

Lawyer Trust Accounts: Is there a Better System?

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**Lawyer Trust accounts: Is there a
better system?**
A Dutch perspective

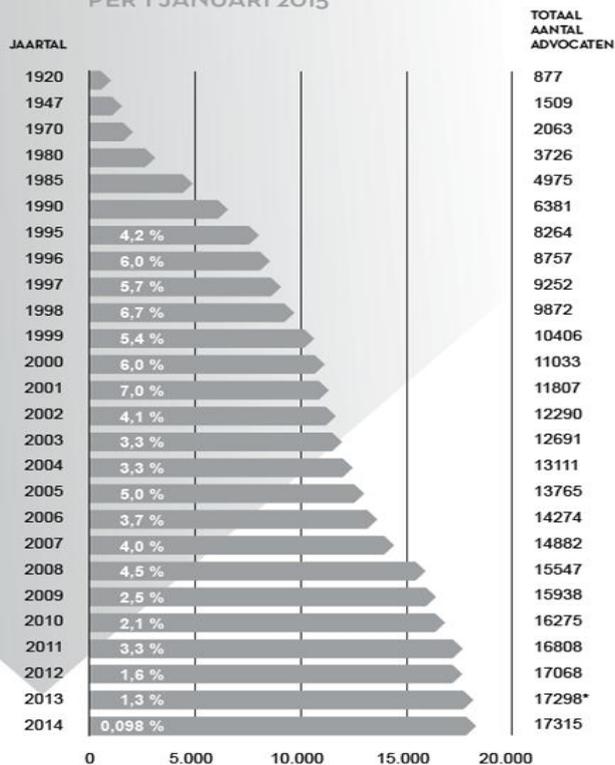
Niels Hupkes
The Netherlands Bar
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Agenda

- Organisation of the legal profession in The Netherlands
 - The Netherlands Bar
 - Local Bars
 - Supervision of the legal profession
- Client money accounts
 - Current system
 - Challenges
 - Alternatives

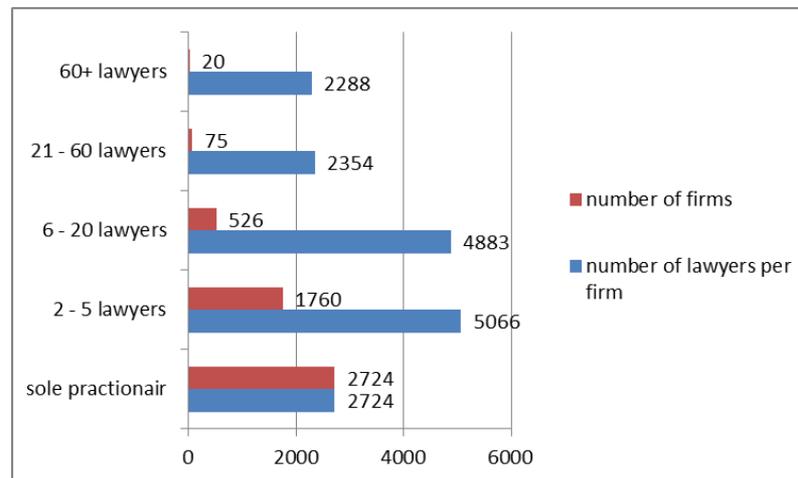
Legal profession

GROEI VAN DE BALIE
PER 1 JANUARI 2015



* Er kunnen kleine verschillen zijn ten opzichte van het aantal schrappingen en toetredingen. Dit heeft te maken met het meetmoment.

17,315 lawyers (or advocates)

