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SUPREME COURT OF WISCONSIN

No. 14-07

In the Matter of Petition for Amendment to Rules Relating to Electronic Banking

FILED

APR 4, 2016

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On December 17, 2014, the Office of Lawyer Regulation (OLR), by its Director Keith Sellen, filed a rule petition asking the court to amend and/or recreate the supreme court rule pertaining to trust accounts together with several related rules.[1] The OLR asked the court to amend Supreme Court Rule (SCR) 20:1.0 (Terminology), amend SCR 20:1.5 (Fees), repeal and recreate SCR 20:1.15 (Safekeeping property; trust accounts and fiduciary accounts), and amend SCR 22.39 (Burden of proof). The OLR explains that as electronic banking increases and the use of paper checks diminishes, it is harder for lawyers to comply with existing trust account rules and harder for the OLR to monitor, audit, and investigate compliance with those rules. The proposed rule changes are intended to address that concern.

[1] On June 2, 2015, the OLR filed three amended appendices (A, C, and E) containing non-substantive changes to the petition.

The most significant changes proposed include: 1) procedures providing for the use of electronic transactions for trust and fiduciary account deposits and disbursements; 2) revision of the record-keeping requirements to provide general standards in the disciplinary rule and to transfer the detailed procedures from the rule to guidelines published by the OLR; 3) a rebuttable presumption that shifts the burden of proof to the respondent upon a showing by the OLR that the respondent failed to promptly deliver trust or fiduciary property or failed to provide records accounting for trust or fiduciary property; and 4) transfer of the fee provisions of the trust account rule to the fee rule.

The court discussed this petition at an open administrative rules conference on January 20, 2015, and voted to schedule a public hearing. On September 25, 2015, a letter was sent to interested persons, seeking input. Comments were received from the State Bar of Wisconsin, advising the court that its Board of Governors had voted unanimously to support the petition.

The court conducted a public hearing on the petition on December 4, 2015. The court discussed the matter at some length at its open administrative rules conference on December 14, 2015. The court's discussion included the question whether to refine certain definitions, including "retainer" and "flat fee," but the court determined that these concerns, which were not part of the petition, should be addressed in a different forum.

The court discussed the proposed amendment to the applicable burden of proof. The court recognized that lawyers and their clients want electronic banking options, but with the declining use of paper

checks and increased use of electronic transactions, the OLR will face increasing difficulty auditing lawyer trust accounts. Consequently, lawyers in possession of the funds of clients and third persons will be required to show the proper safeguarding, delivery, and accounting of funds. To that end, the petition proposed two rebuttable presumptions: a presumption that the lawyer has failed to hold funds in trust when the lawyer fails to promptly deliver funds or to promptly produce records related to the funds; and a presumption that the lawyer has converted funds when a lawyer fails to promptly provide an accounting. These presumptions may be rebutted by the lawyer's production of records or an accounting that overcomes such presumption by clear, satisfactory, and convincing evidence.

On balance, the court agreed to impose on lawyers a rebuttable presumption of a trust account rule violation in the event of a lawyer's failure to promptly deliver trust property to a client or third party entitled to the property, a lawyer's failure to promptly provide an accounting of trust or fiduciary property to the OLR, or a lawyer's failure to promptly submit trust or fiduciary account records to the OLR. The court declined to create a rebuttable presumption that such failings violate SCR 20:8.4(c) (Misconduct). The court thus modified the proposed language pertaining to the burden of proof in SCR 22.39 and made identical changes where the standard of proof is referenced in SCR 20:1.15(e)(4), SCR 20:1.15(g)(3), and SCR 20:1.15(k)(9).

With respect to the other proposed changes, the court agreed to amend the definitions of "advanced fee" and "flat fee" in SCR 20:1.0

to provide new cross references. The court accepted the OLR's request, made at the public hearing, to modify SCR 20:1.15(f)(3)b.1 to clarify that funds may be moved from the E-Banking Trust Account to the IOLTA and from the IOLTA back to the E-Banking Trust Account via electronic transaction. The court agreed to repeal and recreate the trust account rule, consistent with the petition, subject to the above-referenced changes. The court also approved the proposed amendments to SCR 20:1.5 (Fees), which moves language from the existing trust account rule pertaining to fees into a more logical place within the fee rule.

The court notes that the new trust account rule deletes many of the highly detailed record-keeping requirements previously included in the rule. This change does not relieve a lawyer of his or her obligation to maintain proper records but affords practitioners more flexibility in the manner in which they maintain those records. The OLR will publish Record-Keeping Guidelines to provide guidance to lawyers regarding recommended record-keeping practices. Therefore,

IT IS ORDERED that, effective July 1, 2016:

SECTION 1. 20:1.0(ag) of the Supreme Court Rules is amended to read:

20:1.0(ag) "Advanced fee" denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed-upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat, or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are

subject to the requirements of SCR 20:1.5, ~~SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(c)(4)h., SCR 20:1.15(g),~~ including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), SCR 20:1.15(f)(3)b.4., and SCR 20:1.16(d).

SECTION 2. 20:1.0(dm) of the Supreme Court Rules is amended to read:

20:1.0(dm) "Flat fee" denotes a fixed amount paid to a lawyer for specific, agreed-upon services, or for a fixed, agreed-upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed-upon stage in the representation. A flat fee, sometimes referred to as "unit billing," is not an advance against the lawyer's hourly rate and may not be billed against at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, ~~SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(c)(4)h., SCR 20:1.15(g),~~ including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), SCR 20:1.15(f)(3)b.4., and SCR 20:1.16(d).

SECTION 3. Wisconsin Comment to 20:1.0 of the Supreme Court Rules is amended to read:

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The definition of flat fee specifies that flat fees "become the property of the lawyer upon receipt." Notwithstanding, the lawyer must either deposit the advanced flat fee in trust until earned, or comply with the alternative in ~~SCR 20:1.15(b)(4m), alternative protection for advanced fees~~SCR 20:1.5(g). In addition, as specified in the definition, flat fees are subject to the requirements of all rules to which advanced fees are subject.

SECTION 4. 20:1.5(f) of the Supreme Court Rules is created to read:

20:1.5(f) Except as provided in SCR 20:1.5(g), unearned fees and funds advanced by a client or 3rd party for payment of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to SCR 20:1.5(h). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred.

SECTION 5. A Wisconsin Comment to 20:1.5(f) of the Supreme Court Rules is created to read:

WISCONSIN COMMENT

SCR 20:1.5(f) Advances for fees and costs.

Lawyers are obligated to hold advanced fee payments in trust until earned, or use the alternative protection for advanced fees as set forth in SCR 20:1.5(g). Additional requirements for advanced fees are identified in SCR 20:1.0(ag). Sometimes the lawyer may receive advanced fee payments from 3rd parties. In such cases, the lawyer must follow the requirements of SCR 20:1.8(f). In addition, the lawyer should establish, upon receipt or prior to receipt of the advanced fee payment from a 3rd party, whether any potential refund of unearned fees will be paid to the client or 3rd-party payor. This may be done through agreement of the parties or by the lawyer informing the client and 3rd-party payor of the lawyer's policy regarding such refunds. Lawyers also receive cost advances from clients or 3rd parties. Since January 1, 1987, the supreme court has required cost advances to be held in trust. Prior to that date, the applicable trust account rule, SCR 20.50(1), specifically excluded such advances from the funds that the supreme court required lawyers

to hold in trust accounts. However, by order dated March 21, 1986, the supreme court amended SCR 20.50(1) as follows: "All funds of clients paid to a lawyer or law firm~~, other than advances for costs and expenses,~~ shall be deposited in one or more identifiable trust accounts as provided in sub. (3) maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm may be deposited in such an account except as follows . . . ." This requirement is specifically addressed in SCR 20:1.5(f).

SECTION 6. 20:1.5(g) of the Supreme Court Rules is created to read:

20:1.5(g) A lawyer who accepts advanced payments of fees may deposit the funds in the lawyer's business account, provided that review of the lawyer's fee by a court of competent jurisdiction is available in the proceeding to which the fee relates, or provided that the lawyer complies with each of the following requirements:

(1) Upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client a notice in writing containing all of the following information:

a. The amount of the advanced payment.

b. The basis or rate of the lawyer's fee.

c. Any expenses for which the client will be responsible.

d. The lawyer's obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation.

e. The lawyer's obligation to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of the dispute.

f. The ability of the client to file a claim with the Wisconsin Lawyers' Fund for Client Protection if the lawyer fails to provide a refund of unearned advanced fees.

