed form can be sent to the Trust Accounts Department at tad@lawsociety.com.au);

- Within 30 days after first receiving trust money (other than transit money or written direction money or trust money subject to a specific power pursuant to an electronic lodgement network operator's settlement scheme (such as PEXA)), a law practice must give the designated local regulatory authority (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. The completed form can be sent to the Trust Accounts Department at tad@lawsociety.com.au);

- Ensure that receipts and cheques also contain the name of the law practice or the business name under which the law practice engages in legal practice;

- Ensure that both the office and trust accounting systems are defined prior to the commencement of the law practice;

- Ensure that discussions have been held with the external accountant as to the office account records to be maintained;

- Ensure the trust account record-keeping system is compliant with the Rules and the record-keeping procedures are defined, including the persons involved in the record-keeping;

- Ensure that a file is opened in respect of each matter for which the law practice receives instructions to provide legal services, as soon as practicable after the instructions are received;

- Ensure that the appropriate registers are kept in respect of the matter files opened, financial interests and safe custody documents.

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 of the law practice or ceasing to engage in legal practice in NSW; and within 14 days after the closure of the general trust account a law practice must give the designated local regulatory authority (the Law Society Council) written notice of that fact (Rule 50(3)). A form is available on the Law Society website for download; The completed form can be sent to the Trust Accounts Department at tad@lawsociety.com.au);

- Close any statutory deposit account and return the funds to the general trust account, prior to the closure of the general trust account;

- Ensure that the authorisations to transfer trust and controlled money balances to the new law practice have been obtained from the client in accordance with rule 6 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015;

- Complete a trust trial balance statement and trust reconciliation statement on the day of the transfer and ensure sufficient funds are retained in the general trust account to meet unpresented cheques;

- Review the inactive matter balances prior to transfer;

- 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 designated local regulatory authority (the Law Society Council) notification within 14 days of so ceasing to hold trust money (Rule 51(1)). A form is available on the Law Society website for download. The completed form can be sent to the Trust Accounts Department at tad@lawsociety.com.au;

- Ensure that provision for the storage/retention of trust records is appropriate for a period of not less than seven years (pursuant to Section 147(2)(d));

- Ensure that the statutory provisions relating to the submission of an External Examiner's Report are complied with (pursuant to Section 155(1)).

Question:

3.8. **The Rules provide a time limit for the completion of controlled money statements (listings), monthly trust trial balance statements, trust reconciliation statements, and, as a consequence, the trust account cash book balance. What is the time limit?**

Response:

Fifteen working days after the end of the month concerned (Rules 48(3) and 64(8)).

Question:

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

Response:

Section 189 states: “A bill is to be given in accordance with the Uniform Rules.”

Rule 73 provides for the “giving of a bill”:

- by personal delivery to the client or an agent of the client;
- by post to the client or an 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 client (if the client has consented to receiving bills by facsimile transmission);
- by DX;
- by sending it to the client's usual email address or mobile phone number or an agent of the client's usual email address or mobile phone number (if the client has consented to receiving bills electronically or the agent receiving them electronically);
- 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. Section 187 states that if a person is given a bill in the form of a lump sum bill, the client may request the law practice to give an itemised bill.

Question:

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

Response:

Section 147(2)(d) provides 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 trust records have to be retained in printed form?**

Response:

Section 147(1) provides that trust records must be kept in permanent form. "Permanent form" in relation to a trust records is defined in Section 128 to mean "printed or, on request, capable of being printed, in English on paper or other material".

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

(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.

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. For example, this would apply to records kept on a "cloud" based system provided by another entity. For the more recent trust account records (i.e. those records dated in the last 12 months), the law practice should take into consideration the possible requirement to print records pursuant to the conduct of a Law Society investigation or external examination.

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 by 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/practising-law-in-NSW/trust-money-and-fidelity-fund/trust-accounting-software

Question:

3.14. **What are the minimum general trust account records that are required to be maintained by the Rules?**

Response:

The Rules require the following records to be kept with respect to the general trust account:

- Duplicate trust receipts (Rule 36(3)) unless exempted by the operation of Rule 36(3);
- Deposit record (Rule 37);
- Trust Cheque/EFT Payment Record (Rule 43);
- Trust Account Receipts and Payments Cash Books (Rules 44 and 45);
- Trust Transfer Journal (Rule 46);
- Trust Ledger Account (Rule 47);
- (Month-end) Trust Trial Balance Statement (Rule 48);
- (Month-end) Trust Reconciliation Statement (Rule 48);
- Trust Account Statement (Rule 52);
- Authorised ADI account statements.

Question:

3.15. **The Rules require the form in which trust money is deposited to the general trust account, i.e. cash, cheque or direct deposit/electronic funds transfer to be recorded in two areas, these being the trust account receipt (Rule 36(2)(d)) and the trust account receipts cash book (Rule 44(1)(d). The trust account deposit record is also required to show whether the deposit consists of cheques or cash (and the amount of each) (Rule 37 (2)(c)). Why is the legislation so particular in relation to the recording of the form in which the funds are received?**

Response:

It is an important control of the trust accounting system that the funds received are deposited to the general trust account intact, and it follows that the law practice must be on guard for potential misappropriations. An essential procedure that should be implemented by a law practice over the deposit of trust money is that the receipt should be compared to the deposit slip to ensure that the funds are deposited as received and that some of the trust money is not (for example) deposited to the law practice's general/office account or paid to an employee of the practice. A review of the authorised ADI statements should also be conducted to ensure that all trust money purportedly deposited to the general trust account is credited to that account and not to another account or paid to a legal practitioner or another associate of the practice. Another 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 Rules prompt good controls for the detection of misappropriation and

irregularities with respect to the handling of trust money by insisting on the form of receipt being shown in the records and the breakup of cash and cheques on the deposit records.

4. TRUST ACCOUNT 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(1), which dictates that funds are entrusted to the law practice for or on behalf of another person. Therefore, a cheque should only be drawn against cleared funds.

The period for the clearance of funds 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, and prior to the expiration of the clearance period set by the authorised ADI, then a special clearance of the funds should be obtained.

Question:

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

Response:

Rule 36(2) provides that the following information must be included on a trust account receipt:

- The date of the receipt of money;
- The date of issuing the receipt (if it is different to the date of the receipt of money);
- The amount of money received;
- The form in which the money was received;
- The name of the person from whom the money was received;
- The name of the person on whose behalf the money is held;
- The matter description;
- The matter reference (or the trust ledger account reference, whichever is applicable);
- The reason for the receipt;
- The law practice’s name or the business name under which it engages in legal practice;
- The expression "Trust account” or "Trust A/c"; and

- The name of the person who made out the receipt.

Rule 36(5) provides that trust account receipts must be consecutively numbered and issued in consecutive sequence.

Question:

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

Response:

The answer is “yes”. The requirement to make out a trust account receipt is set out in Rule 36(1). Pursuant to an amendment to Rule 36(4) from 2 September 2016, 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/electronic funds transfer).

Question:

4.4. **What is a “Cancelled trust receipt”?**

Response:

A cancelled trust 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 money in error, when the money received related to the office account; or an incorrect name from whom the money was received is recorded. It is permissible for these receipts to be cancelled.

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 the cancellation shown.

Question:

4.5. **What controls should be in place over unissued trust account receipt books of a law practice?**

Response:

For manual trust account records, on receipt of the printed trust account receipt books, the law practice should ensure that:

- The receipt books are checked to ensure that the sequence for all books is intact;

- Controls are placed over their storage and issue, i.e. they should be retained in a secure place and signed for on issue;

- The current receipt book in use is constantly checked for missing receipts, both original and duplicate;

- The current receipt book in use is stored in a secure 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 directly from the system, 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. For all computerised accounting software systems, the practice should ensure that the printed receipts are reviewed against the trust account receipts cash book for missing receipt numbers.

Question:

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

Response:

Security over unissued trust account receipts is essential to the integrity of the trust accounting system. If trust account receipts are obtained by unauthorised persons, the receipts may be issued to the clients or other persons and the funds may not be accounted for.

Control over unissued receipts assists the legal practitioner to ensure the completeness of the accounting system and reduces the opportunity for fraud or misappropriation of trust money, particularly with respect to trust money received by the law practice in the form of cash. For 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. However, the client is satisfied in that a receipt has been issued and may therefore not suspect any misappropriation.

Question:

4.7. **Are original trust account receipts required to be given?**

Response:

Pursuant to an amendment to Rule 36(4) from 2 September 2016, a trust account receipt must be given, on request, to the person from whom the trust money was received. If the person does not request the receipt, then it is not required to be given.

Question:

4.8. **To whom must the trust account receipt be given?**

Response:

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

5. TRUST ACCOUNT PAYMENTS

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 by cheque from the general trust account?**

Response:

Rule 43(4) provides the information that must be included on the source record for a trust account cheque, which are:

- The number of the cheque (Note: Cheques shall be numbered in the series);
- The date the cheque was drawn;
- The amount of the cheque;
- 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 payable to the CBA to obtain a bank cheque made payable to Revenue NSW, the records must include “CBA B/C Revenue NSW”;
- Details identifying the trust ledger account to be debited, including the matter description and the matter/ledger reference number;
- The reason for the payment.

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:

Rule 43(1)(a) prohibits a cheque drawn on the general trust account being made payable to cash. The client or payee is not able 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 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.

Question:

5.4. **A legal practitioner acting for a purchaser has been advised by the authorised ADI 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 the law practice do, as Rule 43(1) precludes any trust cheque being made 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 ADI allows the words "Cash – *name of Authorised ADI* B/C *named payee*" to be inserted in the Payee section of the trust 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 Revenue NSW, 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 trust cheque drawn must be kept and the name of the authorised ADI and payee on the cheque including the name of beneficiary (e.g. Revenue NSW) are to be recorded on the relevant cheque butt, trust account payments cash book 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 cheques paid from the general trust account ?**

Response:

Rule 43(2) requires that general trust account cheques must be signed by an authorised principal of the law practice; or, if the authorised principal is not available, other persons can be authorised to sign general trust account cheques. This authorisation must be in writing and must be to any of the following persons:

- An authorised legal practitioner associate (which includes supervised principals and employed legal practitioners); or
- An authorised Australian legal practitioner who holds an Australian practising 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 must, pursuant to Rule 50(2) and during July each year, 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 trust cheques (Note: The relevant document, titled “Notification of Authorised Signatories as at 1 July” can be found on the Law Society website and, once completed, can be sent to the Trust Accounts Department at tad@lawsociety.com.au). Notification is not required during July to the extent that this information has already been provided in the Law Practice Confirmation and Trust Money Statement – Part B. (Note: This document requests the names and position (in the law practice) of all signatories to the general trust account for the year ended 31 March. The Part B document itself is normally completed by 31 May of each year).