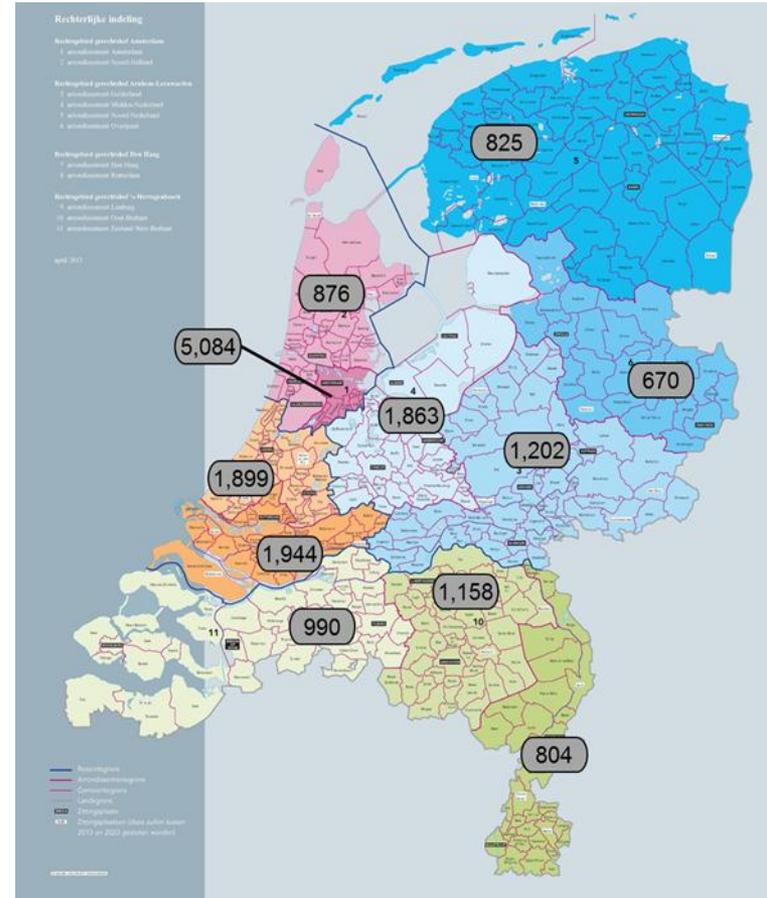


The Netherlands Bar

- Membership of The Netherlands Bar is mandatory.
- General council consists of 7 members, including the Bar President. Some of the tasks of the general council are:
 - To uphold the rule of law, promote access to justice and to legal aid.
 - To promote proper exercise of the practice of lawyers and to take all measures necessary.
 - Propose all necessary bye-laws (which have to be approved by the assembly of delegates: lawyers representing the 11 judicial districts).
- Revised Act on Advocates as of 1 January 2015:
 - Anchoring core values (independence, partiality, professionalism, integrity and confidentiality).
 - Anchoring legal professional privilege.
 - Strengthening supervision and handling of complaints by Local Bar President.
- As of 1 January 2015 only 1 bye-law (instead of 11).

Local Bars

- 11 judicial districts with own Local Bar, with a Local Bar Council and a Local Bar President.
- No hierarchical relationship between The Netherlands Bar and the Local Bars.
- Tasks Local Bar Council are:
 - To promote proper exercise of the practice of lawyers.
 - Assessing admission to the Bar.
 - Assessing and monitoring three year traineeship of lawyers.
 - Assisting Local Bar President with handling of complaints and supervision.



Supervision of lawyers

- Local Bar President is the sole supervisor within own judicial district:
 - Supervisory powers based on the General Administrative Law Act (Section 5.2), including:
 - Entering a law firm (art. 5:15), demanding information (art. 5:16), inspection of all relevant documents (art. 5:17).
 - No legal professional privilege towards the Local Bar President (art. 45a (3) Act on Advocates).
 - Local Bar President also supervisor for compliance with AML legislation.
 - Enforcement by the Local Bar President:
 - Filing complaint with disciplinary board (art. 46f Act on Advocates).
 - Imposing an administrative fine or incremental penalty payment. (art. 45g Act on Advocates and 26 (2) and 27 (2) Dutch AML legislation)
- Local Bar President still handles the complaints from clients.
- Introduction of a Supervisory Board which task is to oversee the performance of the Local Bar President.

Client money accounts

- Section 6.5 (article 6.18 – 6.23) of the bye-law on Advocates:
 - Client money: “funds that have a relationship with the service provided by the lawyer and not intended for the lawyer in the course of his acting in that capacity, but for the client or a third party” (art. 1.1)
 - All lawyers are obliged to have a client money foundation at their disposal (art. 6.21). There are two ways:
 - Creating an own client money foundation.
 - Joining an existing client money foundation through an agreement.
 - The client money foundation is a separate entity:
 - The sole purpose of the foundation is the handling of client money.
 - The foundation has at least two directors who have to approve every transaction.
 - Only if the foundation transfers client money it is mandatory to have a separate bank account.
 - Every transaction has to be registered by date, amount, name of the client and beneficiary, and name of the advocate who is handling the case.
 - When asked the foundation is obliged to inform the Local Bar President about all matters concerning the client money account and the foundation.

Client money accounts

- Supervision of client money accounts:
 - All lawyers have to declare yearly that they have a client money foundation at their disposal and that they comply with all legislation.
 - A lawyer who is a director has to declare yearly that they comply with all legislation;
 - At least 10% of all law firms are audited every year. This audit includes the client money foundation and account that is at their disposal.
 - 2013: 594 law firms were audited (12.4% of all law firms). Minor defects in organisation and the use of the client money foundation and account were discovered with 157 law firms (26.4%).
 - 2014: 568 law firms were audited (12% of all law firms). Minor defects in organisation and the use of the client money foundation and account were discovered with 227 law firms (40%).
 - Since 2013 there is a special financial investigative unit (FTA) with The Netherlands Bar. The FTA assists the Local Bar President with financial investigations including the client money accounts.
 - In 2013 an explanatory audit showed that 12 out of 44 law firms had payment procedures that are not without risks and therefore vulnerable.

Challenges

- **Misuse**
 - Client money account used to temporarily allocate more than €1,000,000 without legal services being performed → disciplinary reprimand.
 - Payments authorized by one lawyer/director during several years → 3 month suspension.
 - Payment of upfront fee on client money account → 2 weeks suspension.
- **Abuse**
 - A lawyer founded gave his administrator (previously sentenced for four years for fraud) unlimited access to the client money account. Around €160,000 was stolen. The bank did not monitor the transactions.
 - Lawyer: disbarred and a 2 month suspended sentence.
 - Controller: 3 month suspended sentence.
 - Bank: sentenced to pay €160,000 back to clients.
 - A lawyer accepted client money (in total €20,000) in the firms bank account and not in the client money account and is not willing to pass it on to the client → disbarred.

Alternatives?

- Enhancing education and awareness.
 - The discovered defects in regular audits are generally a result of a lack of knowledge.
- Reducing the encountered legislative or administrative burden.
 - September 2015: start of a survey amongst all 5.105 law firms to collect and examine encountered burdens and find out causes.
- What are possible alternatives?
 - No obligation for a foundation if lawyers do not handle client money, but if lawyers do handle client money a foundation with enhanced supervision.
 - Stricter rules for the use of client money account (no cash payment or withdrawal, more accountability for lawyers, extensive reporting obligations).
 - French CARPA-system → all French lawyers are obliged to open an account with CARPA. The CARPA functions under the control of the Local French Bar and all transactions are monitored by CARPA and the French Bar (more information on www.unca.fr / international).

Questions?

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