

OVERDRAFT NOTIFICATION

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Sixteen years ago the Minnesota Supreme Court adopted a rule providing for a trust account overdraft notification (ODN) program.[Ftn 1](#) Attorneys must maintain their trust accounts in financial institutions approved by the Office of Lawyers Professional Responsibility (OLPR). To be approved, the financial institution must agree to promptly notify the OLPR of any trust account check (or withdrawal) drawn on insufficient funds, regardless of whether the check (or withdrawal) is paid or dishonored. This highly effective program has protected the public by identifying more than 50 attorneys who had misappropriated money from client trust accounts. It has also assisted the bar by providing instruction to hundreds of attorneys on proper trust account record keeping without creating a disciplinary file or record for those attorneys.

How It Works

When a financial institution (bank) receives a check or withdrawal request that overdraws the lawyer's trust account it notifies the OLPR, which in turn sends an inquiry letter regarding the overdraft notification to the account holder. The attorney is asked to explain the overdraft and to provide copies of the required trust account books and records for the three-month period including and preceding the date of the overdraft.[Ftn 2](#) If the overdraft was caused by a bank error and the bank acknowledges responsibility for the error in a letter to the OLPR, the attorney does not have to provide copies of the trust account books and records.

Even if the trust account records provided do not fully comply with Rule 1.15(h) and (i), MRPC, the OLPR will often work with the attorney to bring his or her trust account record keeping into compliance. Provided that the records are not seriously inadequate and there does not appear to be a trust account shortage or other misuse of the trust account, no disciplinary file need be opened. However, if the attorney does not respond to the ODN, does not provide the requested books and records, or the records reveal trust account shortages or seriously incomplete or otherwise inadequate record keeping, a disciplinary investigation file will be opened.

Educating the Bar

Since the beginning of the overdraft notification program, fewer discipline files have been opened and an increasing percentage of files are closed after the attorney is given instruction on proper record-keeping procedures. For example, in 1991, 139 ODNs were received. Seventy-six percent (105) of these inquiries were closed without opening a disciplinary investigation file and 30 of the attorneys involved were given instruction on proper record keeping. In 2005, 111 ODNs were received. Of the 100 inquiries that were terminated, 67 percent resulted in the subject attorneys being given instruction on trust account record keeping. Table A documents the growth in provision of instruction to attorneys who were subject to ODNs.

Table A

Year	Number of OD Files in Which Instruction Was Given
1991	30 (of 105 = 29%)
1992	70 (of 151 = 46%)
1993	55 (of 131 = 42%)
1994	76 (of 144 = 53%)
1995	51 (of 117 = 44%)
1996	39 (of 110 = 35%)
1997	72 (of 154 = 46%)
1998	58 (of 116 = 50%)
1999	34 (of 83 = 41%)
2000	38 (of 98 = 39%)
2001	44 (of 91 = 48%)
2002	54 (of 99 = 55%)
2003	53 (of 96 = 55%)
2004	66 (of 100 = 66%)
2005	67 (of 100 = 67%)

Overdrafts & Reports

During the last 15 years 1,924 overdrafts have been reported: an average of about 128 per year. In 1991, 139 overdrafts were reported. Last year 111 were reported. The highest number of overdrafts was in 1992 when 185 were reported. In 1999, only 83 overdrafts were reported and the OLPR discovered that several banks, including a large bank with many trust accounts, were not fully complying with the overdraft notification program. The OLPR worked with these banks to ensure that their ODN procedures were brought into compliance so that the banks did not have to be decertified.

The most common cause of overdrafts not resulting in an investigation file is “late deposit.” This occurs when the deposit on which checks are written is not posted to the account until after the checks have

cleared the bank. This can be avoided by making sure that the deposit is received and posted by the bank before the checks are issued. Sometimes it is a matter of a deposit being made after 3:00 p.m. on the day the checks are cashed so that the checks are posted but the deposit is not posted until the following business day. Bank error is the second most common cause of ODNs that do not result in investigation. Two other common causes of overdrafts are failing to have a sufficient amount in the account to cover service or check-printing charges and mathematical/clerical errors.

Unfortunately, attorney misconduct is also a cause of trust account overdrafts. From 1991-2006, ODNs have resulted in 85 private disciplines (admonitions or private probations), two transfers to disability status, 17 public reprimands with probation, 35 suspensions, and 14 disbarments. Table B illustrates the discipline meted out for trust account overdrafts over the last 15 years.

Table B

Year	Priv	Publ Rep	Susp	Disb	Total
1991	5	2	1	0	8
1992	12	2	2	0	16
1993	13	2	5	1	21
1994	13	1	1	1	16
1995	7	3	5	3	18
1996	4	0	4	1	9
1997	1	1	1	2	5
1998	3	2	5	1	12*
1999	4	1	1	0	6
2000	2	0	4	0	6
2001	5	2	0	1	8
2002	4	1	1	0	6
2003	5	0	1	1	7
2004	5	0	0	1	6
2005	2	0	4	1	7
2006	0	0	0	1	2*
Totals	85	17	35	14	153

*There was one transfer to disability status in each of these years.

Effective Public Protection

The positive results from the overdraft notification program make it one of the discipline system's most effective tools both for preventing and detecting trust account misuse and misappropriation. Misappropriation of client money occurs whenever an attorney makes unauthorized use of a client's funds.

It may be negligent or intentional. It may be rationalized as “temporary borrowing” or outright theft. Whatever the cause, misappropriation places client money at risk and violates the trust given to attorneys who handle other people’s money without posting a bond. Misuse of a trust account by commingling or using the account for personal or business purposes also puts client funds in jeopardy by giving creditors a basis for attaching funds in the account. It is also a significant cause of negligent misappropriation of client funds. The attorney who is a poor record-keeper may withdraw client funds believing that he is taking only his or her own money. Help with trust account record keeping can be obtained from the OLPR website (www.courts.state.mn.us/lprb) and through the advisory opinion service (651) 296-3952 or (800) 657-3601.

Notes

¹ Rule 1.15(j)-(o), Minnesota Rules of Professional Conduct (MRPC), adopted effective January 1, 1990.

² Rule 1.15(h)-(i), MRPC, provides:

(h) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer’s private practice of law, and to establish compliance with paragraphs (a) through (f). Equivalent books and records demonstrating the same information in an easily accessible manner and in substantially the same detail are acceptable. The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients or third persons, for at least six years after completion of the employment to which they relate

(i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual renewal of the lawyer’s registration and in such form as the Clerk of the Appellate Courts may prescribe, that the lawyer or the lawyer’s law firm maintains books and records as required by paragraph (h). The Lawyers Professional Responsibility Board shall publish annually the books and records required by paragraph (h).

The Thompson West 2006 *Minnesota Rules of Court* (2006) publishes these requirements on pp. 1204-1206 as Lawyers Board Opinion 9. These requirements can also be found as Appendix 1 to the MRPC on the Lawyers Board website, www.courts.state.mn.us/lprb.