(2) Upon termination of the representation, the lawyer shall deliver to the client in writing all of the following:

a. A final accounting, or an accounting from the date of the lawyer's most recent statement to the end of the representation, regarding the client's advanced fee payment.

b. A refund of any unearned advanced fees and costs.

c. Notice that, if the client disputes the amount of the fee and wants that dispute to be submitted to binding arbitration, the client must provide written notice of the dispute to the lawyer within 30 days of the mailing of the accounting.

d. Notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client within 30 days after receiving notice of the dispute from the client, the lawyer shall submit the dispute to binding arbitration.

(3) Upon timely receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and if the dispute is not resolved, the lawyer shall submit the dispute to binding arbitration with the State Bar Fee Arbitration Program or a similar local bar association program within 30 days of the lawyer's receipt of the written notice of dispute from the client.

(4) Upon receipt of an arbitration award requiring the lawyer to make a payment to the client, the lawyer shall pay the arbitration

award within 30 days, unless the client fails to agree to be bound by the award of the arbitrator.

SECTION 7. A Wisconsin Comment to 20:1.5(g) of the Supreme Court Rules is created to read:

WISCONSIN COMMENT

SCR 20:1.5(g) Alternative protection for advanced fees.

SCR 20:1.5(g) allows lawyers to deposit advanced fees into the lawyer's business account, as an alternative to SCR 20:1.5(f). The provision regarding court review applies to a lawyer's fees in proceedings in which the lawyer's fee is subject to review at the request of the parties or the court, such as bankruptcy, formal probate, and proceedings in which a guardian ad litem's fee may be subject to judicial review. In any proceeding in which the lawyer's fee must be challenged in a separate action, the lawyer must either deposit advanced fees in trust or use the alternative protections for advanced fees in this subsection. The lawyer's fee remains subject to the requirement of reasonableness under SCR 20:1.5(a) as well as the requirement that unearned fees be refunded upon termination of the representation under SCR 20:1.16(d). A lawyer must comply either with SCR 20:1.5(f) or SCR 20:1.5(g), and a lawyer's failure to do so is professional misconduct and grounds for discipline. The writing required under SCR 20:1.5(g)(1) must contain language informing the client that the lawyer is obligated to refund any unearned advanced fee at the end of the representation, that the lawyer will submit any dispute regarding a refund to binding arbitration, such as the programs run by the State Bar of Wisconsin and the Milwaukee Bar Association, within 30 days of receiving a request for refund, and

that the lawyer is obligated to comply with an arbitration award within 30 days of the award. The client is not obligated to arbitrate the fee dispute and may elect another forum in which to resolve the dispute. The writing must also inform the client of the opportunity to file a claim in the event an unearned advanced fee is not refunded, and should provide the address of the Wisconsin Lawyers' Fund for Client Protection.

If the client's fees have been paid by one other than the client, then the lawyer's responsibilities are governed by SCR 20:1.8(f). If there is a dispute as to the ownership of any refund of unearned advanced fees paid by one other than the client, the unearned fees should be treated as trust property pursuant to SCR 20:1.15(e)(3).

SCR 20:1.5(g) applies only to advanced fees for legal services. Cost advances must be deposited into the lawyer's trust account.

Advanced fees deposited into the lawyer's business account pursuant to this subsection may be paid by credit card, debit card, prepaid or other types of payment cards, or an electronic transfer of funds. A cost advance cannot be paid by credit card, debit card, prepaid or other types of payment cards, or an electronic transfer of funds under this section. Cost advances are subject to SCR 20:1.15(b)(1) or SCR 20:1.15(f)(3)b.

SECTION 8. 20:1.5(h) of the Supreme Court Rules is created to read:

20:1.5(h)(1) At least 5 business days before the date on which a disbursement is made from a trust account for the purpose of paying fees, with the exception of contingent fees or fees paid pursuant to

court order, a lawyer shall transmit to the client in writing all of the following:

a. An itemized bill or other accounting showing the services rendered.

b. Notice of the amount owed and the anticipated date of the withdrawal.

c. A statement of the balance of the client's funds in the lawyer's trust account after the withdrawal.

(2) The lawyer may withdraw earned fees on the date that the invoice is transmitted to the client, provided that the lawyer has given prior notice to the client in writing that earned fees will be withdrawn on the date that the invoice is transmitted. The invoice shall include each of the elements required under SCR 20:1.5 (h)(1).

(3) If a client makes a particularized and reasonable objection to the disbursement described in SCR 20:1.5(h)(1), the disputed portion shall remain in the trust account until the dispute is resolved. If the client makes a particularized and reasonable objection to a disbursement described in SCR 20:1.5(h)(1) or (2) within 30 days after the funds have been withdrawn, the disputed portion shall be returned to the trust account until the dispute is resolved, unless the lawyer reasonably believes that the client's objections do not present a basis to hold funds in trust or return funds to the trust account under SCR 20:1.5(h). The lawyer will be presumed to have a reasonable basis for declining to return funds to trust if the disbursement was made with the client's informed consent, in writing. The lawyer shall promptly advise the client in

writing of the lawyer's position regarding the fee and make reasonable efforts to clarify and address the client's objections.

SECTION 9. A Wisconsin Comment to 20:1.5(h) of the Supreme Court Rules is created to read:

WISCONSIN COMMENT

SCR 20:1.5(h) Withdrawal of non-contingent fees from trust account.

SCR 20:1.5(h) applies to attorney fees, other than contingent fees. It does not apply to filing fees, expert witness fees, subpoena fees, and other costs and expenses that a lawyer may incur on behalf of a client in the course of a representation. In addition, this section does not require contingent fees to remain in the trust account or to be returned to the trust account if a client objects to the disbursement of the contingent fee, provided that the contingent fee arrangement is documented by a written fee agreement, as required by SCR 20:1.5(c). While a client may dispute the reasonableness of a lawyer's contingent fee, such disputes are subject to SCR 20:1.5(a), not to this subsection. A client's objection under SCR 20:1.5(h)(3) must offer a specific and reasonable basis for the fee dispute in order to trigger the lawyer's obligation to keep funds in the lawyer's trust account or return funds to the lawyer's trust account. A generalized objection to the overall amount of the fees or a client's unilateral desire to abrogate the terms of a fee agreement should not ordinarily be considered sufficient to trigger the lawyer's obligation. A lawyer may resolve a dispute over fees by offering to participate and abide by the decision of a fee arbitration program. In addition, a lawyer may bring an action for declaratory judgment pursuant to § 806.04, Wis.

Stats. to resolve a dispute between the lawyer and a client regarding funds held in trust by the lawyer. The court of appeals suggested employment of that method to resolve a dispute between a client and a 3rd party over funds held in trust by the lawyer. See Riegleman v. Krieg, 2004 WI App 85, 271 Wis. 2d 798, 679 N.W.2d 857.

Additionally, when a lawyer's fees are subject to final approval by a court, such as fees paid to a guardian ad litem or lawyer's fees in formal probate matters, objections to disbursements by clients or 3rd party payors are properly brought before the court having jurisdiction over the matter. A lawyer should hold disputed funds in trust until such time as the appropriate court resolves the dispute.

SECTION 10. 20:1.15 of the Supreme Court Rules is repealed and recreated to read:

SCR 20:1.15 Safekeeping property; trust accounts and fiduciary accounts.

(a) Definitions.

In this section:

(1) "Draft account" means an account from which funds are withdrawn through a properly payable instrument or an electronic transaction.

(2) "Electronic transaction" means a paperless transfer of funds to or from a trust or fiduciary account. Electronic transactions do not include transfers initiated by voice or automated teller or cash dispensing machines.

(3) "Fiduciary" means an agent, attorney-in-fact, conservator, guardian, personal representative, special administrator, trustee, or

other position requiring the lawyer to safeguard the property of a client or 3rd party.

(4) "Fiduciary account" means an account in which a lawyer deposits fiduciary property.

(5) "Fiduciary property" means funds or property of a client or 3rd party that is in a lawyer's possession in a fiduciary capacity. Fiduciary property includes, but is not limited to, property held as agent, attorney-in-fact, conservator, guardian, personal representative, special administrator, or trustee, subject to the exceptions identified in sub. (m).

(6) "Financial institution" means a bank, savings bank, trust company, credit union, savings and loan association, or investment institution, including a brokerage house.

(7) "Immediate family member" means a lawyer's spouse, registered domestic partner, child, stepchild, grandchild, sibling, parent, stepparent, grandparent, aunt, uncle, niece, or nephew.

(8) "Interest on Lawyer Trust Account or 'IOLTA account'" means a pooled interest-bearing or dividend-paying draft trust account, separate from a lawyer's business and personal accounts, which is maintained at an IOLTA participating institution. Typical funds that would be placed in an IOLTA account include earnest monies, loan proceeds, settlement proceeds, collection proceeds, cost advances, and advanced payments of fees that have not yet been earned. An IOLTA account is subject to the provisions of SCR Chapter 13 and the trust account provisions of subs. (a) to (i), including the IOLTA account provisions of subs. (c) and (d).