The requirements with respect to payments by electronic funds transfer from the general trust account are discussed later in Question 5.10.

Question:

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

Response:

Yes. Any fees charged by the authorised ADI for the cancellation of the cheque must not be debited from the general trust account.

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 trust account cheque has been issued and advise of the problem;

(iii) Enter the reversal in the trust account cash book and trust ledger account, adding the reason for the reversal and entering the amount as a negative amount. This has the effect of cancelling the original entry;

(iv) If applicable, a replacement cheque may be issued in the 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 trust account cheque is made payable to or the order of a specified person or persons, marked "Not Negotiable” and the words “or bearer” are struck out and initialled. (Reference: Rule 43(1)(a) and (b));

(ii) Ensure that the trust account records are up to date in accordance with the Rules and that there are sufficient trust funds to the credit of the trust ledger account from which the cheque is to be drawn;

(iii) Ensure that when the cheque is signed, it is accompanied by supporting documentation that explains the matter to which the payment relates, the payee, the amount of the cheque and the reason for the payment. The supporting documents must be reviewed by the signatories before the cheque is signed;

(iv) Ensure that the documentation supporting the payment is appropriately marked to indicate that payment has been made;

(v) Ensure that proper authority is obtained for the payment of trust money for costs and disbursements, pursuant to the requirements of Rule 42.

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 that 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" and not “transit money.” Section 142(1) states that a law practice that receives a written direction to deal with trust money (other than cash) in a particular way must comply with that direction within the period specified in the direction, or otherwise, as soon as practicable after it is received.

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. That is, the trust money must be deposited to the law practice general trust account, pursuant to Section 137, before the money is paid from the account.

It should be noted that a law practice is not required to have its trust records externally examined for a given year if it has only received or held trust money subject to a written direction for the 12 months period from 1 April to 31 March of the following year. This also applies to a law practice that only received or held trust money subject to a specific power pursuant to an electronic lodgement network operator's settlement scheme (such as PEXA), and/or transit money for a given year.

Question:

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

Response:

The answer is yes. It is one of only two methods for payments from a general trust account, the other being payments by cheque (Reference: Section 144(1)). The same controls must be implemented for electronic funds transfers as those adopted when signing trust cheques.

Before adopting electronic funds transfers, the liability clauses must be clearly understood. A transaction is authorised by a password. The control of password security is essential and is the basis upon which the system is built. If the authorised ADI receives a valid transaction (i.e. the correct password has been entered), 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 funds transfers. The authorised ADI will only pay on an authenticated transaction (i.e. one that contains the correct password) which the practitioner is expected to control.

The appropriate records to be maintained for electronic funds transfers are contained in Rule 43(4). Attention is directed to Rule 43(2) in regard to who can authorise an electronic funds transfer.

The wording of Rule 43(2)(a) that an “electronic funds transfer must be entered under the direction or authority of an authorised principal of the law practice” is often used by law practices to support written directions by an authorised principal to the authorised ADI to effect an international telegraphic transfer or to provide a bank cheque from funds held in the general trust account. However, it should be noted that the wording of this Rule does not permit an associate of a law practice (such as a bookkeeper) who is not an authorised principal or an authorised legal practitioner associate to physically effect the electronic funds payment in a sole capacity, on the basis that the transaction has been authorised internally by an authorised principal, or, in his or her absence, by an authorised legal practitioner associate.

Therefore, if an associate of the law practice who is not an authorised principal or an authorised legal practitioner associate is authorised, in a sole capacity, to enter the details of trust account payments by electronic funds transfer into the banking system, the law practice is advised to contact its authorised ADI for guidance to ensure that the associate cannot physically effect the payment, without the assistance of another authorised person(s) detailed in Rule 43(2). One suggestion is that the associate enter the details of a proposed electronic funds transfer into the banking system and the authorised ADI then provides a written notification to the authorised principal that the transaction is awaiting approval. The authorised principal then reviews the payment information provided by the authorised ADI before approving the payment (e.g. by entering a security password).

Audit trails must be reviewed to ensure transaction referencing in the trust account cash books and the 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 funds 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 the authorised ADI statements are reviewed daily by the account signatory to ensure that only authorised payments are made from the general trust account and office account. It is critical that there is minimal time between an unauthorised transaction and reporting the incident to the authorised ADI.

The law 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 the subject of unauthorised access and/or malicious activity. Purported emails from your authorised ADI requesting personal details and a password must not be opened or replied to.

Law practices are also reminded of Section 154(1), which requires a legal practitioner associate of a law practice to notify the Law Society in writing when they become 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 for general trust account cheques that the section on the cheque which currently reads "Pay to the order of" should be altered to "Pay to" to conform with the Law Society's requirements. Would you please advise me if this is correct?**

Response:

No. Rule 43(1)(a) requires all payments from a general trust account effected by cheque to be made payable to or to the order of a specified person or persons and must not be made payable to bearer or cash. In other words, both "Pay to the order of" and "Pay to" would comply with this 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, which are required to be kept by Rules 44 and 45, 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 and cancellations, payments by cheques, cheque reversals and cancellations, and payments by electronic funds transfer (EFT). The cash books should provide control over the receipt/cheque/EFT sequencing; banking (for receipts); and provide the totals for the receipts and payments which form the basis of the calculation of the month-end balance of the cash book.

