

# Trust account overdrafts: what you need to know

For more than 30 years, the Office of Lawyers Professional Responsibility has administered a trust account overdraft program. In fact, Minnesota was one of the first states to implement such a program (in 1990, following the American Bar Association's adoption of a model rule on the topic in 1988). This important early warning tool is now in place in all but a couple of states, but I'm not sure how familiar the practicing bar is with the rules, the program, and what to do if you receive a trust account overdraft notice.

## The rule and the program

Rule 1.15(m), Minnesota Rules of Professional Conduct, provides that every lawyer practicing or admitted in Minnesota has consented to overdraft reporting by any financial institution holding client trust accounts. Lawyers can only hold client funds in trust accounts.<sup>1</sup> Those accounts, in turn, can only be with banks approved by the OLPR.<sup>2</sup> The bank, as part of its agree-



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ment with the OLPR, must report to our Office any time a check or debit is presented against a trust account containing insufficient funds.<sup>3</sup> This is true whether the withdrawal is honored or dishonored. Because the bank is reporting to us, the rules do not require you to report such notices to our office.

When our Office receives an overdraft notification, we send an inquiry letter to the attorney or

firm on the account, requesting an explanation and three months of the required books and records. We request and expect a timely response to the request, generally within 14 days. If you receive an overdraft notice, you should immediately turn your attention to discovering the cause of the overdraft and providing the books and records requested. Too often we see lawyers brush off the request by offering a cursory explanation of what happened. Don't do that. Nothing raises the antennae of regulators more than partial responses accompanied by no records or incomplete ones. If there is an issue with your trust account, don't panic! Do seek counsel if you need help with the request, and please do so sooner rather than later. If you need additional time, let us know. Be candid about why additional time is needed but also remember we consider this a critical ethics obligation—so you should prioritize addressing any potential issue accordingly.

Importantly, and please remember this, most overdraft inquiries result in no discipline. Forty-one trust account overdraft notices were reported to the Director in 2020. The Director converted only seven of the resulting inquiries into disciplinary files. One of the most beneficial things about this program is that it allows us to continue to educate lawyers on proper record keeping; it's a concrete example of our recognition that mistakes happen. People write checks on their trust account when they mean to write them from their business account. Banks also make mistakes. Unexpected service charges may be assessed to the account. Deposits may not clear when you expect them to. You might forget to record a disbursement or make a duplicate disbursement. Third party checks may bounce. Strict compliance with the trust account rules, including the provisions set forth in Appendix 1 to the Rules, would eliminate most of these scenarios as potential problems, but again, falling a little short of perfection is not what may trigger further investigation.

## When inquiry becomes investigation

There are several reasons we may open a discipline investigation after the initial trust account inquiry. A non-exhaustive list of those reasons includes:

- you do not respond despite our efforts to follow up, or your responses are so incomplete that it is apparent you are not keeping the required books and records on a regular basis;
- the records show you have shortages in the account that persisted over time (less money on hand than you should have, if everyone whose money you are holding asked for their money at the same time); or
- you regularly have more than \$200 of your own funds in your trust account.

This last issue is called *commingling* and it means you have client funds and your own funds in the account—often because you want to keep a cushion in place to avoid an overdraft in the first place! Please do not do this as the rules require you to, within a “reasonable time,” withdraw earned fees and account to the client for that withdrawal.<sup>4</sup> Commingling can also put client funds at risk by giving creditors a basis to attach funds in the trust account. Thus, commingling gets our attention. As the closing numbers demonstrate, however, the inquiry is focused on the overall adequacy (or inadequacy) of record keeping and rule compliance and should not be a cause for panic. Please know that we also expunge our overdraft records after three years if no investigation is commenced.

## Public protection

In addition to the educational benefits of the program, there is no question that it is one of our most effective tools in preventing and detecting trust account misuse and misappropriation of client funds. In the first 15 years of the program, 14 lawyers were disbarred in cases that started

with a trust account overdraft notice, and others received discipline—some private, some public.<sup>5</sup> I have not totaled the overall numbers for the program—something we will do for the board's next annual report—but the program routinely uncovers serious misconduct that otherwise might not come to light from client complaints. Just this month, we discovered intentional misappropriation of client funds in a matter that started with an overdraft notice. I've come to learn that it happens more than you would think, but it still surprises me. And I remain proud that Minnesota was an early adopter of this effective and now widespread program.

### Conclusion

The duty to safekeep client property—particularly money—is a fundamental fiduciary obligation. Although Rule 1.15

is the most detailed rule with the most subparts, do not be intimidated. But it does take time to understand the requirements and to comply with them on a day-to-day basis, time I know you would rather spend on billable client work or at leisure. It can't be helped—the consequences of failing to give this ethics obligation the time it requires are serious. Because we want to help you with this important requirement, we have a lot of resources on our website devoted to the topic. Each year an OLPR lawyer and a forensic auditor devote significant time to administering the overdraft notification program. Time well-spent, in my view, due to its strong educational component, as well as the significant public protection benefits. Please call our ethics hotline (651-296-3952) if you have a question about how to satisfy your trust account obligations. ▲

### Notes

<sup>1</sup> Rule 1.15(e), MRPC; Rule 1.15(f), MRPC.

<sup>2</sup> Rule 1.15(d), MRPC; Rule 1.15(k), MRPC.

<sup>3</sup> Rule 1.15(k), MRPC.

<sup>4</sup> Rule 1.15(b), MRPC.

<sup>5</sup> Betty M. Shaw, Overdraft Notification, Bench & Bar (April 2006).