(9) "IOLTA participating institution" means a financial institution that voluntarily offers IOLTA accounts and certifies to WisTAF annually that it meets the IOLTA account requirements of sub. (d).

(10) "Properly payable instrument" means an instrument that, if presented in the normal course of business, is in a form requiring payment pursuant to the laws of this state.

(11) "Trust account" means an account in which a lawyer deposits trust property.

(12) "Trust property" means funds or property of clients or 3rd parties that is in a lawyer's possession in connection with a representation, which is not fiduciary property.

(13) "WisTAF" means the Wisconsin Trust Account Foundation, Inc.

(b) Segregation and safekeeping of trust property.

(1) **Separate account.** A lawyer shall hold in trust, separate from the lawyer's own property, that property of clients and 3rd parties that is in the lawyer's possession in connection with a representation. All funds of clients and 3rd parties paid to a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable trust accounts.

(2) **Identification and location of account.** Each trust account shall be clearly designated as a "Client Account," a "Trust Account," or words of similar import. The account shall be identified as such on all account records, including signature cards, monthly statements, checks, and deposit slips. An acronym, such as "IOLTA," "IOTA," or "LTAB," without further elaboration, does not clearly designate the account as a client account or trust account. Each

trust account shall be maintained in a financial institution that is authorized by federal or state law to do business in Wisconsin and that is located in Wisconsin or has a branch office located in Wisconsin and which agrees to comply with the overdraft notice requirements of sub. (h). A trust account may be maintained at a financial institution located in the jurisdiction where the lawyer principally practices law if that jurisdiction has an overdraft notification requirement.

(3) **Lawyer funds.** No funds belonging to a lawyer or law firm, except funds reasonably sufficient to pay monthly account service charges, may be deposited or retained in a trust account. Each lawyer or law firm that receives trust funds shall maintain at least one draft account, other than the trust account, for funds received and disbursed other than in a trust capacity, which shall be entitled "Business Account," "Office Account," "Operating Account," or words of similar import.

(4) **Trust property other than funds.** Unless a client otherwise directs in writing, a lawyer shall keep securities in bearer form in a safe deposit box at a financial institution authorized to do business in Wisconsin. The safe deposit box shall be clearly designated as a "Client Account" or "Trust Account." The lawyer shall clearly identify and appropriately safeguard other property of a client or 3rd party.

(5) **Insurance and safekeeping requirements.** Each trust account shall be maintained at a financial institution that is insured by the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Share Insurance Fund (NCUSIF), the Securities Investor

Protection Corporation (SIPC), or any other investment institution financial guaranty insurance. IOLTA accounts shall also comply with the requirements of sub. (d)(3). Lawyers using the alternative to the E-Banking Trust Account shall comply with the requirements of sub. (f)(3)c. Except as provided in subs. (b)(4) and (d)(3)b. and c., trust property shall be held in an account in which each individual owner's funds are eligible for insurance.

(c) Types of trust accounts.

(1) **IOLTA accounts.** A lawyer or law firm who receives client or 3rd-party funds that the lawyer or law firm determines to be nominal in amount or that are expected to be held for a short period of time such that the funds cannot earn income for the benefit of the client or 3rd party in excess of the costs to secure that income, shall maintain a pooled interest-bearing or dividend-paying draft trust account in an IOLTA participating institution.

(2) **Non-IOLTA accounts.** A lawyer or law firm who receives client or 3rd-party funds that the lawyer or law firm determines to be capable of earning income for the benefit of the client or 3rd party shall maintain an interest-bearing or dividend-paying non-IOLTA trust account. A non-IOLTA trust account shall be established as any of the following:

a. A separate interest-bearing or dividend-paying trust account maintained for the particular client or 3rd party, the interest or dividends on which shall be paid to the client or 3rd party, less any transaction costs.

b. A pooled interest-bearing or dividend-paying trust account with sub-accounting by the financial institution, the lawyer, or the

law firm that will provide for computation of interest or dividends earned by each client's or 3rd party's funds and the payment of the interest or dividends to the client or 3rd party, less any transaction costs.

c. An income-generating investment vehicle selected by the client and designated in specific written instructions from the client or authorized by a court or other tribunal, on which income shall be paid to the client or 3rd party or as directed by the court or other tribunal, less any transaction costs.

d. An income-generating investment vehicle selected by the lawyer to protect and maximize the return on funds in a bankruptcy estate, which investment vehicle is approved by the bankruptcy trustee or by a bankruptcy court order, or otherwise consistent with 11 U.S.C. § 345.

e. A draft account or other account that does not bear interest or pay dividends because it holds funds the lawyer has determined are not eligible for deposit in an IOLTA account because they are neither nominal in amount nor expected to be held for a short term such that the funds cannot earn income for the client or 3rd party in excess of the costs to secure the income, provided that the account has been designated in specific written instructions from the client or 3rd party.

(3) **Selection of account.** In deciding whether to use the account specified in par. (1) or an account or investment vehicle specified in par. (2), a lawyer shall determine, at the time of the deposit, whether the client or 3rd-party funds could be utilized to

provide a positive net return to the client or 3rd party by taking into consideration all of the following:

a. The amount of interest, dividends, or other income that the funds would earn or pay during the period the funds are expected to be on deposit.

b. The cost of establishing and administering a non-IOLTA trust account, including the cost of the lawyer's services and the cost of preparing any tax reports required for income accruing to a client's or 3rd party's benefit.

c. The capability of the financial institution, lawyer, or law firm to calculate and pay interest, dividends, or other income to individual clients or 3rd parties.

d. Any other circumstance that affects the ability of the client's or 3rd party's funds to earn income in excess of the costs to secure that income for the client or 3rd party.

(4) **Professional judgment.** The determination whether funds to be invested could be utilized to provide a positive net return to the client or 3rd party rests in the sound judgment of the lawyer or law firm. If a lawyer acts in good faith in making this determination, the lawyer is not subject to any charge of ethical impropriety or other breach of the Rules of Professional Conduct.

(d) Interest on Lawyer Trust Account (IOLTA) requirements.

(1) **Location.** An IOLTA account shall be maintained only at an IOLTA participating institution.

(2) **Certification by IOLTA participating institutions.**

a. Each IOLTA participating institution shall certify to WisTAF annually that the financial institution meets the requirements of

sub. (d)(3) to (6) for IOLTA accounts and that it reports overdrafts on draft trust accounts and draft fiduciary accounts of lawyers and law firms to the office of lawyer regulation, pursuant to the institution's agreements with those lawyers and law firms. WisTAF shall by rule adopted under SCR 13.03(1) establish the date by which IOLTA participating institutions shall certify their compliance.

b. WisTAF shall confirm annually, by a date established by WisTAF by rule adopted under SCR 13.03(1), the accuracy of a financial institution's certification under sub. (d)(2)a. by reviewing one or more of the following:

1. The IOLTA comparability rate information form submitted by the financial institution to WisTAF.

2. Rate and product information published by the financial institution.

3. Other publicly or commercially available information regarding products and interest rates available at the financial institution.

c. WisTAF shall publish annually, no later than the date on which the state bar mails annual dues statements to members of the bar, a list of all financial institutions that have certified, and have been confirmed by WisTAF as IOLTA participating institutions. WisTAF shall update the published list located on its website to add newly confirmed IOLTA participating institutions and to remove financial institutions that WisTAF cannot confirm as IOLTA participating institutions.

d. Prior to removing any financial institution from the list of IOLTA participating institutions or failing to include any financial

institution on the list of IOLTA participating institutions, WisTAF shall first provide the financial institution with notice and sufficient time to respond. In the event a financial institution is removed from the list of IOLTA participating institutions, WisTAF shall notify the office of lawyer regulation and provide that office with a list of the lawyers and law firms maintaining IOLTA accounts at that financial institution. The office of lawyer regulation shall notify those lawyers and law firms of the removal of the financial institution from the list, and provide time for those lawyers and law firms to move their IOLTA accounts to an IOLTA participating institution.

e. Lawyers and law firms may rely on the most recently published list of IOLTA participating institutions for purposes of compliance with sub. (c)(1), except when the office of lawyer regulation notifies the lawyer or law firm of removal, in accordance with sub. (d)(2)d.

