

STATE OF WISCONSIN

IN SUPREME COURT

In the Matter of Amendment of
Supreme Court Rules 20:1.15 and 20:1.0,
Relating to Electronic Banking

SUPPORTING MEMORANDUM

No. _____

INTRODUCTION

The Office of Lawyer Regulation, by Director Timothy C. Samuelson and Trust Account Program Administrator Travis J. Stieren, files this memorandum in support of its petition to revise the Rule of Professional Conduct regarding attorney trust accounts, Supreme Court Rule (SCR) 20:1.15 (the "trust account" rule), and two related definitions in SCR 20:1.0. The proposed changes will permit electronic transactions in lawyer trust accounts.

The subject matter of the proposed rule changes falls within the power of the Wisconsin Supreme Court to regulate the practice of law pursuant to its constitutional responsibility to exercise superintending and administrative authority over the courts. The recommended procedural changes do not abridge the substantive rights of any participant in the attorney disciplinary process. The Court has previously amended both SCR 20:1.15 and SCR 20:1.0.

Wisconsin is the only state that prohibits electronic transactions in lawyer trust accounts. The general prohibition on

electronic transactions adopted in SCR 20:1.15(f) (2) and (3) has adversely affected lawyers engaged in the practice of law in Wisconsin, limited client choice, increased administrative burdens, and restricted access to justice. The proposed revisions will permit electronic transactions while maintaining sufficient procedural safeguards to protect the public.

I. Background

Every state and the District of Columbia, has adopted the American Bar Association's (ABA) Model Rules of Professional Conduct and adapted the model rules to each state's particular needs. Rule 1.15 is the Model Rule governing lawyer trust accounts (Model Rule).¹

Trust account rules are needed because "[a] lawyer often takes temporary possession of a client's property in the course of representing the client, for example as part of administering an estate, paying or collecting a judgment, or exchanging valuable documents at a closing."² "Precautions are required to assure safety of the property."³ "Requiring the property to be clearly identified and held separately reduces the danger of conversion, negligent misappropriation, or loss and protects the property from seizure by creditors of the lawyer or of other clients."⁴

¹ Am. Bar Ass'n, Model Rules of Prof'l Conduct, R. 1.15 (2020). See Appx. 1.

² Restatement (Third) of the Law Governing Lawyers, § 44 cmt b (Am. Law Inst. 2000).

³ *Id.*

⁴ *Id.*

Wisconsin's SCR 20:1.15 has been revised numerous times, most extensively in the version that became effective July 1, 2004.⁵ That revision identified, for the first time, a number of prohibited transactions including internet transactions, electronic transfers by third parties, credit card transactions, and debit card transactions.⁶

These prohibitions soon became outdated and they have significantly complicated the lives of practicing lawyers and their clients. Recognizing the need to ease the restriction on electronic transactions, effective July 1, 2007, the trust account rule was amended to allow lawyers to maintain a second "Credit Card Trust Account" to act as a pass-through account by which to accept credit card or other electronic payments before transferring funds to a primary trust account.⁷

The trust account rule was amended again, effective July 1, 2016, offering another option for lawyers to accept and make electronic payments.⁸ Presently, lawyers may either maintain a second pass-through trust account, now called an "E-Banking Trust Account," or they can use the exception that is known as the "all-in-one" trust account, in which they can maintain just one trust

⁵ S. Ct. Order 02-06, 2004 WI 49 (issued Apr. 30, 2004, eff. July 1, 2004).

⁶ SCR 20:1.15(d)(4), S. Ct. Order 02-06, 2004 WI 49 (issued Apr. 30, 2004, eff. July 1, 2004).

⁷ SCR 20:1.15(e)(4), S. Ct. Order 06-04, 2007 WI 48 (issued May 2, 2007, eff. July 1, 2007) (Walsh Bradley, J. concurring in part, dissenting in part).

⁸ S. Ct. Order 14-07, 2016 WI 21 (issued Apr. 4, 2016, eff. July 1, 2016).

account and use it for electronic transactions provided they comply with four additional security conditions including a bond or crime insurance policy covering the maximum daily account balance of the trust account from the prior year.⁹

As a practical matter, these options are cumbersome to use. And the all-in-one trust account may no longer even be viable. Until 2022, only one Wisconsin insurer, Cap Specialty, offered the crime insurance policies required by SCR 20:1.15(f)(3)c. Cap Specialty had worked with the State Bar and OLR to develop a policy that would comply with the trust account rule. This insurer no longer offers or renews all-in-one trust account insurance policies. While it is possible there may be other insurers willing to offer similar policies, compliance with this exception is wholly dependent on products that may or may not be available in the private marketplace.

