

OVERDRAFT NOTICE PROGRAM

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What happens when a lawyer's trust account check is presented against insufficient funds? In Minnesota, since August 1990, the bank which has the account will report the overdraft to the Office of Lawyers Professional Responsibility.

When the Director's Office receives the overdraft notice, the lawyer is requested to provide a written explanation, together with the relevant documents. In most cases, the explanation is satisfactory and no further action is taken. In some cases, the lawyer's trust account practices are not so deficient that discipline is required, but some educational instruction is needed. In about 10 percent of the cases a discipline investigation file is opened, more often than not with the ultimate result of discipline being imposed.

The greatest benefit of the overdraft program has been educational. Attorneys learn that problems result from such improper practices as:

- Lack of individual client ledgers.
- Failure to reconcile ledgers.
- Disbursing funds before corresponding deposits have cleared.

When trust account deficiencies are detected, a brochure entitled "Attorney Business and Trust Account: Books and Records Requirements and Sample Trust Account Transactions, Trial Balance and Reconciliations" is sent to the lawyer. This brochure was mailed to all licensed Minnesota attorneys in May 1989. See *Bench & Bar*, May/June 1989 at p. 17. The brochure contains examples of trust account records and also shows how the trust account bank statement should be reconciled with the remaining trust account books and records.

The basic purposes of the books and records requirements are simple. A lawyer should have ready answers to such questions as: How much should I have in trust for each client? For all clients? Is the right amount in the account now? Would my books and records demonstrate the answers to these questions?

The most common reason for formal disciplinary investigations is the lawyer's failure to maintain adequate books and records. Most often the lawyer has failed to maintain client subsidiary ledgers which are necessary to identify and segregate client funds within the trust account.

Another basis for disciplinary investigations is that the lawyer commingled lawyer funds with client funds. This commingling was most often caused by leaving earned fees in the trust account and not

withdrawing them as earned.

While most formal disciplinary investigations will likely result in private discipline (*i.e.*, admonitions or private probation), overdraft notices have led or contributed to petitions seeking public discipline against five attorneys. In one of these cases, the lawyer agreed to a 21-month suspension for trust account violations and other unrelated violations. *See In re Mack*, No. CX-90-2713, slip op. (Minn. Oct. 23, 1991.) Two others received public reprimands. *In re Roberts*, No. C8-91-1988, slip op. (Minn. Oct. 23, 1991) and *In re Miley*, No. C7-91-718, slip op. (Minn. July 12, 1991) (public reprimand and probation).

One of the responsibilities of law firm partners is to institute and monitor systems which ensure compliance with trust account requirements. *See Rule 5.1(a)*, Rules of Professional Conduct. The firm should assign trust account supervisory duties to one of its partners.

With a few minor exceptions, lawyers have been very cooperative in responding to the overdraft inquires and proving the requested trust account records. Several lawyers have responded to formal investigations with words to the effect, "None of my clients are missing a penny - why are you investigating me?" These lawyers were under the mistaken impression that trust account violations are limited to misappropriation or shortages of client funds. They came to realize that some trust account violations involve neither misappropriation nor trust account shortages. Lawyers can be subject to discipline for failure to maintain the books and records. *See, e.g.* Opinion No. 9 of the Lawyers Professional Responsibility Board; *see also, In re Reiter*, 472 N.W.2d 316 (Minn. 1991). Discipline can also result from trust account shortages which are due to innocent bookkeeping errors that persist or continue in the account because of the lawyer's failure to properly and/or regularly reconcile the account.

The overdraft notice program should not be confused with a random trust account audit program. Overdraft review of a trust account is triggered by a bank notifying the Director's Office of an overdraft. The random audit program, which has not been adopted in Minnesota, involves an auditor at random picking lawyer trust accounts for audit. The random audit program is far more ambitious and expensive than the overdraft notice program, whose burdens have been shouldered through existing resources of the Director's Office.

Most lawyers are not trained to be bankers or accountants, but the skills of a bookkeeper and something like the mindset of a banker are needed to handle client funds properly. Even among the vast majority of lawyers who are honest, problems arise in handling client funds without appropriate training. The overdraft notice program has, in effect, provided remedial training to lawyers whose poor systems or negligence have permitted overdrafts to occur.

The trust account overdraft notification program has not detected a substantial number of instances involving lawyer theft or misappropriation. In fact, the instances involving serious misconduct have been relatively few. The overdraft program has, however, provided necessary education and guidance to a fair number of lawyers in maintaining the required trust account records and in performing the required trust account procedures.

**Trust Account Overdraft
Notice Statistics
8/90 - 11/91**

Overdraft notices received	167
No investigation after explanation	125
Disciplinary file openings.....	16
Accounts already subject of disciplinary file.....	7
Pending.....	19
File closed with educational instruction.....	33
Disciplinary file openings (16):	
Supreme Court petition pending.....	3
Public discipline imposed.....	3
Charges pending.....	1
Private discipline imposed/ expected.....	4
Dismissal.....	2
Investigation continuing.....	3
Reasons for disciplinary file openings (N > 16):	
Inadequate books and records.....	12
Commingling.....	7
Inadequate response from attorney.....	5
Trust account checks signed by nonlawyer.....	4
Repeated trust account overdrafts.....	3
Shortages exist.....	3
Other.....	11