(3) **Safekeeping requirements.**

a. An IOLTA participating institution shall comply with the insurance and safety requirements of sub. (b)(5).

b. A repurchase agreement utilized for an IOLTA account may be established only at an IOLTA participating institution deemed to be "well-capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

c. An open-end money market fund utilized for an IOLTA account may be established only at an IOLTA participating institution in a fund that holds itself out as a money market fund as defined under

the Investment Act of 1940 and, at the time of investment, has total assets of at least $250,000,000.

(4) **Income requirements.**

a. **Beneficial owner.** The interest or dividends accruing on an IOLTA account, less any allowable reasonable fees, as allowed under par. (5), shall be paid to WisTAF, which shall be considered the beneficial owner of the earned interest or dividends, pursuant to SCR Chapter 13.

b. **Interest and dividend requirements.** An IOLTA account shall bear the highest non-promotional interest rate or dividend that is generally available to non-IOLTA customers at the same branch or main office location when the IOLTA account meets or exceeds the same eligibility qualifications, if any, including a minimum balance, required at that same branch or main office location. In determining the highest rate or dividend available, the IOLTA participating institution may consider factors in addition to the IOLTA account balance that are customarily considered by the institution at that branch or main office location when setting interest rates or dividends for its customers, provided the institution does not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. However, IOLTA participating institutions may voluntarily choose to pay higher rates.

c. **IOLTA account.** An IOLTA participating institution may establish an IOLTA account as, or convert an IOLTA account to, any of the following types of accounts, assuming the particular financial institution at that branch or main office location offers these

account types to its non-IOLTA customers, and the particular IOLTA account meets the eligibility qualifications to be established as this type of account at the particular branch or main office location:

1. A business checking account with an automated or other automatic investment sweep feature into a daily financial institution repurchase agreement or open-end money market fund. A daily financial institution repurchase agreement must be invested in United States government securities. An open-end money market fund must consist solely of United States government securities or repurchase agreements fully collateralized by United States government securities, or both. In this par. c.1., "United States government securities" include securities of government-sponsored entities, such as, but not limited to, securities of, or backed by, the Federal National Mortgage Association, the Government National Mortgage Association, and the Federal Home Loan Mortgage Corporation;

2. A checking account paying preferred interest rates, such as money market or indexed rates;

3. An interest-bearing checking account such as a negotiable order of withdrawal (NOW) account or business checking account with interest; and

4. Any other suitable interest-bearing or dividend-paying account offered by the institution to its non-IOLTA customers.

d. **Options for compliance.** An IOLTA participating institution may:

1. Establish the comparable product for qualifying IOLTA accounts, subject to the direction of the lawyer or law firm; or,

2. Pay the highest non-promotional interest rate or dividend, as defined in sub. (d)(4)b., less any allowable reasonable fees charged in connection with the comparable highest interest rate or dividend product, on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product.

e. **Paying rates above comparable rates.** An IOLTA participating institution may pay a set rate above its comparable rates on the IOLTA checking account negotiated with WisTAF that is fixed over a period of time set by WisTAF, such as 12 months.

(5) **Allowable reasonable fees on IOLTA accounts.**

a. Allowable reasonable fees on an IOLTA account are as follows:

1. Per check charges.

2. Per deposit charges.

3. Fees in lieu of minimum balance.

4. Sweep fees.

5. An IOLTA administrative fee approved by WisTAF.

6. Federal deposit insurance fees.

b. Allowable reasonable fees may be deducted from interest earned or dividends paid on an IOLTA account, provided that the fees are calculated in accordance with an IOLTA participating institution's standard practice for non-IOLTA customers. Fees in excess of the interest earned or dividends paid on the IOLTA account for any month or quarter shall not be taken from interest or dividends of any other IOLTA accounts. No fees that are authorized under SCR 20:1.15(d)(5) shall be assessed against or deducted from the principal of any IOLTA account. All other fees are the

responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. IOLTA participating institutions may elect to waive any or all fees on IOLTA accounts.

(6) **Remittance and reporting requirements.** A lawyer or law firm shall direct the IOLTA participating institution at which the lawyer or law firm's IOLTA account is located to do all of the following, on at least a quarterly basis:

a. Remit to WisTAF the interest or dividends, less allowable reasonable fees as allowed under par. (5), if any, on the average monthly balance in the account or as otherwise computed in accordance with the IOLTA participating institution's standard accounting practice.

b. Provide to WisTAF a remittance report showing for each IOLTA account the name of the lawyer or law firm for whose IOLTA account the remittance is sent, the rate and type of interest or dividend applied, the amount of allowable reasonable fees deducted, if any, the average account balance for the period for which the report is made, and the amount of remittance attributable to each IOLTA account.

c. Provide to the depositing lawyer or law firm a remittance report in accordance with the participating institution's normal procedures for reporting account activity to depositors.

d. Respond to reasonable requests from WisTAF for information needed for purposes of confirming the accuracy of an IOLTA participating institution's certification.

(e) Prompt notice and delivery of property.

(1) **Notice and delivery.** Upon receiving funds or other property in which a client has an interest, or in which a lawyer has received notice that a 3rd party has an interest identified by a lien, court order, judgment, or contract, the lawyer shall promptly notify the client or 3rd party in writing. Except as stated in this rule or otherwise permitted by law or by agreement with the client, the lawyer shall promptly deliver to the client or 3rd party any funds or other property that the client or 3rd party is entitled to receive.

(2) **Accounting.** Upon final distribution of any trust property or upon request by the client or a 3rd party having an ownership interest in the property, a lawyer shall promptly render a full written accounting regarding the property.

(3) **Disputes regarding trust property.** When a lawyer and another person or a client and another person claim an ownership interest in trust property identified by a lien, court order, judgment, or contract, the lawyer shall hold that property in trust until there is an accounting and severance of the interests. If a dispute arises regarding the division of the property, the lawyer shall hold the disputed portion in trust until the dispute is resolved. Disputes between the lawyer and a client are subject to the provisions of SCR 20:1.5(h).

(4) **Standard of proof.** A lawyer's failure to promptly deliver trust property to a client or 3rd party entitled to the trust property, promptly submit trust account records to the office of lawyer regulation or promptly provide an accounting of trust property to the office of lawyer regulation shall result in a presumption that the lawyer has failed to hold trust property in trust, contrary to

SCR 20:1.15(b)(1). This presumption may be rebutted by the lawyer's production of records or an accounting that overcomes this presumption by clear, satisfactory, and convincing evidence.

(f) Security requirements and restricted transactions.

(1) **Security of transactions.** A lawyer is responsible for the security of each transaction in the lawyer's trust account and shall not conduct or authorize transactions for which the lawyer does not have commercially reasonable security measures in place. A lawyer shall establish and maintain safeguards to assure that each disbursement from a trust account has been authorized by the lawyer and that each disbursement is made to the appropriate payee. Only a lawyer admitted to practice law in this jurisdiction or a person under the supervision of a lawyer having responsibility under SCR 20:5.3 shall have signatory and transfer authority for a trust account.

(2) **Prohibited transactions.**

a. **Cash.** No withdrawal of cash shall be made from a trust account or from a deposit to a trust account. No check shall be made payable to "Cash." No withdrawal shall be made from a trust account by automated teller or cash dispensing machine.

b. **Telephone transfers.** 1. Except as provided in SCR 20:1.15(f)(2)b.2., no deposits or disbursements shall be made to or from a pooled trust account by a telephone transfer of funds.

2. Wire transfers may be initiated by telephone, and telephone transfers may be made between non-pooled trust accounts that a lawyer maintains for a particular client.

c. **Electronic transfers by 3rd parties.** A lawyer shall not authorize a 3rd party to electronically withdraw funds from a trust account. A lawyer shall not authorize a 3rd party to deposit funds into the lawyer's trust account through a form of electronic deposit that allows the 3rd party making the deposit to withdraw the funds without the permission of the lawyer.

(3) **Electronic transactions.** A lawyer shall not make deposits to or disbursements from a trust account by way of an electronic transaction, except as provided in SCR 20:1.15(f)(3)a. through c.

a. **Remote Deposit.** A lawyer may make remote deposits to a trust account, provided that the lawyer keeps a record of the client or matter to which each remote deposit relates, and that the lawyer's financial institution maintains an image of the front and reverse of each remote deposit for a period of at least six years.

b. **E-Banking Trust Account.** A lawyer may accept funds paid by credit card, debit card, prepaid or other types of payment cards, and other electronic deposits, and may disburse funds by electronic transactions that are not prohibited by sub. (f)(2)c., provided that the lawyer does all of the following:

1. Maintains an IOLTA account, which shall be the primary IOLTA account, in which no electronic transactions shall be conducted other than those transferring funds from the primary IOLTA to the E-Banking Trust Account for purposes of making an electronic disbursement, or those transactions authorized by SCR 20:1.15(f)(3)a., (3)b.4.a., and (3)b.4.d.

