

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 22-05 (AMENDED)

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

FILED

MAR 30, 2023

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

On July 15, 2022, the Office of Lawyer Regulation (OLR), by its Director Timothy Samuelson, and Trust Account Program Administrator Travis J. Stieren, filed a rule petition asking the court to amend Supreme Court Rule (SCR) 20:1.0 and 20:1.15 to permit electronic transactions in lawyer trust accounts. The OLR explains that Wisconsin is the only state that prohibits electronic transactions in lawyer trust accounts. The OLR asserts that the revisions will permit electronic transactions with sufficient procedural safeguards to protect the public.

Prior to filing the petition, the OLR consulted with: Attorney Dean R. Dietrich, President-Elect of the State Bar of Wisconsin; Attorney Diane S. