

A DEPOSIT TO YOUR TRUST ACCOUNT IS NOT THE FINAL STEP: Confirm Available Funds



A MESSAGE FROM THE AUDIT DEPARTMENT

Have you ever made a deposit to your personal bank account and noticed on your deposit confirmation slip or screen that there are two different balances provided for your account? One balance is the funds available and the other is the total funds in the account. If you had \$100 in your account before depositing a \$400 cheque moments ago, your slip or screen would display something like this:

Funds available: \$100
Total balance: \$500

Why the difference? The savings institution has placed a hold on your deposit, preventing you from withdrawing or otherwise transferring the \$400 until the instrument has cleared the banking system. This is a common occurrence for all types of personal and business accounts, including trust accounts. See this [LawPro article](#) for further details.¹

In a lawyer's trust account, the dollar amounts are higher. Imagine that the confirmed available funds in your trust account is \$100,000 of client A's money, and your new deposit was \$400,000 for client B's money.

CONSIDER THE FOLLOWING SCENARIOS:

¹ Note that article subsection "Endorsement No.7 - Limited Trust Account Overdraft Liability Coverage" is specific only to members covered under an Ontario LawPro policy.

SCENARIO 1:

Trust Cheque for \$15,000 written before funds available

If you were to write a trust cheque for \$15,000 from client B's money *before the \$400,000 has become available funds*, you have just used client A's money for the \$15,000 payment for B's matter. The Law Society requires, for each trust disbursement, that funds be confirmed to be available before they are disbursed. If you do not have confirmed available funds before disbursing funds for the matter, you have breached your duty to care for your client's property as a careful and prudent owner would when dealing with like property, as required by rule 3.5-2 of the *Code of Professional Conduct*. Each client who provides you with trust money is trusting you to not use their money for any other purpose. Acting as a careful and prudent owner would, you cannot use one client's money to bridge another client's transaction during the bank's hold period.

SCENARIO 3:

\$400,000 instrument was fraudulent

Consider if that \$400,000 instrument you deposited was fraudulent and is later returned. **Any** cheque you wrote against the \$400,000 instrument before it was returned is now a shortfall of the same amount in your trust account that you are responsible to remedy forthwith (rules 5-44(1)(e) and (g)).

SCENARIO 2:

Trust cheque for \$380,000 written before funds available

What if you instead wrote a trust cheque for \$380,000 from client B's matter before the \$400,000 has become available funds? As with scenario 1, you have just used client A's money for the payment. In addition:

- Your savings institution would return the \$380,000 cheque for non-sufficient funds ("NSF") since only \$100,000 was available funds;
- Also similar to scenario 1, you would have breached rule 3.5-2 of the Code, and your savings institution would typically charge an NSF fee which, if it was charged to the trust account, would breach financial accountability rule 5-44(1)(g) since your trust account no longer has a sufficient balance to meet all of the firm's obligations; and
- The recipient of the \$380,000 cheque would incur time and perhaps bank fees of their own as a result of your cheque being returned as NSF, resulting in more time and likely costs for your firm.

Confirm Available Funds

Prior to disbursing any trust money on any matter or making a transfer between matters, you must ensure sufficient money is held in trust for the matter. While this starts by checking the balance in the client trust ledger, it doesn't end there.

A firm must confirm the funds to be available, by:

- checking the client trust ledger;
- ensuring the receipt has been deposited to the pooled trust bank account;
- investigating any 'red flags' that may occur at any point in the confirmation process; and
- only initiating a payment from the trust account once one of the below has occurred:
 - o The deposited funds have specifically been confirmed in writing by your savings institution as having been cleared; or
 - o The deposited funds have been held long enough to comply with the firm's confirmed available funds policy, which was determined for receipts of paper instruments or electronic funds through consultation with your savings institution.

While the confirmed available funds policies and procedures of the firm are determined by the trust account supervisor, it is the professional responsibility of each lawyer in the firm to comply with the policy.



PREVENTION

A trust account supervisor is responsible for, among other things, the controls in relation to the operation of firm's trust bank accounts. Ensuring appropriate hold policies is a control element that helps ensure compliance with Law Society rules and safe handing of all clients' trust money. How does your trust account supervisor ensure your firm is on-side of the Law Society requirements and avoid the other troublesome, time-consuming and likely costly issues that arise?