Question:

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

Response:

Rule 48(2)(a)(i) and (b)(i) requires that the month-end trust account records reconcile with the balance of 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 trust receipts cash book and trust payments cash book are totalled to obtain the total receipts and total payments for the month. The following summary is then recorded in the chosen record:

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 trust receipts cash book. The bookkeeper/practitioner at month-end then totals the trust 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 trust receipts and the monthly total of trust payments are each posted (recorded) in a control account ledger. The receipts total will be added to the balance at the end of the last month and the total payments deducted. Alternatively, the balance of the control account can be updated after each receipt or payment is entered onto the ledger. Either method will result in a month-end trust cash book balance.

7. TRUST ACCOUNT DEPOSITS

Question:

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

Response:

Section 137 requires that trust money (other than cash) received by a law practice must be deposited into a general trust account as soon as practicable after receiving it unless the law practice has a written direction to deal with the money otherwise than by depositing it in the general trust account; the money is controlled money; the money is transit money; or the money is power money.

You may note that Section 137 states that the trust money must be deposited into the general trust account "as soon as practicable after receiving it." The Trust Accounts Department advises that pursuant to Section 137, the money should be deposited to the general trust account before the end of the next banking day after the day of its receipt, or, if that is not practicable, as soon as practicable after that day.

Section 139 provides that controlled money is to be deposited in the account specified in the written direction relating to the money as soon as practicable after its receipt.

Section 140 provides that transit money (other than cash) is to be paid or delivered as required by the instructions relating to the money within the specified period or as soon as practicable after its receipt.

Section 141 provides that power money (other than cash) is to be dealt with according to the power.

Section 142 provides that written direction money (other than cash) is to be dealt with according to the written direction or as soon as practicable after it is received.

Section 143 provides that all trust money received in cash (other than controlled money) is to be deposited in the general trust account as soon as practicable after its receipt, even if the law practice has a written direction to deal with it in some other way. Once deposited, the money may be dealt with in accordance with the written direction.

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(2) requires the deposit record to include:

(a) The date of the deposit;

(b) The amount of the deposit;

(c) Whether the deposit consists of cheques and/or cash and the amounts of each;

(d) For each cheque, the name of the drawer, the name of the ADI, the branch (or BSB number) on which the cheque is drawn and the amount.

Rule 37(3) requires that the trust deposit record must be made out in duplicate.

The person responsible for completing the deposit should ensure that the authorised ADI's 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 law practice ensures that the authorised ADI's receipt, that is the stamp and initials, are shown on the duplicate copy of the trust deposit record.

Question:

7.3. **Do the Rules permit the depositing of money by use of the "Quick Banking" style deposit system?**

Response:

The Rules do not preclude the use of this method of depositing trust 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 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 ADI (bank) cheques are extremely difficult to have cancelled and then reissued.

In the event that the "Quick Banking" style of depositing is used, the law practice must ensure that the trust deposit record is kept in duplicate (pursuant to Rule 37(3)) and that all the information required under Rule 37(2) is shown on the deposit record.

8. TRUST RECONCILIATION STATEMENT

Question:

8.1. **Why is the monthly trust 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 trust records) with the external trust 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 adjusting items 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 the month-end.

Other common types of adjusting items are:

(a) debit adjusting items – which includes payments from the trust account that have not been posted to the trust account records as at the end of the named month;

(b) credit adjusting items – which includes deposits to the trust account that have not been posted to the trust account records as at the end of the named month; and

(c) unpresented cheques.

Each month-end reconciliation statement should be reviewed by a principal of the law practice. The cause of any adjusting items, if not known, must be ascertained and corrected, if required. Adjusting items that represent deficiencies in the general trust account must be acted upon and corrected immediately they are identified.

Question:

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

Response:

The procedures for completing a trust reconciliation statement are:

(i) Ensure that all receipts and payments are entered into the trust account receipts and payments cash books prior to the month-end closure;

(ii) Total the trust account receipts and payments cash books to determine the closing cash book balance;

(iii) Obtain the month-end trust authorised ADI statement;

(iv) Compare the trust authorised ADI statement transactions with the entries in the trust account cash book:

1. <u>In respect of receipts</u>:

1.1 Tick entries that are common to the trust authorised ADI statement and the trust account receipts cash book;

1.2 List entries recorded in the trust authorised ADI statement that are not recorded in the trust account receipts cash book, appropriately headed. (Note: These items are commonly referred to as “credit adjusting items” and are subtracted from the month-end trust authorised ADI statement balance);

1.3 List items recorded in the trust account receipts cash book that are not recorded in the trust authorised ADI statement, appropriately headed. (Note: These items are commonly referred to as “outstanding deposits” and are added to the month-end trust authorised ADI statement balance).

Thoroughly investigate the items above in lists 1.2 and 1.3 to ascertain their nature and why they are included as an adjusting item. 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. <u>In respect of payments</u>:

2.1 Tick the entries that are common to the trust authorised ADI statement and the trust account payments cash book;

2.2 List the entries recorded in the trust authorised ADI statement that are not recorded in the trust account payments cash book, appropriately headed. (Note: These items are commonly referred to as “debit adjusting items” and are added to the month-end trust authorised ADI statement balance);

2.3 List the items recorded in the payments cash book that are not recorded in the trust authorised ADI statement, appropriately headed. (Note: These items are commonly referred to as “unpresented cheques” (or payments) and are subtracted from the month-end trust authorised ADI statement balance).

Thoroughly investigate the items above in lists 2.2 and 2.3 as to their nature and if necessary corrective action taken. Unpresented cheques older than 15 months from the date of issue are stale and, therefore, must be cancelled in the records of the law practice, before further action is taken.

3. Complete the reconciliation statement by commencing with the trust authorised ADI statement balance and adjusting this to reconcile with the trust account cash book balance by taking into consideration the different types of adjusting items noted above in points 1 and 2.

Note: Monthly reconciliation statements must be prepared within 15 working days of each month-end.

9. TRUST LEDGER ACCOUNT

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:

Rule 47(2) requires that the trust ledger account 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, pursuant to Rule 47(3) and (5):

- The date of the transaction (e.g. date of issuing the receipt, or date of payment, or date of journal entry) and, if different, the date of receipt of the money;
- Receipt/cheque/EFT number, journal reference, and transaction type;
- Particulars sufficient to identify the reason for the transaction;
- Name of the person from whom the money was 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;

- For payments by EFT, the name and number of the account to which the money was transferred and the relevant BSB number, and the name of the person receiving the benefit of the payment;

- For journal entries, the other trust ledger account reference, the name of the person on whose behalf the transfer was made and the matter description;

- The amount of the transaction; and

- The resulting balance of account arising from each transaction.

Rule 47(4) states that the transactions shown in the trust ledger account must be recorded in the order in which the transactions occur and must be recorded within 5 working days from the day the receipt was made out, the payment was made or the (journal) transfer was effected, as the case requires.

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) The law practice maintains 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. (Refer to Rule 49(4))

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. (Refer to Rule 49(3))

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?**

Response:

The accounting system should be designed to provide management information to the manager of the business. With respect to Rule 47(3)(c), a short sentence that clearly explains the reason for the transaction would normally be sufficient. How this information can be recorded is shown in the following examples:

For receipts - on account of costs and disbursements; on account of stamp duty; on account of barristers fees;

For payments by cheque or EFT - Supreme court filing fee; building report; distribution of an estate;

For transfer journals - transfer from a sale matter to a purchase matter 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 $900 in trust money on account of costs and disbursements, which is made up of $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 the individual trust 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 that a separate trust ledger account must be kept 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 ledger account. The client (who is the 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 by journal transfer, pursuant to Rule 46. The report fee should then be paid from the third-party matter account.

10. TRUST TRIAL BALANCE STATEMENT

Question:

10.1. How is the trust account "trial balance" referred to in the Rules?

Response:

The term "trial balance" does not exist in the Rules. Rule 48(2)(b) requires the law practice to prepare a statement reconciling the balance of the law practice's trust ledger accounts with the balance of the practice's trust account cash books.

As the above requirement effectively refers to a trust trial balance statement, the Trust Accounts Department considers the term "trust trial balance statement" is appropriate to distinguish it from the trust authorised ADI reconciliation statement.

Question:

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

Response:

The trust trial balance statement is used in an accounting system to ensure that the principle of double entry accounting has been followed correctly, which is demonstrated when it balances with the law practice's trust account cash books as at the end of each month. If the records do not balance, it means that there is an error or multiple errors in the record-keeping, which will warrant further investigation and correction. Law practices, particularly those with manual record-keeping systems, should be particularly careful when preparing the trust trial balance statement and other trust records in order to minimise the possibility of errors occurring. Examples of errors that may arise include incorrect calculations, posting an entry to the wrong side of the trust ledger account, and transposition errors in posting an entry (e.g. recording a $15.00 transaction as $51.00).

The trust trial balance statement shows the balance of each trust ledger account holding monies in the general trust account. As this includes any trust ledger accounts with debit balances, such deficiencies can be readily identified from a review of the trust trial balance statement and be corrected immediately. Trust trial balance statements produced from computerised systems will normally show the date of the last transaction of each trust ledger account, and any old balances or dormant balances can also be readily identified. Another advantage of trust trial balance statements is that they provide the name and matter description of each trust ledger account, and any miscellaneous or unusual trust ledger accounts holding monies in the general trust account are readily identifiable and can then become the subject of further review, if deemed appropriate.

Question:

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

Response:

The following procedures are generally more relevant when preparing a month-end trust trial balance statement using a manual record-keeping system. However, some procedures also apply to trust trial balance statements prepared from computerised systems:

(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. Such entries should

be entered progressively throughout the month, in accordance with Rules 44(3), 45(2)(b) and 47(4)(b);

(ii) Ensure all journal entries have been posted to the relevant trust ledger accounts;

(iii) Prepare the trust trial balance statement by listing the month-end balance of each individual trust ledger account, which must include the name, the reference number and the matter description of each ledger account. Trust ledger accounts showing Nil balances may be excluded from the trust trial balance statement. A statutory deposit account, if opened, should be included. This is normally included at the foot of the trial balance statement;

(iv) Add the trust ledger account balances and subtract the statutory deposit amount, if there is one;

(v) Compare the total of the trust trial balance statement 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 trust reconciliation statement), control account/cash book balance and the total of the trust trial balance statement should all agree, with a zero variance.

Question:

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

Response:

Rule 48(2)(b) requires the trust trial balance statement to show the following information:

- The month to which the trust 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 trust account cash book balance.

Question:

10.5. **Rule 48(2)(b)(i) requires that the trust trial balance statement show a comparison between its total and the balance of the practice's trust account cash books (reconciled trust account 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 and to demonstrate that the trust trial balance statement is in balance with the reconciled trust account cash book balance. A nil variance shown on the comparison demonstrates that the information shown in the trust trial balance statement, including the balances of each trust ledger account, is accurate. 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.

The comparison is normally shown below the trust trial balance statement. An example is as follows:

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

Total Trust Ledger Accounts	$_____
Less Statutory Deposit	$_____
Reconciled Trust Account 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 given to the person for whom or on whose behalf 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).

The exemptions are:

Pursuant to Rule 52(5) if:

The balance of the ledger account as at 30 June is zero; and

- no transaction affecting the account has taken place within the previous 12 months (Rule 52(5)(a)); or
- 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 53:

The following exemptions with respect to commercial or government clients also apply:

- 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;

- 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.

(Note: A commercial or government client is defined in Section 170(2))

Question:

11.2. **For which types of trust money am I required to issue trust account statements?**

Response:

Rule 52(1) requires that the law practice must give a trust account statement to each person for whom or on whose behalf trust money (other than transit money and written direction money) is held or controlled by the law practice or an associate of the law practice. Therefore, trust account statements must be issued for the following types of trust money:

- general trust money;

- controlled money;

- power money (where practicable);

- investment of trust money.

Question:

11.3. **The Rules require that a trust account statement is to be "*given as soon as practicable*" by the law practice to the person for whom or on whose behalf the money is held or controlled. How can I furnish the trust account statement?**

Response:

The terms "given" or "as soon as practicable" are not defined in the Act or the Rules. It is the Trust Accounts Department's view that the method of giving a bill to a client that is set out in 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 reflects the transactions in the trust ledger account, and the validity of the trust ledger account is generally not confirmed until the trust authorised ADI reconciliation statement and trust trial balance statement have been completed. These are required to be completed within 15 working days of the 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 the month-end records for June have been prepared.

A law practice's ability to give statements as soon as practicable after 30 June in each year will also depend on other factors including:

- the number of statements of accounts required to be sent;
- accounting facilities, including whether the law practice keeps the trust account records in manual or computerised form. (Note: The requirement to forward statements of account from manual record-keeping systems may be more onerous in comparison to statements that are generated from computerised systems);
- 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 keep brief particulars sufficient to identify the relevant transaction and any purpose for which the money was received.

When third-party cheques are received, a law practice should ensure, where possible, that copies of the cheques are retained. Copies of other relevant documentation, 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*".

Pursuant to the requirements of Section 143(1), it must be noted that transit money received in the form of cash must be deposited into the general trust account before the money is otherwise dealt with in accordance with the instructions relating to the money.

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. The Rules do not require the keeping of a transit money register (or anything similar).

Question:

12.3. **What happens if the law practice cannot pass on the third-party cheque, or the instructions have expired, or the cheque is no longer valid?**

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, a client provides the law practice with a cheque payable to Revenue NSW for stamp duty. It is later determined that the cheque is 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 the authorised ADI accepting the direction.

It should be noted that if the law practice fails to deliver a third-party cheque pursuant to the instructions received, this would constitute an irregularity which must be reported to the designated local regulatory authority (the Law Society Council) pursuant to Section 154(1). Such irregularities are to be reported in writing to the Law Society's Trust Accounts

Department as soon as practicable after the legal practitioner becomes aware of the irregularity, at tad@lawsociety.com.au . The written notification must be addressed to the Chief Trust Account Investigator.

13. POWER MONEY (MONEY SUBJECT OF A POWER)

Question:

13.1. **What is power money?**

Response:

Power money is defined in Section 129(1)(d) as trust money that is the subject of a power given to the practice or an associate of the practice to deal with the money for or on behalf of another person. The Trust Accounts Department advises that the power can include the authority to deal with the money.

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; or
- 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. (Note: The account cannot be "controlled money", pursuant to its definition in Section 128(1), because the law practice does not have exclusive control over the money in the account).

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(2). However, as there is normally only one ADI statement and one cheque book, the law

practices can by agreement, allocate the task of record-keeping to one law practice and ensure that the other law practice receives a copy of the 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 as a signatory to a bank account), whether alone or jointly, the practice is required to keep records in accordance with Rule 55(2).

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 (including relevant documents),

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 is referred to in Section 142(1). It provides that a law practice that receives a written direction to deal with trust money (other than cash) in a particular way must comply with that direction within the period specified in the direction, or otherwise, as soon as practicable after it is received.

