

PRACTICE BRIEFING

Checklist for practices considering opening a trust account

This Practice Briefing has been prepared for those law practices intending to open a trust account. It is intended to provide guidance and information on best practices and does not constitute legal advice.

INTRODUCTION

Information regarding trust account management is available on the Law Society website at <http://www.lawsociety.org.nz/for-lawyers/regulatory-requirements/trust-account-management>

A trust account is defined in section 6 of the Lawyers and Conveyancers Act 2006 ('the Act') as meaning, in relation to a practitioner or incorporated firm, "any trust account at a bank in New Zealand that is a trust account in the name of that practitioner or incorporated firm". Trust money means all money that is, when received by a practice, subject to the provisions of section 110 of the Act.

The other Practice Briefings referred to in this briefing can be located at: <http://www.lawsociety.org.nz/practice-resources/practice-briefings/>

TRUST ACCOUNT REQUIREMENTS

You must be practising on your own account as a barrister and solicitor and meet the criteria in regulation 19 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 before opening and operating a lawyer's trust account.

Determine the type of accounting system you will use, whether manual, computer or bureau (see the Lawyers Trust Accounting Guidelines (LTAG) about computer systems. These are available for downloading from the Law Society website). Please do not hesitate to contact the Law Society Inspectorate for guidance about your trust accounting needs. An Inspector can be contacted via email at inspectorate@lawsociety.org.nz,

It is recommended that a practice operates a trust account using an appropriate software package, rather than a manual system.

Open a designated trust bank account (in the name of the practice) with a bank in New Zealand

(including a related Interest Bearing Deposit facility), and advise the New Zealand Law Society that you have opened the account. When opening such an account it is useful to direct the bank to sections 299 to 303 of the Lawyers and Conveyancers Act 2006. The bank must record the account as a lawyer's trust account.

Ensure that the trust account cheque book meets the requirements (refer to the LTAG for guidance) – trust account cheques are to be printed with a restrictive crossing, “Not Transferable”, and without the words “or bearer”.

Open a separate bank account for the law practice (if you do not already have one). The trust account number (or suffix) should differ from the practice account number to avoid confusion.

ESSENTIAL TRUST ACCOUNTING RECORDS

Check that your intended trust accounting system is appropriate (Inspectors can assist). You may also wish to check with other practices that the software you are intending to utilise is reliable and user-friendly.

Check that the trust accounting software can produce acceptable receipts as these are required in certain circumstances. If it cannot, obtain receipt books from an approved printer. A list of approved printers is available from the Law Society's Inspectorate.

Implement the following:

- » A central file of electronic payments (refer to the LTAG).
- » A journal book or equivalent (refer to the LTAG).
- » A payment requisitioning system.
- » A record of valuable property (held on clients' behalf).
- » A register of trustees, executors & attorneys (recommended).
- » A record of invoices/fees.

RECONCILIATIONS

Refer to the LTAG for a list of the reports underpinning end of month certifications (see below) which must be retained. These materials include:

- » The cashbook summary/bank reconciliation.
- » Photocopy or printout of end of month bank statement for the trust bank account.
- » Unpresented cheques listing, detailing cheque numbers, dates, payees and amounts (if any).
- » Details of all other adjusting items, if any (including copies of relevant bank statements with key balances highlighted).
- » Listing of client balances (credits should, of course, in total equate to the cash book balance).

And separately for each deposit facility:

- » Bank reconciliation/control report.
- » Printout/photocopy of month end bank statement/schedule for each investment account.
- » Practice listing of deposit account balances, often called a client trial balance.

You need to retain each end of month reconciliation and supporting documents. If you decide to utilise a hardcopy system, it is recommended that the practice uses a ring binder folder with a series of monthly indices. Each set of month end workpapers occupies the relevant month in that folder. This allows a quick checking that balances are correctly carried forward from one month to another, or that adjusting items have cleared in the succeeding month, etc. If you are using an electronic filing system, it is recommended that your documentation is in a PDF format and filed with an appropriate and identifiable naming protocol. Whichever method you use, it is essential that an external reviewer can see that the documents have been reviewed by the appropriate person (often by signature).