2. Maintains a separate IOLTA account with commercially reasonable account security for electronic transactions, which shall be entitled: "E-Banking Trust Account."

3. Holds lawyer or law firm funds in the E-Banking Trust Account reasonably sufficient to cover monthly account fees and fees deducted from deposits and maintains a ledger for those account fees.

4. Transfers the gross amount of each deposit within 3 business days after the deposit is available for disbursement, and if necessary, adds funds belonging to the lawyer or law firm to cover any deduction of fees and surcharges relating to the deposit, in accordance with all of the following:

a. All advanced costs and advanced fees held in trust under SCR 20:1.5(f) shall be transferred to the primary IOLTA account by check or electronic transaction.

b. Earned fees, cost reimbursements, and advanced fees that are subject to the requirements of SCR 20:1.5(g) shall be transferred to the business account by check or by electronic transaction.

c. Any funds that the client has directed be disbursed by electronic transfer shall be promptly disbursed from the E-Banking Trust Account by electronic transaction.

d. All funds received in trust other than funds identified in SCR 20:1.15(f)(3)a., b., and c. shall be transferred to the primary IOLTA account by check or by an electronic transaction.

e. Except for funds identified in SCR 20:1.15(f)(3)a. and b., a lawyer or law firm shall not be prohibited from deducting electronic transfer fees or surcharges from the client's funds, provided the

client has agreed in writing to accept the electronic payment after being advised of the anticipated fees and surcharges.

5. Identifies the client matter and the reason for disbursement on the memo line of each check used to disburse funds; records in the financial institution's electronic payment system the date, amount, payee, client matter, and reason for the disbursement for each electronic transaction; and makes no disbursements by credit card, debit card, prepaid or other types of payment cards, or any other electronic payment system that does not generate a record of the date, amount, payee, client matter, and reason for the disbursement in the financial institution's electronic payment system.

6. Replaces any and all funds that have been withdrawn from the E-Banking Trust Account by the financial institution or card issuer, and reimburses the account for any shortfall or negative balance caused by a chargeback, surcharge, or ACH reversal within 3 business days of receiving actual notice that a chargeback, surcharge, or ACH reversal has been made against the E-Banking Trust Account; and reimburses the E-Banking Trust Account for any chargeback, surcharge, or ACH reversal prior to accepting a new electronic deposit or transferring funds from the primary IOLTA to the E-Banking Trust Account for purposes of making an electronic disbursement.

c. **Alternative to E-Banking Trust Account.** A lawyer may deposit funds paid by credit card, debit card, prepaid or other types of payment cards, and other electronic deposits into a trust account, and may disburse funds from that trust account by electronic transactions that are not prohibited by sub. (f)(2)c., without

establishing a separate E-Banking Trust Account, provided that all of the following conditions are met:

1. The lawyer or law firm maintains commercially reasonable account security for electronic transactions.

2. The lawyer or law firm maintains a bond or crime policy in an amount sufficient to cover the maximum daily account balance during the prior calendar year.

3. The lawyer or law firm arranges for all chargebacks, ACH reversals, monthly account fees, and fees deducted from deposits to be deducted from the lawyer's or law firm's business account; or the lawyer or law firm replaces any and all funds that have been withdrawn from the trust account by the financial institution or card issuer within 3 business days of receiving actual notice that a chargeback, surcharge, or ACH reversal has been made against the trust account; and the lawyer or law firm reimburses the account for any shortfall or negative balance caused by a chargeback, surcharge, or ACH reversal. The lawyer shall reimburse the trust account for any chargeback, surcharge, or ACH reversal prior to disbursing funds from the trust account.

(4) **Availability of funds for disbursement.**

a. **Standard for trust account transactions.** A lawyer shall not disburse funds from any trust account unless the deposit from which those funds will be disbursed has cleared, and the funds are available for disbursement.

b. **Exception: Real estate transactions.** In closing a real estate transaction, a lawyer's disbursement of closing proceeds from funds that are received on the date of the closing, but that have not

yet cleared, shall not violate sub. (f)(4)a. provided that the lawyer complies with sub. (f)(4)c., and that the closing proceeds are deposited no later than the first business day following the closing and are comprised of any of the following types of funds:

1. A cashier's check, teller's check, money order, official check or electronic transfer of funds, issued or transferred by a financial institution insured by the FDIC or a comparable agency of the federal or state government.

2. A check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state.

3. A check issued by the state of Wisconsin, the United States, or a political subdivision of the state of Wisconsin or the United States.

4. A check drawn on the account of or issued by a lender approved by the Federal Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2.

5. A check from a title insurance company licensed in Wisconsin, or from a title insurance agent of the title insurance company, if the title insurance company has guaranteed the funds of that title insurance agent.

6. A non-profit organization check in an amount not exceeding $5000 per closing if the lawyer has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the trust account.

7. A personal check or checks in an aggregate amount not exceeding $5000 per closing if the lawyer has reasonable and prudent

grounds to believe that the deposit will be irrevocably credited to the trust account.

c. **Uncollected funds.** Without limiting the rights of the lawyer against any person, it is the responsibility of the disbursing lawyer to reimburse the trust account for any funds described in sub. (f)(4)b. that are not collected and for any fees, charges, and interest assessed by the financial institution on account of the funds being disbursed before the related deposit has cleared and the funds are available for disbursement. The lawyer shall maintain a subsidiary ledger for funds of the lawyer that are deposited in the trust account to reimburse the account for uncollected funds and to accommodate any fees, charges, and interest.

d. **Exception: Collection trust accounts.** When handling collection work for a client and maintaining a separate trust account to hold funds collected on behalf of that client, a lawyer's disbursement to the client of collection proceeds that have not yet cleared does not violate sub. (f)(4)a. so long as those collection proceeds have been deposited prior to the disbursement.

(g) Record-keeping requirements for all trust accounts.

(1) **Record retention.** A lawyer shall maintain and preserve complete records of trust account funds, all deposits and disbursements, and other trust property and shall preserve those records for at least 6 years after the date of termination of the representation. Electronic records shall be backed up by an appropriate storage device. The office of lawyer regulation shall publish guidelines for trust account record-keeping.

(2) **Record production.** All trust account records have public aspects related to a lawyer's fitness to practice. Upon request of the office of lawyer regulation, or upon direction of the supreme court, the records shall be submitted to the office of lawyer regulation for its inspection, audit, use, and evidence under any conditions to protect the privilege of clients that the court may provide. The records, or an audit of the records, shall be produced at any disciplinary proceeding involving the lawyer, whenever material.

(3) **Standard of proof.** A lawyer's failure to promptly deliver trust property to a client or 3rd party entitled to that trust property, promptly submit trust account records to the office of lawyer regulation, or promptly provide an accounting of trust property to the office of lawyer regulation shall result in a presumption that the lawyer has failed to hold trust property in trust, contrary to SCR 20:1.15(b)(1). This presumption may be rebutted by the lawyer's production of records or an accounting that overcomes this presumption by clear, satisfactory, and convincing evidence.

(h) Dishonored payment notification (Overdraft notices). All draft trust accounts, and any draft fiduciary account that is not subject to an alternative protection under sub. (k)(10), are subject to the following provisions on dishonored payment notification:

(1) **Overdraft reporting agreement.** A lawyer shall maintain draft trust and fiduciary accounts only in a financial institution that has agreed to provide an overdraft report to the office of lawyer regulation under par. (2). A lawyer or law firm shall notify

the financial institution at the time a trust account or fiduciary account is established that the account is subject to this subsection.

(2) **Overdraft report.** In the event any properly payable instrument or electronic transaction is presented against or made from a lawyer trust or fiduciary account containing insufficient funds, whether or not the instrument or electronic transaction is honored, the financial institution shall report the overdraft to the office of lawyer regulation.

(3) **Content of report.** All reports made by a financial institution under this subsection shall be substantially in the following form:

a. In the case of a dishonored instrument or electronic transaction, the report shall be identical to an overdraft notice customarily forwarded to the depositor or investor, accompanied by the dishonored instrument or electronic transaction, if a copy is normally provided to the depositor or investor.

b. In the case of instruments or electronic transactions that are presented against insufficient funds and are honored, the report shall identify the financial institution involved, the lawyer or law firm, the account, the date on which the instrument or electronic transaction is paid, and the amount of overdraft created by the payment.

(4) **Timing of report.** A report made under this subsection shall be made simultaneously with the overdraft notice given to the depositor or investor.

(5) **Confidentiality of report.** A report made by a financial institution under this subsection shall be subject to SCR 22.40, Confidentiality.

