

A matter of trust

There has been another wave of attempts to elicit funds from trust accounts operated by legal practitioners. These attempts are nothing new to the Society and are on the increase.

The current trend involves the criminal offence of dishonest dealings with documents, a practice that discretely tests the internal processes, controls and knowledge of firms in the hope that weakness or failure will yield financial gain for the criminal.

The most recently reported activities involve unwitting practitioners being engaged by clients via email or the Internet. With weak or no risk management practices in relation to client due diligence, the firm or practitioner may simply provide their letter of engagement/retainer agreement without any customer identification, or may accept an uncertified photocopied document as stand alone confirmation of client identity and proceed with the matter.

Most cases involve instructions from a 'client' seeking to recover a debt. In all of these cases we have come across to date, the so-called 'debtor' has sent to the practitioner a cheque or bank draft for the amount being sought prior to any legal work being undertaken and in some cases, even before a letter to the debtor has been drafted.

The trouble arises when the 'debtor's' bank draft or cheque is paid into the practitioner's trust account and a transfer to the 'client' of the appropriate balance is then processed by the practitioner. In the cases reported to date, substantial payments have been received by way of bank cheque or draft which has been dishonoured as a forged or counterfeit instrument. In some cases, due to weakness in the legal practitioner's internal trust accounting controls, the payment to the 'client' has been effected prior to notification of the dishonour (which can take up to six weeks). This occurs at great expense to the practitioner who is required to immediately make good the resulting deficit in the trust account.



While some cheques/drafts are crude and easily detected, the majority are sophisticated and appear legitimate.

In addition to adopting proper client due diligence to ensure that you are dealing with bona fide clients, it is critical that proper banking practices are adhered to so that drawing against a forged cheque does not occur.

Historically it has been recommended that overseas cheques/drafts are banked on a 'collection' basis rather than on a 'negotiation' basis to avoid any loss as a result of currency conversion variations if the payment is subsequently dishonoured.

However, the risks accepted by a practitioner agreeing to the bank's terms and conditions at the time of requesting 'collection' of an overseas cheque/draft may not be fully understood. It is possible that when banking on a 'collection' basis the practitioner may in fact be accepting that any of the items being deposited may be dishonoured at any time by the overseas bank, including after the date that the overseas bank allows your bank to deal with the cheque proceeds.

If this happens, the practitioner may be accepting liability to reimburse the bank the full amount of the dishonoured items/s, plus the amount of any adverse exchange rate variations, plus any overseas bank charges incurred by the bank in respect of the transaction and/or any interest incurred that may result in the amount being debited

being greater than the amount originally credited to the trust account.

The practitioner may also be accepting that the selling rate applicable on the day of the advice/receipt of dishonour will apply and that the bank may debit the original account (being the trust account) the amounts that are required to be reimbursed to the bank under that clause.

It is strongly recommended that overseas cheques/drafts are no longer accepted payment instruments for deposit into the trust account on any terms. Instead, payments from overseas accounts should only be accepted by electronic funds transfer (using 'real time gross settlement') thus reducing the risk of loss as a result of currency conversion variations and internal failures regarding cheque clearance.

Any actual or suspected attempts to fraudulently elicit funds from a legal practitioner trust account should be reported to SAPOL. Practitioners should be aware that the failure to make such a report to SAPOL may not only hinder wider investigations into criminal activity, but could also have implications from professional indemnity and ethical perspectives. It is for this reason that we strongly recommend that reports are also made to the Professional Standards and Law Claims units of the Society.

For further information or assistance please contact Professional Standards on 8229 0229 or at profstds@lawsocietysa.asn.au. B