INTEREST BEARING DEPOSIT (IBD)

You have a duty to ensure client monies earn interest wherever practicable: see section 114 of the Act. Consider whether balances will generate sufficient interest to cover the attendant administration load to justify being placed on IBD. Discuss this with your client or include it in your practice's terms of engagement.

Once you start using an IBD account, please ensure that the client name recorded on the IBD is correct and matches your own records. Names are indicative of ownership. The composition of the two lists should be checked periodically.

The Automatic Exchange of Information, the Common Reporting Standard (AEOI/CRS), and Foreign Account Tax Compliance Act (FATCA) have ramifications for IBD monies, including due diligence procedures that should be carried out prior to placing monies on IBD.

Please refer to the practice briefings on the NZLS website. It is recommended that you familiarise yourself with these regimes and attendant requirements.

CONTROLLED ACCOUNTS

A controlled account is an account where a lawyer has, in the course of his or her practice, control of money for or on behalf of a client. An example of this is where a lawyer holds a power of attorney for an impaired client and makes payments on behalf of that client from the client's bank account. The bank account is under the control of the lawyer. These must be administered so that the practice accounts properly to the client and keeps records, both to the same standard as required for a practice's trust account.

It is recommended that a controlled account should form part of the monthly trust account reconciliation as a separate control account. Practices may wish to consider if it is appropriate to transfer the monies from the controlled bank account into the practice's trust account. Please refer to the Practice Briefing Looking after a client's bank account available on the Law Society website.

PAYMENTS FROM THE TRUST ACCOUNT

The key legislative obligations relating to payments are set out in regulations 11 and 12 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008:

11(1) “It is the duty of every practice required by section 112(1) of the Act to keep records in respect of trust accounts to do so in such a manner as to enable them to be conveniently and properly reviewed by the inspectorate. “

And, 12(6) “A practice may make transfers or payments from a client’s trust money only if-

- (a) the client’s ledger account has sufficient funds and they are available for that purpose; and
- (b) the practice obtains the client’s instruction or authority for the transfer or payment, and retains that instruction or authority (if in writing) or a written record of it; and
- (c) payments to a third party are made in a form that permits the crediting of the money only to the account of the intended payee”.

Accordingly, for inspection purposes, your filing systems must be capable of retrieval of the salient details ie, authorities, account nominations and the bank reports. A written record would be in the form of a formal file note if the instruction is verbal. It is recommended that this is confirmed in writing to the client.

Ensure that all payments are referenced to client instructions and you hold robust evidence of the payee bank account numbers. Emails are at risk of scamming or hacking and should be verified before being acted upon even when an email chain is being followed. Handwritten bank account numbers are not evidentially robust, as they are subject to a legibility risk, and thus are not recommended. Many practices keep copies of bank batch reports with evidence of client instruction and bank account numbers in a central file as well as a copy on the client file.

Additionally, in the cashbook there should be reference in the narration to the authority underlying the payment. This could be “[client name] email [date] instructions to pay (detail) which was confirmed via telephone contact” or suchlike. You should ensure the narrations show the payee and reference the client authority.

JOURNALS

It is recommended that you operate a journal book or similar requisition system to record journal transfers.

All inter-client journals should be able to be referenced back to client instructions or authority. The only exception is an error correction. All inter-client transfers must be capable of reference to authority. If such authority is not readily implicit, explicit authority is required or a written record of it.

Where applicable, there should be reference in the narration to the authority supporting the journal. This could be “sale & purchase agreement dated ...” or “company or trustee resolution dated ...”.

DEDUCTION OF FEES FROM TRUST ACCOUNT

The Inspectorate's recommended approach is to request that clients explicitly approve fees before they are taken by deduction. If you rely on the less preferred option (via a default authority conferment clause in your client care materials) you may be required to evidence not only that the client/s has been sent the invoice but also that the client care materials have been received and accepted by the client.

Prior to deducting fees, you need to comply with regulation 9. Your fee invoices must be dated and show the recipient address (postal or email). The fee element and disbursements must show separately on the invoice. Disbursements can only be charged at the actual cost to an arm's length third party, and the paid invoice should be provided to the client with your practice's invoice. Overhead recovery fees (photocopying, phone, stationery, etc) can be charged but these must be described as fees not disbursements and noted in your client care and service information prior to being charged. Further information regarding invoicing is available on the Law Society website.