Section 137(a) states that the written direction must be from "a person legally entitled to provide it", which directs the law practice to deal with the money other than by depositing it into the practice's general trust account. Rule 34 includes a similar definition for written direction money, which is: "Trust money that is received or held by a law practice, in respect of which the law practice has a written direction to deal with the money otherwise than by depositing it in a general trust account, and that is not controlled money."

The provisions of Section 143(1) require that written direction money received in the form of cash must be deposited into the law practice's general trust account before it can otherwise be dealt with in accordance with the direction.

The phrase "*a person legally entitled"* (to provide the written direction) is not defined in the Act. However, the operation of Section 137(a) provides that such a person may not always be the person on whose behalf trust money is received, and (for example) may be another person authorised to give binding written directions to the law practice with regard to trust money provided.

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:

Section 142(2) requires that 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. The Trust Accounts Department also advises that the law practice should keep a copy of the cheque to which the written direction relates.

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

Question:

14.3. **My legal practitioner friend told me that it is permissible under the Act 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 Act clearly provides in Section 129(1) that money entrusted to a law practice on account of costs and disbursements in advance of providing the services is trust money. Upon receipt, the money must be deposited into a general trust account or controlled money account in accordance with Section 137. Section 146 prohibits a law practice from mixing trust money with other money (unless authorised to do so by the designated local regulatory authority (the Law Society Council).

The client's written direction cannot change the character of the money from trust money to non-trust money. Therefore, the deposit of trust money in the form of costs received in advance to the law practice general (office) account would represent a breach of Sections 137 and 146.

15. CONTROLLED MONEY

Question:

15.1. **What is controlled money?**

Response:

Section 128(1) defines "controlled money" to mean 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 trust 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, pursuant to the requirements of the Act and Rules, are:

- Written direction from the client in regard to the deposit and withdrawal (Section 139(1) and (3));
- A controlled money receipt (Rule 62(2) and (4));
- Controlled money register (Rule 64(1) to (4));
- Withdrawal record (Rule 63(3) to 63(5));
- Record of controlled money movements (ledger format) (Rule 64(2) and (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(4) and (5)).

Question:

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

Response:

Rule 64(8) requires that the listing must be prepared within 15 working days after the 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 such cases, 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 one of the law practices would usually hold the ADI statements, 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 is deemed to have received money when the practice "*is given a power or authority to deal with the money for or on behalf of another person*", which is power money. The money in this account can be classified as power money for both law practices. This account cannot be considered to be controlled money for either law practice, because neither law practice nor one of its associates has "exclusive control" of the account (meaning exclusive signatory authority). "Exclusive control" of the account by a law practice is an essential component of controlled money, pursuant to the definition in Section 128(1).

In terms of record-keeping, if the two law practices are joint signatories to the account and there is only one ADI statement, the law practices can, by agreement, allocate the task of record-keeping to one law practice and ensure that the other law practice is provided with a copy of the records for the power money account, pursuant to Rule 55(2), at least monthly. It must be noted that an External Examiner's Report is required for power money accounts (except for trust money subject to a specific power pursuant to an electronic lodgement network operator's settlement scheme (such as PEXA)).

Question:

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

Response:

Yes. However, the legal practitioner must note Section 139(1), which states "As soon as practicable after receiving controlled money, a law practice must deposit the money in the account specified in the written direction relating to the money." It would follow that the relevant written direction received by the law practice pursuant to Section 139(1) would include a specific authority to deposit the trust money to a foreign currency account and not a general direction to deposit the money to an unspecified interest-bearing account.

The Trust Accounts Department also advises that the following records should clearly identify that the account is a foreign currency account:

- Controlled money receipt (Rule 62(4));
- Controlled money movement record (ledger) (Rule 64(3)); and
- Controlled money monthly statement - listing of accounts. (Rule 64(8)).

16. TRUST MONEY RECEIVED IN CASH

Question:

16.1. **What are the requirements according to the Act and the Rules in relation to trust money received in cash?**

Response:

Trust money (other than controlled money) 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 depositing it otherwise than 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. Once deposited, the money may be dealt with in accordance with the written direction.

Controlled money received in the form of cash must be deposited in 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. (Section 143(1))

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. (Section 141(1))

A law practice is required to report significant cash transactions of AUD $10,000 or more, or the foreign currency equivalent, to Austrac under the *Financial Transactions Reports Act 1988 (Cth)*. (Note: This legislation applies only to cash deposits that are effected by the law practice and not by any external party, such as a client). 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. This legislation extends to all accounts maintained by the law practice that hold trust money, as well as the general (office) account of the law practice.

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 Statutory Deposit Calculator published on the Law Society of NSW Website https://www.lawsociety.com.au/practising-law-in-NSW/trust-money-and-fidelity-fund/statutory-deposits/calculator

Please also refer to the link below for the Statutory Deposit formula, which is contained in Clause 10 of the Legal Profession Uniform Law Application Regulation 2015:
https://www.legislation.nsw.gov.au/#/view/regulation/2015/330/part3/div1/sec10

(Note: The applicable period, as it relates to Statutory Deposit calculations, is currently referred to in Clause 12(1) of the legislation as meaning a period of three months ending on 31 March, 30 June, 30 September or 31 December).