(6) **Withdrawal of report by financial institution.** The office of lawyer regulation shall hold each overdraft report for 10 business days to enable the financial institution to withdraw a report provided by inadvertence or mistake. The deposit of additional funds by the lawyer or law firm shall not constitute reason for withdrawing an overdraft report.

(7) **Lawyer compliance.** Every lawyer shall comply with the reporting and production requirements of this subsection, including filing of an overdraft notification agreement for each IOLTA account, each draft-type trust account and each draft-type fiduciary account that is not subject to an alternative protection under sub. (k)(10).

(8) **Service charges.** A financial institution may charge a lawyer or law firm for the reasonable costs of producing the reports and records required by this rule.

(9) **Immunity of financial institution.** This subsection does not create a claim against a financial institution or its officers, directors, employees, or agents for failure to provide a trust account overdraft report or for compliance with this subsection.

(i) Trust account certificate and acknowledgements.

(1) **Annual requirement.** A member of the state bar of Wisconsin shall file with the state bar of Wisconsin annually, with payment of the member's state bar dues or upon any other date approved by the supreme court, a statement as to whether the member is engaged in the practice of law in Wisconsin. If the member is practicing law, the

member shall state the name, address, and telephone number of each financial institution in which the member maintains a trust account, a fiduciary account, or a safe deposit box. The state bar shall supply to each member, with the annual dues statement, or at any other time directed by the supreme court, a form on which this statement shall be made.

(2) **Certification by law firm.** A law firm shall file one certificate of accounts on behalf of the lawyers in the firm who are required to file a certificate under par. (1).

(3) **Compliance with SCR 20:1.15.** Each state bar member shall acknowledge on the annual dues statement, or another form approved by the supreme court, that the member is aware of all of the following requirements of this rule:

a. That SCR 20:1.15 establishes fiduciary obligations for trust and fiduciary property that comes into the member's possession, including the duty to hold that property in trust separate from the member's own property, to safeguard that property, to maintain complete records of that property, to account fully for that property, and to promptly deliver that property to the owner.

b. That SCR 20:1.15 requires a member to maintain each IOLTA account in an IOLTA participating institution, to file an overdraft agreement with the office of lawyer regulation for each account that is subject to SCR 20:1.15(h) and (k)(10), and to annually report all trust and fiduciary accounts to the state bar of Wisconsin that are not subject to an exception under SCR 20:1.15(m).

(4) **Suspension for non-compliance.** A state bar member who fails to file the acknowledgements required by sub. (i)(3) or a trust

account certificate, unless a certificate of accounts is filed by the law firm, is subject to the automatic suspension of the member's membership in the state bar in the same manner provided in SCR 10.03(6) for nonpayment of dues.

(j) Multi-jurisdictional practice. If a lawyer also licensed in another state is entrusted with funds or property in connection with a representation in the other state, the provisions of this rule shall not supersede the applicable rules of the other state.

(k) Fiduciary property.

(1) **Segregation of fiduciary property.** A lawyer shall hold in trust, separate from the lawyer's own funds or property, those funds or that property of clients or 3rd parties that are in the lawyer's possession when acting in a fiduciary capacity.

(2) **Accounting.** Upon final distribution of any fiduciary property or upon request by a client or a 3rd party having an ownership interest in the property, a lawyer shall promptly render a full written accounting regarding the property.

(3) **Fiduciary accounts.** A lawyer shall deposit all fiduciary funds specified in par. (1) in any of the following:

a. A pooled interest-bearing or dividend-paying fiduciary account with sub-accounting by the financial institution, the lawyer, or the law firm that will provide for computation of interest or dividends earned by each fiduciary entity's funds and the proportionate allocation of the interest or dividends to each of the fiduciary entities, less any transaction costs.

b. An income-generating investment vehicle, on which income shall be paid to the fiduciary entity or its beneficiary or beneficiaries, less any transaction costs.

c. An income-generating investment vehicle selected by the lawyer and approved by a court for guardianship funds if the lawyer serves as guardian for a ward under Ch. 54 and subject to Ch. 881, Wis. Stats.

d. An income-generating investment vehicle selected by the lawyer to protect and maximize the return on funds in a bankruptcy estate, which investment vehicle is approved by the bankruptcy trustee, by a bankruptcy court order, or otherwise consistent with 11 U.S.C. § 345.

e. A draft account or other account that does not bear interest or pay dividends when, in the lawyer's professional judgment, placement in the account is consistent with the needs and purposes of the fiduciary entity or its beneficiary or beneficiaries.

(4) **Location.** Each fiduciary account shall be maintained in a financial institution as provided by the written authorization of the client, the governing trust instrument, organizational by-laws, an order of a court, or, absent such direction, in a financial institution that, in the lawyer's professional judgment, will best serve the needs and purposes of the client or 3rd party for whom the lawyer serves as fiduciary. If a lawyer acts in good faith in making this determination, the lawyer is not subject to any charge of ethical impropriety or other breach of the Rules of Professional Conduct. When the fiduciary property is held in a draft account and the account is at a financial institution that is not located in

Wisconsin or authorized by state or federal law to do business in Wisconsin, the lawyer shall comply with the requirements of sub. (k)(10)b., c., d., e., or f.

(5) **Prohibited transactions.**

a. **Cash.** No withdrawal of cash shall be made from a fiduciary account or from a deposit to a fiduciary account. No check shall be made payable to "Cash." No withdrawal shall be made from a fiduciary account by automated teller or cash dispensing machine.

b. **Card transactions.** A lawyer shall not authorize transactions by way of credit, debit, prepaid or other types of payment cards to or from a fiduciary account.

(6) **Availability of funds for disbursement.** A lawyer shall not disburse funds from a fiduciary account unless the deposit from which those funds will be disbursed has cleared and the funds are available for disbursement. The exception for real estate transactions in sub. (f)(4)b. shall apply to fiduciary accounts.

(7) **Record retention.** A lawyer shall maintain and preserve complete records of fiduciary account funds, all deposits and disbursements, and other fiduciary property and shall preserve those records for the 6 most recent years during which the lawyer served as a fiduciary and shall preserve at a minimum, a summary accounting of all fiduciary funds and property for prior years during which the lawyer served as a fiduciary. After the termination of the fiduciary relationship, the lawyer shall preserve the records required by this paragraph for at least 6 years. The office of lawyer regulation shall publish guidelines for fiduciary account record-keeping.

(8) **Record production.** All fiduciary account records have public aspects related to a lawyer's fitness to practice. Upon request of the office of lawyer regulation, or upon direction of the supreme court, the records shall be submitted to the office of lawyer regulation for its inspection, audit, use, and evidence under any conditions to protect the privilege of clients that the court may provide. The records, or an audit of the records, shall be produced at any disciplinary proceeding involving the lawyer, whenever material.

(9) **Standard of proof.** A lawyer's failure to promptly submit fiduciary account records to the office of lawyer regulation or promptly provide an accounting of fiduciary property to the office of lawyer regulation shall result in a presumption that the lawyer has failed to hold fiduciary property in trust, contrary to SCR 20:1.15(k)(1). This presumption may be rebutted by the lawyer's production of records or an accounting that overcomes this presumption by clear, satisfactory, and convincing evidence.

(10) **Dishonored payment notification or alternative protection.** A lawyer who holds fiduciary property in a draft account from which funds are disbursed through a properly payable instrument or electronic transaction shall take any of the following actions:

a. Comply with the requirements of sub. (h) relating to dishonored payment notification (overdraft notices).

b. Have the account independently audited by a certified public accountant on at least an annual basis.

c. Hold the funds in a draft account, which requires the approval of a co-trustee, co-agent, co-guardian, or co-personal representative before funds may be disbursed from the account.

d. Require and document the approval of two people from a group consisting of a lawyer or a member or employee of the lawyer's law firm before funds may be disbursed from the account.

e. In the case of an estate or trust, provide an accounting of the administration at least annually to all beneficiaries currently eligible to receive income distributions.

f. In the case of a guardianship proceeding in which annual financial accountings must be reviewed by a court, timely file those annual financial accountings with the court.

(11) **Fiduciary account certificate and acknowledgements.** Funds held by a lawyer in a fiduciary account are subject to the requirements of sub. (i).

(m) Exceptions to this section. This rule does not apply in any of the following instances in which a lawyer is acting in a fiduciary capacity:

(1) The lawyer is serving as a bankruptcy trustee, subject to the oversight and accounting requirements of the bankruptcy court or the office of U.S. Trustee.

(2) The lawyer is serving as an assignee or receiver under the provisions of Ch. 128, Wis. Stats.

(3) The property held by the lawyer when acting in a fiduciary capacity is property held for the benefit of an immediate family member of the lawyer.