II. E-Banking is Safe

Since the adoption of Wisconsin's highly cautious approach to electronic transactions, courts, government agencies, and private companies have all moved toward electronic payments for fees and other monetary transactions. For example, if a lawyer has unclaimed funds in a trust account, the lawyer is required to escheat the funds to the State of Wisconsin under Wis. Stat. Chapter 177. The

⁹ SCR 20:1.15(f)(3)b. and c.

Department of Revenue (DOR) manages the state's unclaimed property program and now requires any payment of unclaimed funds to be sent via online Automated Clearing House (ACH) transactions;¹⁰ it no longer accepts paper checks. Thus, under the current SCR 20:1.15, without an E-Banking Trust Account, a lawyer with unclaimed property in their trust account has no viable means to disburse funds to DOR in compliance with the unclaimed property law. This is one of many examples where lawyers increasingly need the ability to make electronic transactions from their trust accounts.

Increased use of electronic banking carries minimal risk to the public because with the banking industry's shift to electronic payments, security protocols have been updated. For example, the Mid-Atlantic ACH Association (MACHA), an industry leader in ACH transactions that merged with the Wisconsin ACH Association, informed OLR that the audit trail for electronic transactions is more reliable than that of paper transactions because every electronic transaction has a unique record of a prior authorization. Further, for every ACH transaction, an 80-character addenda record is created, which can be used for client identification. Each addenda record must be maintained by both the

¹⁰ See Wisconsin Department of Revenue, Unclaimed Property Holder Report Guide, (Publication 82, 03/22), available at <https://www.revenue.wi.gov/DOR%20Publications/pb82.pdf>; see also Wisconsin Department of Revenue Frequently Asked Questions regarding Holders (April 5, 2022), available at <https://www.revenue.wi.gov/Pages/FAQS/ucp-holders.aspx#hold8>.

originating financial institution and the receiving financial institution for six years.

The proposed rule keeps the burden upon the lawyer to fully account for trust account funds and to produce records of activity in the trust account to OLR upon request.¹¹

III. Survey of Other States' Trust Account Rules

The ABA Model Rule does not forbid electronic transactions. Indeed, of the fifty states and the District of Columbia, Wisconsin is an outlier: it the only state that generally prohibits electronic transactions in lawyer trust accounts.

Thirty-nine states plus the District of Columbia follow the Model Rule which enumerates five specific duties for a lawyer: holding funds in trust separate from the lawyer's own property; maintaining records of all transactions; prompt notice and delivery of property; resolving disputes regarding trust property; and providing a full accounting. Assuming these requirements are met, nothing in the Model Rule precludes a lawyer from using electronic transactions.

Ten states explicitly allow electronic transactions so long as the electronic transaction is authorized or directed by the lawyer.

¹¹ SCR 20:1.15(e)(2) and (4).

Seven of these states require that the *withdrawal* of funds by electronic transfer be directed or authorized by the lawyer; no similar restriction exists regarding electronic *deposits*.¹²

Three of these states require that all deposits and withdrawals, including electronic transfers, must be made or directed by the lawyer or someone under the lawyer's supervision.¹³

OLR proposes the Court amend the existing rule in a manner consistent with these three states, such that all trust account deposits and withdrawals, electronic or otherwise, shall be made or directed by the lawyer or a person under the lawyer's supervision pursuant to SCR 20:5.3.¹⁴

OLR recommends this approach for at least three reasons.

First, this proposal is generally consistent with existing SCR 20:1.15(f)(1). The proposal would increase transactional flexibility for lawyers and law firms, while at the same time ensuring that a lawyer direct and control all transactions. This requirement will protect the public by ensuring the lawyer is ultimately responsible for all client funds held in trust. To this end, OLR proposes the Court incorporate a comment to the proposed rule: "[w]ritten confirmation of authorization for electronic

¹² Colorado, Colo. RPC 1.15C(b); Florida, Fla. Bar Reg. 5-1.2(e); Louisiana, La. R. Prof. Cond. 1.15(f); New York, Rules Prof. Conduct, 22 NYCRR 1200.0, Rule 1.15(e); North Carolina, 27NCAC 02, Rule 1.15-2(s); North Dakota, N.D.R. Prof. Conduct 1.15(k); Washington, Wa. Rules Prof. Cond. 1.15(h)(5).

¹³ Louisiana, La. R. Prof. Cond. 1.15(f); Minnesota MRPC 1.15(j); Wyoming, Wyo. R. State Bar., Atty'y Cond. & Prac. 1.15(a)(4)(iii).

¹⁴ SCR 20:5.3 enumerates the "[r]esponsibilities regarding nonlawyer assistance."

disbursements should be maintained as part of complete trust account records.”