REGULAR REPORTING TO THE LAW SOCIETY - REGULATION 17

As Trust Account Supervisor you will be required to complete an online certification monthly from when you open a trust account. Please ensure that the certificates are submitted as follows:

Monthly certificate: By the 10th working day of the new month (15th working day in January).

Quarterly certificate: By the 10th working day of the new month (15th working day in January).

Please note that regional public holidays are counted as a working day for the purposes of regulation 17. The Law Society website has some FAQs at <http://www.lawsociety.org.nz/for-lawyers/regulatory-requirements/trust-account-management/frequently-asked-questions-about-trust-account-certificates>. Alternatively, you can call the Inspectorate on 04 463 2974 for assistance.

REGULAR REPORTING TO CLIENTS - REGULATION 12(7)

The regulations require each practice to provide to each client for whom trust money is held a complete and understandable statement of all trust money handled for the client, all transactions in the client's account, and the balance of the client's account:

- » at intervals of not more than 12 months; and
- » in respect of all transactions that are not completed within 12 months, at intervals of not more than 12 months; and
- » in respect of all other transactions, promptly after or prior to the completion of the transaction.

Failing to meet this requirement is a common fault and the cause of client complaints.

Most modern software packages can provide a listing of balances that have been held for longer than 12 months and ledger reports that can usually serve as a proxy reporting statement. The Inspectorate recommends that practices review such 'stale balance' reports periodically and check that reporting is being completed and that instructions warrant the ongoing retention of such monies.

The Inspectorate also recommends that practices send a copy of the ledger associated with all IBD balances to accompany the RWT certificate sent around April/May each year.

FILES AND FILING SYSTEMS

Decide if you want to utilise a hardcopy or electronic filing system. Electronic files are increasingly being used by practices.

Whatever format is used, files must be able to be conveniently and properly reviewed by the Inspectorate. Files must be retained for at least six years from the date of the last transaction. Please refer to the opinion regarding ownership and retention on the Law Society website.

CLIENT CARE AND SERVICES INFORMATION/ ENGAGEMENT DOCUMENTATION

If you have not done so already, establish forms and procedures to ensure compliance with Rules 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 – eg, letters of engagement, provision of information to clients, etc. Templates are available on the Law Society website.

IT

Consider issues such as passwords, access levels, remote access and back-ups of the trust account and records.

The following is an extract from the generic guidance provided by the Government agency CERT. Full detail is available at: <https://www.cert.govt.nz/businesses-and-individuals/guides/simple-steps-to-cyber-security/get-started-cyber-security/>

1. Back up your data.
2. Keep your operating system and your apps up-to-date.
3. Choose unique passwords.
4. Turn on two-factor or multifactor authentication.
5. Be creative with the answers to your account recovery questions.
6. Be cautious when you're using untrusted networks and free wi-fi.
7. Install an antivirus and scan for viruses regularly.
8. Be smart about social media.

9. Don't give out personal information online unless you know who's asking for it and why.
10. Always check your bank statements.

Expert advice is recommended.

ANTI-MONEY LAUNDERING AND COUNTERING FINANCING OF TERRORISM ACT 2009 (AML/CFT)

Lawyers will be reporting entities under AML/CFT from 1 July 2018. The Law Society has prepared some information in relation to this and it is recommended that you read it.

For trust accounts, the Law Society recommends that practices only provide their trust account number to those who need it, to avoid being inadvertently used for money laundering. An example of how the trust account could be used in this way is that funds could be 'accidentally' deposited into the practice trust account and then the practice contacted about the 'error' and asked to refund the monies to a different account.

PROCESSES

It is recommended that you ensure all processes are documented.

REVIEW INSPECTIONS

Practices opening a new trust account should expect a review to be conducted by the Law Society Inspectorate within the first six months of commencement.

The principal purpose of this first review is constructive - to identify any inadvertent non-compliance and rectify any omissions or weaknesses. You will be contacted with a request for information to be provided prior to an Inspector visiting the practice.

If you need any assistance or have any questions before or after that visit however please do not hesitate to contact your local inspector/s.

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Information in the Practice Briefing series is provided by the Law Society as a service to members. This briefing is intended to provide guidance and information on best practices. Some of the information and requirements may change over time and should be checked before any action is taken.

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