(4) The lawyer is serving in a fiduciary capacity for a civic, fraternal, or non-profit organization that is not a client and has other officers or directors participating in the governance of the organization.

(5) The lawyer is acting in the course of the lawyer's employment by an employer not itself engaged in the practice of law, provided that the lawyer's employment is not ancillary to the lawyer's practice of law.

SECTION 11. Wisconsin Comments to 20:1.15 of the Supreme Court Rules are created to read:

WISCONSIN COMMENT

A lawyer must hold the property of others with the care required of a professional fiduciary. All property that is the property of clients or 3rd parties must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust or fiduciary accounts. Lawyers have duties to keep clear, distinct, and accurate records of all trust transactions, and to be able always to make a full accounting. See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

SCR 20:1.15(a)(2) Electronic transaction.

The types of electronic transactions are developing. For examples of current types of electronic transactions see the record-keeping guidelines published by the office of lawyer regulation.

SCR 20:1.15(b)(1) Separate accounts.

With respect to probate matters, a lawyer's role may be to serve in a fiduciary capacity as the personal representative, to represent an estate's personal representative, or to act as both personal

representative and attorney for an estate. SCR 20:1.15(k) applies to funds and property which a lawyer receives, holds, and distributes while serving in the fiduciary role of personal representative. Such funds and property may include, but are not limited to, bank and investment accounts, stocks, and bonds. SCRs 20:1.15(b)-(i) apply to funds and property which a lawyer receives, holds, and distributes in connection with the representation of a client/personal representative or an estate. Such funds include, but are not limited to, advanced legal fees and advanced costs. If a lawyer acts in good faith to safeguard funds and property received in connection with a probate matter, the lawyer is not subject to any charge of ethical impropriety for holding what may be determined to be fiduciary funds in a segregated trust account or in an IOLTA account for a limited period of time, or for holding what may be determined to be trust funds in a fiduciary account.

SCR 20:1.15(b)(5) Insurance and safekeeping requirements.

Pursuant to SCR 20:1.15(b)(5), trust accounts are required to be held in financial or IOLTA participating institutions that are insured by the FDIC, the NCUSIF, the SIPC or any other investment institution financial guaranty insurance. However, since federal law dictates the amount of insurance coverage available from the FDIC, the NCUSIF, and the SIPC, funds in excess of those limits are not insured. Federal law also limits the types of losses that are covered by SIPC insurance. Consequently, the purpose of the insurance and safety requirements is not to guarantee that all funds are adequately insured. Rather, it is to assure that trust funds are held in reputable financial or IOLTA participating institutions and

that the funds are eligible for the insurance that is available. The exceptions to the SCR 20:1.15(b)(5) requirement relate to trust property other than funds and to IOLTA accounts that are subject to the safety requirements of SCR 20:1.15(d)(3)b. and c.

SCR 20:1.15(d)(3) Safekeeping requirements.

See comment to SCR 20:1.15(b)(5).

SCR 20:1.15(d)(4) Income requirements.

Pursuant to SCR 20:1.15(d)(4), IOLTA accounts shall bear the highest non-promotional interest rate or dividend that is generally available to non-IOLTA customers at the same branch or main office location when the IOLTA account meets or exceeds the same eligibility qualifications, if any, including a minimum balance. Investment products, including repurchase agreements and shares of mutual funds, are neither deposits nor federally or FDIC-insured. An investment in a repurchase agreement or money market fund may involve investment risk including possible loss of the principal amount invested. The rule, however, provides safeguards to minimize any potential risk by limiting investment products to repurchase agreements and open-end money market funds that invest in United States government securities only.

SCR 20:1.15(e) Prompt notice and delivery of property.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law, including SCR 20:1.15(e), to protect such 3rd-party claims against wrongful interference by the client, and accordingly, may refuse to surrender the property to the client. However, a lawyer should not

unilaterally assume to arbitrate a dispute between the client and the 3rd party. If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest in it, the lawyer is free to deliver the property to the person to whom it belongs.

SCR 20:1.15(e)(4) Standard of proof.

A lawyer's failure to comply with the delivery requirements of SCR 20:1.15(e)(1) or the accounting requirements of SCR 20:1.15(e)(2) will result in a presumption that the lawyer has failed to hold property in trust, contrary to SCR 20:1.15(b)(1). This presumption can be rebutted by the lawyer's production of records or an accounting that overcomes this presumption by clear and convincing evidence. See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

SCR 20:1.15(f)(2)c. Electronic transfers by 3rd parties.

Many forms of electronic deposit allow the transferor to remove the funds without the consent of the account holder. A lawyer must not only be aware of the financial institution's policy but also federal regulations pertaining to the specific form of electronic deposit, and must ensure that the transferor is prohibited from withdrawing deposited funds without the lawyer's consent.

SCR 20:1.15(f)(3)a. Remote deposit.

A remote deposit is an electronic deposit of a paper check to a lawyer's trust account. Subject to a lawyer's compliance with the requirements of this subsection, such transactions are permitted in an IOLTA account that is not an E-Banking IOLTA. Unlike other types

of electronic transactions, remote deposits can be traced to images of the front and reverse of the deposited check, which are retained for at least 6 years by the lawyer's financial institution, pursuant to banking regulations. This exception was established to facilitate deposits to an IOLTA account of a lawyer who does not utilize multiple types of electronic transactions, making the expense relating to an E-Banking IOLTA unnecessary. Remote deposits may also be made to a non-pooled account for a particular client, subject to those same requirements.

SCR 20:1.15(f)(3)b. Exception: E-Banking Trust Account.

Financial institutions, as credit card issuers, routinely impose charges on vendors when a customer pays for goods or services with a credit card. That charge is deducted directly from the customer's payment. Vendors who accept credit cards routinely credit the customer with the full amount of the payment and absorb the charges. Before holding a client responsible for these charges, a lawyer needs to disclose this practice to the client in advance, and assure that the client understands and consents to the charges. In addition, the lawyer needs to investigate the following concerns before accepting payments by credit card:

1. **Does the credit card issuer prohibit a lawyer/vendor from requiring the customer to pay the charge?** If a lawyer intends to credit the client for anything less than the full amount of the credit card payment, the lawyer needs to assure that this practice is not prohibited by the credit card issuer's regulations and/or by the agreement between the lawyer and the credit card issuer. Entering into an agreement with a credit card issuer with the intent to

violate this type of requirement may constitute conduct involving dishonesty, fraud, or deceit, in violation of SCR 20:8.4(c).

2. **Does the credit card issuer require services to be rendered before a credit card payment for legal fees is accepted?** If a lawyer intends to accept fee advances by credit card, the lawyer needs to assure that fee advances are not prohibited by the credit card issuer's regulations and/or by the agreement between the lawyer and the credit card issuer. Entering into an agreement with a credit card issuer with the intent to violate this type of requirement may constitute conduct involving dishonesty, fraud, or deceit, in violation of SCR 20:8.4(c).

3. **By requiring clients to pay the credit card charges, is the lawyer required to make certain specific disclosures to such clients and offer cash discounts to all clients?** If a lawyer intends to require clients to pay credit card charges, the lawyer needs to assure that the lawyer complies with all state and federal laws relating to such transactions, including, but not limited to, Regulation Z of the Truth in Lending Act, 12 C.F.R. § 206.

SCR 20:1.15(f)(3)c. Alternative E-Banking Trust Account.

As an alternative to establishing an E-Banking Trust Account for the purpose of making electronic deposits and disbursements, a lawyer may make electronic deposits and disbursements from an IOLTA when additional protections are in place. This alternative may reduce the expense of maintaining two accounts. On the other hand, the alternative requires that the lawyer prevent the electronic withdrawal of funds from the IOLTA that could occur through chargebacks or reversals against a credit card deposit, or other

electronic withdrawals. Specifically, the lawyer must either establish agreements with the lawyer's financial institution and with payment providers to deduct fees, surcharges, and chargebacks from the law firm business account or reimburse the account for such deductions with funds belonging to the lawyer or law firm within 3 business days after receiving notice of the deductions. In addition, the lawyer must establish an agreement with the financial institution to block debits from the IOLTA.

SCR 20:1.15(f)(4)b. Exception: Real estate transactions.

SCR 20:1.15(f)(4)b. establishes an exception to the requirement that a lawyer only disburse funds that are available for disbursement, i.e., funds that have been credited to the account. This exception was created in recognition of the fact that real estate transactions in Wisconsin require a simultaneous exchange of funds. However, even under this exception, the funds from which a lawyer disburses the proceeds of the real estate transaction, i.e., the lender's check, draft, wire transfer, etc., must be deposited no later than the first business day following the date of the closing. In refinancing transactions, the lender's funds must be deposited as soon as possible, but no later than the first business day after the loan proceeds are distributed. Proceeds are generally distributed 3 days after the closing date.

