

Releasing Money from Trust Guidelines

Trust Money:

Broadly, trust money is money entrusted to a law practice in the course of or in connection with the provision of legal services by the practice, for or on behalf of another person.

Who is trust money held for?

It is helpful to think of trust money as having an objective when it is paid into a trust account. It is money held for the benefit of the person or persons *on whose behalf* the money is received. It is not the property of, nor for the benefit of the practitioner. Accordingly, trust money can only be paid at the direction of the person or persons *on whose behalf* it is held.

It can sometimes be difficult to determine *on whose behalf* a firm has received trust money as the person who has paid the money into trust is not necessarily the person *on whose behalf* or for whose benefit that money is held.

As such, the client may not be the person *on whose behalf* trust money is held and cannot direct how the money is to be paid.

It is strongly recommended that in such situations a practitioner should obtain written authority from the outset as to the purpose of any monies held in trust, and for whom they are being held, to avoid any potential issues arising.

In determining *on whose behalf* money is held in trust, a practitioner must have regard to the particular circumstances of each matter, including:

- (a) whether the money was paid by the client or a third party; and
- (b) for what purpose the money was held, including whether the money was held pursuant to an agreement, undertaking or court order.

There may also be circumstances where a practitioner cannot contact the person *on whose behalf* they hold money in trust. Without that person's instructions, the practitioner is unable to unilaterally disburse the money. It may be necessary to obtain an order of the court or determine whether the practitioner is able to pay the trust money into Unclaimed Monies.

Circumstances may also arise where a practitioner can apply trust money towards legal costs owing. A practitioner or law practice may do any of the following, in relation to trust money held in a general trust account for a person –

- (a) exercise a lien, in accordance with the provisions of the *Legal Profession Act 2004*;
- (b) withdraw money for payment to the practice's office account for legal costs owing to the practice, in accordance with the provisions of the *Legal Profession Act 2004* and the *Legal Profession Regulations 2005*;
- (c) after any deductions for legal costs properly owing to the practice, deal with the balance as unclaimed moneys, complying with the relevant provisions of the *Unclaimed Money Act 2008 (Vic)*.

Example 1: Money held for two parties

- 1.1 You hold money in trust from the sale of the former matrimonial home *on behalf* of both the husband and wife. Final Orders have not been made and your client, the wife, instructs you to release half of the trust money to her.

Even though the wife is your client, the money you hold is held on behalf of both the wife and husband. As the amounts that each the wife and husband are entitled to have not been determined, you are unable to release the money to the wife, without the agreement of the husband.

Example 2: Undertaking or agreement

- 2.1 You act for the purchaser in the sale of property. An amount of purchase money is withheld in your trust account, pending the completion of property maintenance by the vendor, within 2 weeks of the signing of sale contracts. You hold the trust money *on behalf* of both the purchaser and the vendor until the terms of the agreement have been satisfied.

Once the terms of the agreement are satisfied, you hold the money on behalf of the vendor and can only release it upon the vendor's instructions. It may be prudent to notify the purchaser before releasing the money.

If a dispute develops regarding the satisfaction of the agreement or undertaking, you may require an Order of the Court to determine whom to release the money to.

Example 3: Third party payments

- 3.1 A third party non-client pays money into trust for your client to cover disbursements. At the end of the matter, a credit balance exists in the trust ledger. Having regard to the circumstances of each matter:
- (i) the money may be held on behalf of the client; or
 - (ii) the money may be held on behalf of the third party non-client.

Even though the money was paid into trust by the third party for the purpose of use by your client, you may be holding the money in trust on behalf of the third party to be used at their direction in the payment of your client's disbursements.

Example 4: Court Order

- 4.1 You purchase a firm and find that the firm had been holding a large sum of trust money on behalf of a former client from 10 years previously. The money had been paid pursuant to a Court Order pending resolution of a dispute. You are unable to locate the former client and your review of the file indicates that no further action had been taken with regards to the dispute.

As there is no determination of "on whose behalf" the trust money is held, and the Court had ordered the firm to hold the trust money, you will require an Order of the Court to authorise the release of money from your trust account.

Example 5: Payment of professional fees

- 5.1 Your client paid money in advance into your trust account, for the purpose of payment of your professional fees and disbursements. At the end of the matter, your client instructs you to release the entire amount back.

If you had oral or written authorisation from your client (which includes a term in your retainer/cost agreement), you may withdraw the money for your fees and disbursements, subject to the provisions of the Legal Profession Act 2004 and Legal Profession Regulations 2005. If the authorisation was given orally, this authorisation must be reduced to writing within 5 working days after the law practice effects the withdrawal in accordance with the provisions of the Legal Profession Act 2004.

Example 6: Claiming a lien

- 6.1 Your client has outstanding professional fees owing to you and you still hold money in trust relating to the matter. Your client instructs you to release the money you hold.

If you are satisfied that the money is held on behalf of the client and that a lien is properly exercisable, you may hold a lien over the trust money for an amount that will satisfy your professional fees. The remainder must be paid to your client, at their direction.

The lien can only be held subject to provisions of the Legal Profession Act 2004 and the Legal Profession Regulations 2005.

How can we help you?

Visit the Ethics Department's website at:
www.liv.asn.au/Practising-in-Victoria/Ethics.

These are guidelines only and do not have the force of law. A practitioner must comply with the *Professional Conduct & Practice Rules 2005*, *Legal Profession Act 2004*, *Legal Profession Regulations 2005* and *Unclaimed Money Act 2008* (more specifically section 3.3.14 of the *Legal Profession Act 2004* and regulation 3.3.34 of the *Legal Profession Regulations 2005*).

To discuss concerns about releasing money from trust, contact the Law Institute's Ethics Department on 9607 9336.

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