

The Overdraft Program Protects and Serves

by

**Eric T. Cooperstein, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (March 22, 1999)

This column often focuses on the enforcement of disciplinary rules and the likely sanctions that this office may impose for violating those rules.

Contrary to the punitive impression this may give the bar, the Director devotes substantial resources to programs that attempt to prevent ethical misconduct and assist lawyers in fulfilling their responsibilities.

One of the least known and understood of these programs is the Overdraft Notification Program for trust accounts.

Routine Reports

Lawyers may only open trust accounts at "approved" financial institutions. See Rule 1.15(i), Minnesota Rules of Professional Conduct (MRPC). This Office approves an institution when it files a written agreement to report any checks or other instruments presented to the bank for payment against insufficient funds.

The bank must report this overdraft regardless of whether the bank decides to pay the check. This requirement reflects the difference between a banking decision regarding whether to extend credit to a customer and the reporting of insufficient funds in a lawyer's trust account. See Rule 1.15(j) and (k), MRPC.

Since these overdraft rule provisions took effect in 1990, Minnesota banks have reported between 125 to 150 overdrafts each year to the Director's Office. A small percentage of these overdraft notices are generated because of bank error. In those cases, the bank usually admits its error, obviating the need for an inquiry to the lawyer responsible for the trust account.

Initial Inquiries

Even where there is no bank error, overdrafts are not initially treated as disciplinary matters. Instead, this office sends a letter of inquiry to the lawyer or law firm whose name appears on the overdraft notice.

The inquiry has two purposes: to determine that the overdraft was not caused by a misappropriation or other abuse of client funds and to ensure that poor record keeping does not result in future trust account problems.

In every case, the Director reviews three months of trust account records to ensure compliance with the Rules, to prevent future problems and to protect the public.

Many overdrafts, even if they were not caused by bank error, have straightforward and innocent explanations. These include check-printing charges improperly debited from the trust account, late deposits of real estate closing proceeds and missing endorsements. Oftentimes a written explanation, supported by properly maintained trust account records, ends the inquiry.

Persistent Problems

On the other hand, many lawyers' responses to overdraft notices reveal significant shortcomings in their trust account record keeping. The most frequent and significant problems are failing to maintain individual client's subsidiary ledgers, failing to add up the balances of those ledgers into a total ("trial") balance and failing to reconcile the trial balance with the bank statement balance. Analysis of these trust accounts usually reveals either an improper surplus or a shortage of funds.

In these situations, the lawyer may have violated Rule 1.15, MRPC, and Lawyers Professional Responsibility Board Opinion No. 9. Rather than turn the overdraft inquiry into a disciplinary file, in many of these cases the Director's staff will work with the attorney to establish proper record keeping, sometimes over a several-month period. This serves the attorney well, allowing a candid discussion of record-keeping practices without fear of discipline.

As long as the attorney demonstrates that he or she can properly maintain his or her records, the inquiry will be closed without ever opening a disciplinary file. Ninety-five percent of all overdraft inquiries are closed in this manner.

Disciplinary Decisions

The Director reserves opening a disciplinary file for conduct that appears serious and may require private probation or public discipline. These situations include substantial shortages, small shortages that have existed over a long period of time, commingling of a lawyer's own funds with client funds, use of the trust account for an attorney's personal business, misrepresentations in the attorney's records and failure to cooperate with an overdraft inquiry.

In these matters, the Director's responsibility to protect the public overshadows the desire to assist lawyers without the threat of sanctions.

Reconciliation Resources

From year to year, only a small number of lawyers experience more than one overdraft inquiry. The Director believes this reflects the success of the program in preventing future trust account problems.

Lawyers need not wait for an overdraft to improve their record-keeping practices. The Office of Lawyers Professional Responsibility publishes booklets for maintaining trust account books and records both manually and by using Quicken computer software. Senior assistant directors are also available through the advisory opinion service to assist lawyers by telephone with their trust account questions.