STEP 1:

Get accurate data by talking to your savings institution for paper instruments (personal cheques, certified cheques, bank drafts). What is the hold period on any instruments you deposit and does it vary based on:

- o The type of instrument?
- o Dollar amount?
- o Whether or not the instrument being deposited is a lawyer trust cheque?
- o Savings institution where the instrument originated?

STEP 2:

While you're at it, ask your savings institution about various electronic payments the firm receives. Electronic funds transfer is a broad concept with different types of payments and potentially different clearing times. Learn the difference among them so you can make informed policies.

STEP 3:

After talking with your savings institution about various paper and electronic payments, review your existing firm policies and practices and incorporate any necessary changes to ensure your processes are designed to comply with Law Society rules and requirements.

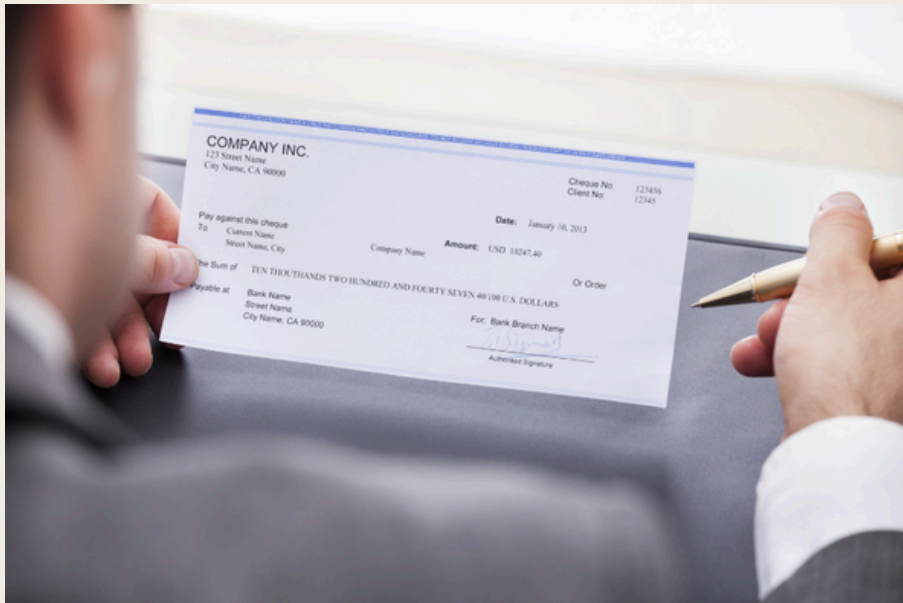
STEP 4:

Diarize for future follow up with your savings institution some time down the road – perhaps each year. Changes are not always communicated directly to account holders and you don't want to miss one.

BUT THIS DOES NOT APPLY AT MY FIRM BECAUSE...

Do you feel this won't happen to you, since:

- 1 You went through preventative steps when you initially set up your trust account?** Unless you have gone through this exercise in 2025, we recommend you do it again. Many savings institutions have changed their hold policies lately and several Manitoba law firms have found out the hard way by having trust cheques returned for insufficient funds.
- 2 You have a big balance in your trust account?** Firms with large balances in their trust accounts are not immune to savings institution hold policies or policy changes. While your trust cheque is unlikely to be returned NSF due to the substantial funds available, using other clients' money—however brief—still constitutes a violation. So, even large firms must ensure they follow the preventative steps.



Unless firm policies and practices:

1. reflect current bank hold periods for all types of paper instruments and electronic transactions, and

2. are **adhered to** by all firm staff,

other clients' money is being inappropriately disbursed.

**It all
comes
down to
this...**

The bottom line is that this impacts **all firms who handle trust money**, no matter the balance in the trust account or number of years the trust account has existed. A law firm hold policy for all types of deposits to the trust account, designed with input from your savings institution and reviewed regularly, is your best way to ensure you are not disbursing other clients' money.

While the trust account supervisor designs control processes for compliance, it is the professional responsibility of each lawyer in the firm to follow the controls in place, each and every time.