

TRUST ACCOUNT OVERDRAFT NOTICE RULE

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The Minnesota Supreme Court and the Lawyers Board have responded to the wave of lawyer misappropriations in recent years by increasing regulation and education. Board Opinion No. 9 was issued and amended to specify the trust account books and records that must be kept. The Court requires lawyers to certify on their annual registration statements that they either keep the required books and records or do not handle trust monies. The Client Security Board was established to compensate victims of lawyer dishonesty. The Director's Office has published and distributed a booklet describing and illustrating how trust account books are to be kept. Prompt and public disciplinary actions are taken against lawyers who mishandle monies. The most recent action is a trust account overdraft notice program, authorized by the Court on January 1.

Beginning August 1, 1990, the Director's Office will receive copies of overdraft notices on attorney trust accounts. Attorneys must maintain trust accounts only in approved financial institutions.

To be approved for handling attorney trust accounts, the financial institution must agree in writing to report to the Director's Office whenever any "properly payable attorney trust account instrument is present against . . . insufficient funds, irrespective of whether or not the instrument is honored." Rule 1.15(j), R. Prof. Con. All financial institutions maintaining Interest on Lawyer Trust Account (IOLTA) accounts have been notified of the rule change, and most have agreed to participate in the overdraft notice program. Those who have so agreed have been approved to maintain lawyer trust accounts. A list of approved institutions will be published in *Finance & Commerce* in August 1990, and annually thereafter. Attorneys maintaining trust accounts in nonapproved institutions will be notified that they must remove their trust accounts from such institutions.

Trust account overdraft notices will be handled by the Director's Office separately from disciplinary complaints. Rule 1.15(k), R. Prof. Con., requires the financial institution to send an overdraft notice to the Director's Office simultaneously with notice to the attorney. Upon receipt of the notice, the Director's Office will require the attorney or law firm identified in the notice to provide an explanation of the overdraft. The explanation should include documentation of the reason for the overdraft. For example, if it is claimed a check was incorrectly deposited into another account by office personnel, an affidavit from the office personnel together with a copy of the dated deposit slip showing deposit into the incorrect account will be required. If the explanation and documentation is satisfactory, a letter closing the inquiry will be issued, and no disciplinary file will be opened. The Director's Office will maintain records of overdraft notices for three years.

If the explanation for the overdraft is unsatisfactory, if no explanation is made, or if there is a pattern of overdrafts, a disciplinary file may be opened. The Director will then request further explanation or an

audit of the attorney's trust account.

Based on experience in other states, about 300 overdraft notices per year are expected. The majority of the overdrafts will probably result from bank error, deposits into incorrect accounts, or mathematical errors by attorneys. Such errors generally will not result in the opening of a discipline file. However a few overdrafts as a result of incorrect handling of client funds, outright misappropriation, or failure to maintain trust account records required by Lawyers Board Opinion 9, will probably be found and will generate disciplinary files.

The effectiveness of the new program will be limited. The program will not detect or prevent all large misappropriations. Some misappropriations occur outside the trust account or without NSF checks. When James O'Hagan misappropriated client funds, he did not overdraw the trust account. John Flanagan forged endorsements on third-party checks, outside of his trust account. Such thefts will not be detected by the new program.

The overdraft notification rule will catch some misappropriations, and will detect trust account mismanagement problems while they are minor and correctable. Education of attorneys, which has long been one function of the Director's Office, will be a major goal and benefit of the program. In addition to the brochure describing proper trust account management distributed in June 1989, the Director's Office has been providing advisory opinions on trust accounts and other subjects for many years. The Director's Office will continue to provide guidance to attorneys in handling of client funds and maintaining required books and records.