Second, requiring deposits and disbursements to be authorized by the lawyer or a person under the lawyer’s supervision is consistent with the policy that, as a fiduciary to clients, it is the lawyer’s duty to hold client funds in trust. See SCR 20:1.15(b) (1).

Third, deleting subsections (f) (2) and (f) (3)¹⁵ from the existing rule will streamline the Rule, which is the longest and most complex in the country. The proposed revisions simplify the process of accepting payments and making payments from trust accounts, which should facilitate lawyer adherence and compliance with the Rule.¹⁶

IV. The Proposed Rule Allows E-Banking with Sufficient Procedural Safeguards

Wisconsin’s prohibition on electronic transactions has hampered the public’s access to legal services and limits lawyers’ ability to get paid for their services. Firms of all sizes, but particularly small firms and solo practitioners, find the additional financial and administrative costs of maintaining a second trust account burdensome. Anecdotally, many practitioners elect to accept only cash or check payments, rather than comply

¹⁵ SCR 20:1.15(f) (2) & (3) generally prohibit electronic transactions.

¹⁶ OLR is in the process of evaluating whether a further simplified version of the trust account rule would be in the best interests of Wisconsin lawyers and the public.

with Wisconsin's complicated and costly trust account alternatives. Others accept electronic payments without complying with the alternatives – in violation of the Rule – because their clients would otherwise be unable to pay.

Prohibiting electronic payments has a negative effect on the ability of Wisconsin citizens to obtain legal representation and decreases access to justice for many, particularly lower income and younger individuals who are less likely to have traditional checking accounts. Anecdotally, many clients – and even new lawyers – have never used a paper checkbook.

Wisconsin's legal industry is constrained in a way that other industries are not, as electronic payments are common in virtually all facets of life. Removing these now unnecessary barriers to electronic transactions will serve the public interest and reflect modern electronic transaction banking practices.

V. Proposed Electronic Banking Rule Changes

The most significant proposed changes to the Rule would be deletions of the general prohibitions on electronic transactions found in current SCR 20:1.15(f)(2)c. and (3), along with the accompanying E-Banking and all-in-one exceptions of current SCR 20:1.15(f)(3)b. and c. Although the proposal would lift the general prohibition on electronic transactions, lawyers would continue to bear responsibility for all activity in their trust accounts. See SCR 20:1.15(b)(1) and (g).

The deleted provisions would be replaced by new language that allows increased transactional flexibility while maintaining safeguards to protect client property. SCR 20:1.15(f)(1) would be amended to require the lawyer to direct or authorize all electronic transactions:

Every check, draft, electronic transfer, or other withdrawal instrument or authorization shall be personally signed or, in the case of electronic, telephone, or wire transfer, directed by one or more lawyers authorized by the law firm or a person under the supervision of a lawyer having responsibility under SCR 20:5.3.

This language is consistent with existing rules in ten states, noted above, that require each electronic transaction to be either "directed" or "authorized" by the lawyer.

Proposed SCR 20:1.15(f)(1) would further amend the rule by giving lawyers three business days to reconcile accounts in the event of a credit card chargeback or ACH payment reversal:

A lawyer shall replace any and all funds that have been withdrawn from a trust account by a financial institution or card issuer, and reimburse the trust account for any shortfall or negative balance caused by a chargeback, surcharge, or ACH reversal within three business days of receiving actual notice that a chargeback, surcharge, or ACH reversal has been made against the trust account; and the lawyer shall reimburse the trust account for any chargeback, surcharge, or ACH reversal prior to accepting a new electronic deposit.

As an alternative to using the trust account to receive electronic payments, proposed SCR 20:1.15(b)(6)b. would allow lawyers to accept electronic payments for advanced fees and costs

into an operating account so long as they transferred unearned fees into a trust account within two business days:

The lawyer may accept credit card payments or electronic funds transfer payments of advanced legal fees and expenses as temporary deposits in a non-trust account, so long as such funds are transferred promptly, and no later than two business days following receipt, into a client trust account. However, except as provided by SCR 20:1.5(g), a lawyer shall not accept any advance payment into a non-trust account if the lawyer has any reason to suspect that the funds will not be successfully transferred into the client trust account within two business day of receipt.

This approach, used in both Maine and North Dakota,¹⁷ would allow lawyers to maintain only one electronic payment processor attached to the operating account and use that processing service to accept payments for advanced fees and costs, so long as those payments are promptly transferred to the trust account.

Collectively, proposed SCR 20:1.15(f)(1) and SCR 20:1.15(b)(6)b. recognize the practicalities of maintaining credit card or other electronic payment processing services. They would give lawyers the flexibility to determine which means of accepting electronic payments for advanced fees and costs is best for their individual practice: either directly to their trust account or briefly to their operating account before transferring the funds to the trust account.

