

# Random Audits of Attorney Trust Accounts

by Howard W. Martin Jr., 2007–08 VSB President



In the last three years, it has come to light that perhaps \$9.5 million of clients' money has been misappropriated by three licensed attorneys in Virginia. I, like many other attorneys and laypersons in Virginia, find this fact very disturbing.

Every person who handles other people's money has the opportunity to misuse or misappropriate that money. This applies to bankers, investment advisers, estate executors and, yes, even to lawyers, who often hold clients' money in their trust accounts (as required by disciplinary rules).

The law is an honored profession. As Senior Lawyers Conference president George W. Shanks reminded us in the February *Virginia Lawyer*, Alexis de Tocqueville, a lawyer by training who toured America in the 1830s, described lawyers' importance to communities, government, institutions, and the order that preserved democracy in local government. Lawyers continue that leadership today in many organizations, and they have the added responsibility of protecting clients and the public from wrongdoing by fellow attorneys.

When it comes to handling other people's money, lawyers are like Ivory Soap's famous motto, "99 and  $\frac{4}{100}$  percent pure." Actually, Virginia lawyers are even better than that. In the last ten years, according to the recollections of veterans in the VSB Professional Regulation Department, thirty-six lawyers have been sanctioned for mis-

appropriating clients' money. Out of our twenty-seven thousand active lawyer members, that puts our "percent of pureness" at 99.87 percent. That is a pretty strong indicator of honesty in the legal profession in Virginia.

But I think it is high time that we addressed the 0.13 percent of lawyers who have not been honest.

In 2005 a Virginia Beach lawyer was revoked for misusing clients' money. News accounts reported that between \$2 million and \$3 million in claims have been filed against him by legal and investment clients. He processed at least some of the mishandled funds through his attorney trust accounts, which at one time were overdrawn by at least \$2.5 million. Victims are obtaining judgments against the former lawyer, but they remain uncompensated by him.

Also in 2005, a Collinsville lawyer was revoked after he took clients' money from real estate and investment transactions. A 2005 preliminary report by the receiver placed total claims from clients, investors, and title insurance companies at more than \$3 million. This ex-lawyer is now in prison.

In 2007, yet another lawyer, in Woodbridge, was found to have settled more than 250 personal injury cases to the tune of more than \$3.4 million, according to the receiver's latest tally. The lawyer never told most of the clients that their cases had been

settled. He endorsed the settlement checks and converted the money to his own uses. He has been disbarred and is now in jail.

Trust accounts are the places where lawyers are supposed to keep other people's money. The trust accounts are apt targets for a dishonest person having signatory authority. (Bank robber Willie "The Actor" Sutton said, when asked why he robbed banks, "Because, that's where the money is.") I would submit that clues to the major attorney defalcations described above could have been found in the trust account records of the dishonest attorneys.

There is guidance for how we might detect thievery earlier. Since 1984, the American Bar Association has had a Standing Committee on Client Protection. The committee created the *ABA Model Rule on Financial Recordkeeping*, which delineates the types of financial records that must be maintained by a lawyer. The *ABA Model Rules for Trust Account Overdraft Notification* provide a framework for creating an early warning system to alert disciplinary agencies that a lawyer may be handling client funds in an inappropriate manner. The *ABA Model Rule for Random Audit of Lawyer Trust Accounts* serves as a deterrent to misconduct by allowing lawyer disciplinary agencies to conduct random audits of lawyer trust accounts without requiring a basis to believe that

*continued on page 24*

*continued from page 7*

misconduct has occurred. This work by the ABA has been partially responsible for eleven states thus far adopting a random trust account audit process.

Attorney defalcations seriously damage the reputation of the legal profession in Virginia. Members of the public have suffered devastating losses due to the dishonesty of a tiny minority of Virginia lawyers. Lawyers subsidize repayment of lost money through the Clients' Protection Fund. What one bad lawyer does affects all of us. Are we, as members of the bar, going to ignore the issue, or are we going to try to take steps to reduce or eliminate the problem?

I do not know what the right course of action is. But there are certainly a number of steps that we might implement. Maybe the answer is random audits or reviews of lawyer trust accounts. We would have to look at whether such a program in Virginia would be effective and what it would cost.

Maybe random audits are not the answer. Maybe we need to require law

firms to provide periodic certified public accountant verifications that the trust accounts are in order. Maybe we need to beef up our continuing legal education offerings, including the program "The Devil Wears Green," on the management of trust accounts. Maybe we need to ensure that every law firm in Virginia has and uses basic trust account software, such as the program being developed by the VSB's endorsed malpractice insurance carrier, ALPS, that will soon be available for distribution free or at a nominal cost. Maybe we need to refine and improve the trust account investigation procedures used by the bar's Professional Regulation Department. Maybe we ought to use a law firm's first trust account overdraft as the automatic trigger for an audit.

Again, I do not know what our ultimate course of action ought to be. But I believe we must be proactive. We simply must put the clients and the public first. I believe the first thing we need to do is to study the situation and consider the potential solutions.

At a meeting of the VSB Executive Committee on February 29 in Richmond, I outlined some of the facts set forth above and asked the committee to endorse my request for a study of the problem by the bar's Standing Committee on Lawyer Discipline. I proposed to ask COLD to research the experience in other states that employ an audit process, to consider the ABA guidance on the matter, to research the history of offenses in Virginia, to engage the local bars and other statewide bar associations in the conversation, and to estimate the cost and effectiveness of any recommendations. The executive committee unanimously endorsed the proposal to send the question to COLD for study and recommendations. We should all be interested in what COLD concludes and what recommendations it proposes. I will keep you posted. ☺