Question:

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

Response:

If your law practice is unable to pay the minimum deposit, you can seek permission from the Trust Accounts Department to pay a lesser amount. For permission to maintain a portion of a statutory deposit, you will need to:

(i) Download and complete the form titled "Request for Determination of Statutory Deposit" from the Law Society of NSW Website https://www.lawsociety.com.au/practising-law-in-NSW/trust-money-and-fidelity-fund/ statutory-deposits.

Please ensure that all fields on this form are completed, which includes the amount that you determine is appropriate to be held on statutory deposit and specific information as to how you have arrived at this amount (in the box titled "Other information which may be relevant to the determination"); and

(ii) Submit the completed form to the Law Society's Trust Accounts Department at tad@lawsociety.com.au.

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. The reporting period (i.e. the financial year) is from 1 April to 31 March.

Section 155(4) provides that if the only trust money received or held by a law practice during a financial year is transit money, the practice's trust records in respect of that year are not required to be externally examined. In addition to transit money, a law practice is not required to have its trust records externally examined if they have only received or held trust money subject to a specific power pursuant to an electronic lodgement network operator's settlement scheme (such as PEXA) and/or trust money subject to a written direction.

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 conducted, pursuant to Rule 68(3). The External Examiner's Report must be lodged with the designated local regulatory authority (the Law Society Council) within 60 days after the end of the period to which the Report relates, pursuant to Rule 68(4).

If practitioners are unsure as to whether their law practice is required to submit an 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 External Examiner's Reports?**

Response:

Yes, provided both law practices received or held at least one of the following four types of trust money during the reporting period: general trust account money; controlled money; power money excluding power money pursuant to an electronic lodgement network operator's settlement scheme (such as PEXA); and investment of trust money. The report is a law practice-based report and, as a practitioner has been the principal (whether equity or salaried) of more than one law practice during the reporting period, an External Examiner's Report must be lodged for each law practice.

If one or both of the law practices were not required to submit an External Examiner's Report for any financial year, that law practice would still be required to submit the Law Practice – Part A statement, which discloses the types of trust money (if any) that were held by the law practice during the reporting period.

Question:

18.3. **Who can be appointed as an external examiner?**

Response:

Rule 65(2) designates the classes of persons who may be appointed as external examiners of law practices, which are:

- Members of CPA Australia who holds a current Public Practice Certificate; or
- Members of the Institute of Chartered Accountants in Australia and New Zealand who holds a current Certificate of Public Practice; or
- Members of the Institute of Public Accountants who holds a current Professional Practice Certificate; or
- Persons registered as auditors under Part 9.2 of the Corporations Act 2001 (Cth); or
- Employees or agents of the designated local regulatory authority,

and who have successfully completed a course of education approved by the Legal Services Council.

Question:

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

Response:

A database of external examiners is available on the Law Society's website at the following link, which is titled "Find an External Examiner": https://www.lawsociety.com.au/practising-law-in-NSW/trust-money-and-fidelity-funds/external-examiners/find-external-examiner

An external examiner can be located by first name, surname, suburb, postcode or region.

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 Council) 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.

These events must be reported to the designated local regulatory authority (the Law Society Council) by completing the form "Notification of appointment or cessation of External Examiner." The form can be found on the Law Society website at the following link:

https://www.lawsociety.com.au/sites/default/files/2018-03/Notification%20of%20appointment%20or%20Cessation%20EE.pdf

This completed form must be sent to the Law Society's Trust Accounts Department at tad@lawsociety.com.au.

Rule 66(3) provides that the law practice may terminate the appointment of an external examiner with the prior approval of the designated local regulatory authority (the Law Society Council). This can be done by completing the form "Request for Approval for Termination of External Examiner." The form must disclose the reason(s) for the termination in the space provided. The form can be found on the Law Society website at the following link:

https://www.lawsociety.com.au/sites/default/files/2018-03/request%20for%20termination%20approval.pdf

This completed form must be sent to the Law Society's Trust Accounts Department at tad@lawsociety.com.au . The legal practitioner should note that the he/she cannot appoint a new examiner, pursuant to the process set out under Rule 66(2), until termination of the previous examiner is approved by the designated local regulatory authority (the Law Society Council).

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 Council). However, the law practice must ensure that the appropriate level of assistance is provided to the examiner during the conduct of the examination, in accordance with Section 147(2)(c). This includes the prompt provision of the requested records, documents and information, so as to enable the examiner to complete the examination and lodge the Report by the due date.

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 currently 31 May each year, for the reporting period ended 31 March. If an examiner or law practice believes they will not be able to meet the lodgement date, then they should contact the Law Society Trust Accounts Department for further discussion.

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 a 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 the "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 he/she may review the External Examiner's Report ("the Report"), and/or the examiner's working papers to ascertain whether or not the matters were reported or should have been reported by the external examiner.

Therefore, it is expected that 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 External Examiner's Checklist and the extent of the tests conducted;
- the tests have been completed satisfactorily; and
- the results have been communicated to the law practice.

The external examiner is also 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; and
- can be conveniently and properly externally examined;

and submit this opinion to the Law Society Council, being the designated local regulatory authority.

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. In this respect, trust account investigators are allocated law practices for immediate investigation based on Reports that disclose the most serious breaches, including major deficiencies in trust records that had not previously been reported to the Law Society's Trust Accounts Department.

The Rules 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 is impossible to prescribe a completely standard accounting system. The Rules recognise this and call upon the external examiners 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 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.