The proposal would also allow lawyers to pay for and maintain only one credit card or other electronic payment processing service

¹⁷ Maine R. Prof. Conduct 1.15(b)(1); N.D. R. Prof. Cond. 1.15(b).

(i.e., operating account only) as opposed to multiple (i.e., operating account and trust account) which would limit costs and administrative requirements. This, too, should benefit small firms and solo practitioners.

In addition to these changes, several other minor revisions would need to be made to other subsections of both SCR 20:1.15 and SCR 20:1.0, the terminology section of Chapter 20. Although the existing rule on fiduciary accounts, SCR 20:1.15(k), is more lenient with respect to electronic transactions, SCR 20:1.15(k)(5)b. currently prohibits card payments to or from a fiduciary account. This subsection should be deleted to allow electronic card payments in addition to other forms of electronic transactions.

Because SCR 20:1.15(f)(3) would be deleted under the proposed Rule, the third sentence of SCR 20:1.15(b)(5) should also be deleted: "Lawyers using the alternative to the E Banking Trust Account shall comply with the requirements of sub. (f)(3)c." Likewise, in the definitions of both "Advanced fee" under SCR 20:1.0(ag) and "Flat fee" under SCR 20:1.0(dm), the references to "SCR 20:1.15(f)(3)b.4" should be deleted.

Finally, due to common misunderstandings from practitioners, OLR recommends the following addition to SCR 20:1.15(b): "Except as provided by sub. (b)(3), a lawyer shall not hold any funds in a trust account that are unrelated to a representation." Similarly,

to clarify that all fees, including flat fees, must be both reasonable and earned, OLR recommends the following addition to SCR 20:1.0(dm): "Notwithstanding that lawyers have a property interest upon receipt of flat fees, such fees can only be earned by the provision of legal services."

VI. Feedback from Practitioners and Stakeholders

In preparing this petition, OLR consulted with the following persons, each of whom, or their organizational counterparts, participated in the study committee that drafted the Rule that took effect July 1, 2016: Attorney Dean Dietrich (Disciplinary Respondents' Counsel, President-Elect of the State Bar of Wisconsin), Attorney Diane Diel (Family Law Practitioner, Past President of the State Bar of Wisconsin), Michele Barlow (Mid-Atlantic ACH Association - MACHA, formerly the Wisconsin ACH Association), Attorney Tim Pierce (State Bar Ethics Counsel), Attorney Aviva Kaiser (State Bar Ethics Counsel), Rebecca Murray (Wisconsin Trust Account Foundation), and Tehmina Islam (Wisconsin Trust Account Foundation). OLR also presented its proposals to the Lawyer Regulation System Board of Administrative Oversight, the Board of the Wisconsin Trust Account Foundation, the State Bar of Wisconsin Professional Ethics Committee, Attorney J. David Krekeler (Chairperson of the Solo, Small Firm & General Practice Section, State Bar of Wisconsin), Attorney Helen Ludwig (Chairperson of the Bankruptcy, Insolvency & Creditors Rights

Section, State Bar of Wisconsin), and Attorney Michael O'Hear (Chairperson of the Criminal Law Section, State Bar of Wisconsin). OLR is aware of no substantive opposition to the proposal.

OLR recognizes that revisions to the Rule would require education and outreach efforts and, if the proposal is accepted, OLR will update its annual trust account management seminar with a focus on the new electronic banking provisions, upload new guidance materials to its website, work with the State Bar to provide continuing legal education programs on trust account management, and seek other opportunities to raise awareness of the revised electronic banking provisions.

VII. Proposed Effective Date

OLR requests that the proposed revisions to the trust account rule be given an effective date of January 1, 2023. Should any violations of the provisions of the existing rule prohibiting electronic transactions be discovered in either OLR proceedings pending on the effective date or OLR proceedings opened following the effective date of the proposed amendments, OLR would review such violations with an eye toward education and remediation, unless the violations are sufficiently significant to warrant discipline.

CONCLUSION

Revisions to Wisconsin's trust account rule that would allow electronic transactions are overdue. OLR respectfully requests the

Court grant its petition to revise the Rule of Professional Conduct regarding attorney trust accounts, SCR 20:1.15, along with the relevant definitions in SCR 20:1.0.

Respectfully submitted this 15th day of July, 2022.

Timothy C. Samuelson
Director
Office of Lawyer Regulation
110 East Main Street, Suite 315
PO Box 1648
Madison, Wisconsin 53701-1648
State Bar No. 1089968

Travis J. Stieren
Trust Account Program Administrator
Office of Lawyer Regulation
110 East Main Street, Suite 315
PO Box 1648
Madison, Wisconsin 53701-1648
State Bar No. 1038408* (inactive)

APPENDIX 1

American Bar Association Model Rule 1.15: Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.