SCR 20:1.15(g)(2) Record production.

The duty of the lawyer to produce client trust account records for inspection under SCR 20:1.15(g)(2) is a specific exception to the lawyer's responsibility to maintain the confidentiality of the client's information as required by SCR 20:1.6.

SCR 20:1.15(g)(3) Standard of proof.

A lawyer's failure to comply with the record production requirements of SCR 20:1.15(g)(2) or to provide an accounting for trust property will result in a presumption that the lawyer has failed to hold property in trust, contrary to SCR 20:1.15(b)(1). This presumption can be rebutted by the lawyer's production of records or an accounting that overcomes this presumption by clear and convincing evidence. See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

SCR 20:1.15(k)(1) Segregation of fiduciary property.

See comment to SCR 20:1.15(b)(1).

SCR 20:1.15(k)(9) Standard of proof.

A lawyer's failure to comply with the record production requirements of SCR 20:1.15(k)(8) or to provide an accounting for fiduciary property will result in a presumption that the lawyer has failed to hold fiduciary property in trust, contrary to SCR 20:1.15(k)(1). This presumption can be rebutted by the lawyer's production of records or an accounting that overcomes such presumption by clear and convincing evidence. See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

SECTION 12. 22.39 of the Supreme Court Rules is amended to read:

22.39 Burden of proof.

(1) Subject to the exceptions identified in SCR 22.39(2), the ~~The~~ director, or a special investigator acting under SCR 22.25, has the burden of proof in proceedings seeking discipline for misconduct or license suspension or the imposition of conditions for medical incapacity. ~~In proceedings seeking license reinstatement, readmission~~

~~to the practice of law, removal of a medical incapacity, removal of conditions imposed on the practice of law, and discipline different from that imposed in another jurisdiction, the proponent has the burden of proof.~~

(2) A lawyer's failure to promptly deliver trust property to a client or 3rd party entitled to the property, or promptly submit trust or fiduciary account records to the office of lawyer regulation, or promptly provide an accounting of trust or fiduciary property to the office of lawyer regulation, shall result in a presumption that the lawyer has failed to hold trust or fiduciary property in trust, contrary to SCR 20:1.15(b)(1) or SCR 20:1.15(k)(1). This presumption may be rebutted by the lawyer's production of records or an accounting that overcomes this presumption by clear, satisfactory, and convincing evidence.

(3) In proceedings seeking license reinstatement, readmission to the practice of law, removal of a medical incapacity, removal of conditions imposed on the practice of law, and discipline different from that imposed in another jurisdiction, the proponent has the burden of proof.

SECTION 13. A Wisconsin Comment to 22.39 of the Supreme Court Rules is created to read:

WISCONSIN COMMENT

While the director of the office of lawyer regulation or a special investigator appointed by the director pursuant to SCR 22.25 has the burden of proving misconduct in most circumstances, par. (2) establishes a rebuttable presumption of certain violations based solely upon a lawyer's failure to deliver property, produce records

or provide accountings. The conduct that will lead to the presumptions of a violation, and the rules to which the presumptions relate are as follows:

(1) A lawyer's failure to comply with the delivery requirements of SCR 20:1.15(e)(1) will result in a presumption that the lawyer has failed to hold property in trust, contrary to SCR 20:1.15(b)(1).

(2) A lawyer's failure to comply with the record production requirements of SCR 20:1.15(g)(2) or SCR 20:1.15(k)(8) will result in a presumption that the lawyer has failed to hold trust or fiduciary property in trust, contrary to SCR 20:1.15(b)(1) or SCR 20:1.15(k)(1).

(3) A lawyer's failure to comply with the accounting requirements of SCR 20:1.15(e)(2) or SCR 20:1.15(k)(9) will result in a presumption that the lawyer has failed to hold trust or fiduciary property in trust, contrary to SCR 20:1.15(b)(1) or SCR 20:1.15(k)(1). See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

IT IS FURTHER ORDERED that the Comments to SCRs 20:1.0, 20:1.5, 20:1.15, and 22.39 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that the amendments to SCR 22.39 and newly created SCR 20:1.15(e)(4), SCR 20:1.15(g)(3) and SCR 20:1.15(k)(9) adopted pursuant to this order shall apply to proceedings commenced after the effective date of this rule and, insofar as is just and practicable, to proceedings pending on the effective date.

IT IS FURTHER ORDERED that the amendments to SCR 20:1.0(ag) and (dm), the newly created SCR 20:1.5(f) and SCR 20:1.5(g), and all

provisions of newly created SCR 20:1.15, except for SCR 20:1.15(e)(4), SCR 20:1.15(g)(3), and SCR 20:1.15(k)(9), adopted pursuant to this order shall apply to conduct occurring after the effective date of this rule.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 4th day of April,2016.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. *(concurring).* This petition proposes changes in trust accounting rules and comments thereto, especially in light of the increasing use of electronic banking. I agree that Supreme Court Rules Chapter 20, Rules of Professional Conduct for Attorneys, has to keep up with changing times and changing law practice, especially the modernization of business and banking transactions.

¶2 Although I join the order adopting the petition as amended by the court, I am concerned that it fails to address the long-standing central concerns expressed by lawyers and the court about trust accounting rules regarding "advanced fees," "retainers" and "flat fees." This petition leaves these issues to be addressed at another time (not specified) and in a different forum (not specified).

¶3 I am also concerned about the court's modifying at its conference the proposed rebuttable presumption regarding a trust account violation and the assignment of the burden of proof. See section 12 of the order, amending 22.39 of the Supreme Court Rules; section 13, creating Wisconsin Comment to 22.39. These are important and complex issues and should be thoroughly vetted before adoption.

¶4 Most importantly, I conclude that this lengthy, complicated rule should be part of a comprehensive review of the Rules of Professional Conduct for Attorneys by a committee

composed of the diverse stakeholders in the lawyer regulation system.[2]

¶5 Several petitions relating to the Rules of Professional Conduct for Attorneys and the functioning of the component parts of the lawyer regulation system are pending before this court, including Rule Petition 15-03, a 65-page revision of the Rules of Professional Conduct for Attorneys proposed by a committee of attorneys created by the State Bar of Wisconsin.

¶6 I proposed in Rule Petition 15-01 that the court create a committee to review the Rules of Professional Conduct for Attorneys (and the functioning of the component parts of the lawyer regulation system). The court dismissed the Petition based on the inventive ruse that it was not a proper subject for a rule petition. See my dissent to the dismissal of Rule Petition 15-01, 366 Wis. 2d xlv (2015).

¶7 All commentators were supportive of Petition 15-01. Nevertheless, after treating the Petition as a valid rule petition for almost a year, on November 16, 2015, five justices,[3] in a play to dismiss the petition, voted to dismiss the petition on the grounds that it was an improper subject matter for a rule petition.

[2] The committee that drafted Rule 14-07 was diverse and did include public members.

[3] David T. Prosser, Patience Roggensack, Annette K. Ziegler, Michael J. Gableman, and Rebecca G. Bradley.

¶8 Justice Ann Walsh Bradley and I dissented from the dismissal of the petition.

¶9 The dismissal of Rule Petition 15-01 does not necessarily end the prospects for the appointment of a committee to review the functioning of the component parts of the lawyer regulation system and the Rules of Professional Conduct for Attorneys. As was noted at the court's November 16, 2015 open conference and in the order dismissing Rule Petition 15-01, the dismissal of Petition 15-01 does not preclude the court from appointing a committee to fulfill the objectives of Petition 15-01.

¶10 Unfortunately, however, decisions about whether a committee will be established and the composition, mission, and functioning of any such committee will be made behind closed doors. Lawyer discipline is of great importance to the courts, to the lawyers of the state, and to the public. Discussion about changing the lawyer discipline system should, in my opinion, be held in public.

¶11 I write separately here to repeat my commitment to keep the bench, the bar, and the public informed as best I can about what progress (or lack thereof) is made in the creation of a committee. As of this date, no progress has been made.

¶12 I intend to seek, as much as I can, open discussion of improvement of OLR procedures and practices and the Rules of Professional Conduct for Attorneys.

¶13 I prefer the court take a good, hard look at the numerous difficult issues addressed in Rule Petition 14-07 as

part of an overall objective study rather than adopt changes to the Rules of Professional Conduct for Attorneys in a piecemeal approach. The court's piecemeal approach to reviewing the Rules of Professional Conduct for Attorneys may very well be incomplete and lead to inconsistencies and confusion.

¶14 For the reasons set forth, I write separately.

¶15 I am authorized to state that Justice ANN WALSH BRADLEY joins this opinion.