

Statement of Protocol
Regarding Overdraft Notification on Client Trust Accounts
Office of Disciplinary Counsel

The Office of Disciplinary Counsel is aware of and grateful for the support of the Louisiana Supreme Court, the Louisiana Legislature, and the Louisiana State Bar Association in the creation of an overdraft notification rule which would provide the basis for the report of client trust account overdrafts to this office. At least 32 other states have enacted such a rule and all have reported substantial reductions in the instances of conversions and thefts of client and third party funds by dishonest lawyers. Our own experience indicates that in almost every instance where conversion of client funds has occurred, such dishonest acts were preceded by at least one instance of an overdraft having occurred on the client trust account. This 'early warning' provides the Office of Disciplinary Counsel with an opportunity to intervene and, if not prevent, at least limit the extent of harm caused to clients and third parties.

Rational and appropriate concerns have been expressed by some that the creation of an overdraft notification rule would trigger lengthy and costly investigations, even in instances of bank error or simple inadvertence. Those understandable concerns can and are addressed by the public disclosure of the protocol which the Office of Disciplinary Counsel intends to follow in its handling of client trust account overdraft notifications provided by banks. The following protocol will be put in place at the initial screening level (which occurs prior to the opening of a formal investigation) to allow for some preliminary review of the overdraft incident.

- Upon initial receipt of the overdraft notification, a preliminary review will be conducted to determine if the incident was triggered by bank error. If so, then no investigative file would be opened.
- If the overdraft incident was not as a result of banking error, then the screening department of ODC would be required to contact the lawyer directly to see if the overdraft is attributable to simple inadvertence or employee mistake. If that fact can be established at the screening level, the lawyer would merely be cautioned to exercise continued care in the future and no formal disciplinary investigation would be opened.
- If the incident was determined to be as a result of a lack of proper accounting procedures within the office or a lack of accounting knowledge, the screening counsel would have the option of diverting the lawyer to the excellent LSBA Accounting School and/or the LSBA Ethics School so as to acquire the necessary skills and understanding needed to properly handle client and third party funds.
- Where the screening efforts reflect concern that the overdraft was not caused by simple inadvertence, where there are multiple instances of client trust account overdrafts, or if the lawyer has previously been cautioned or diverted to Accounting or Ethics School and the problems persist, the Office of Disciplinary

Counsel obviously will reserve the right to open the matter as a formal disciplinary investigation.

This protocol represents an adaptation of what already occurs within the Office of Disciplinary Counsel when complaints are received. While historically the office receives nearly 3200 complaints per year, nearly 1000 or more are screened out either on the basis that the individual about whom the complaint has been filed is not a Louisiana licensed attorney, or because the facts alleged against the attorney, if true, would not constitute a violation of the Rules of Professional Conduct. Additionally, between 300 and 500 matters are diverted out of the discipline system annually at the screening level, typically because the misconduct involved is relatively minor and there is little likelihood that it will be repeated by the attorney. Where the attorney agrees to such a diversion opportunity, the excellent programs of the Louisiana State Bar Association, administered by the Lawyer Client Assistance Counsel, provides an opportunity to educate and address the lawyer's mistake without a disciplinary investigation or a disciplinary record. The protocol set forth above would effectively 'weed out' those matters which are minor or which do not reflect a violation of ethics rules.

The rule which allows for overdraft notification to the Office of Disciplinary Counsel on a lawyer's client trust account reflects a time proven mechanism for limiting and, in many instances, preventing the harm caused by the rare dishonest lawyer who places his or her own interests above those of the client. This protocol reflects an excellent opportunity to balance the need for early detection and prevention of dishonest conduct while excluding those overdraft instances caused by bank error or simple employee inadvertence or mistake. The Office of Disciplinary Counsel supports the universal goal of providing protection for both innocent clients who are victims of lawyer dishonesty and as well as those lawyers whose conduct is ethical and otherwise appropriate.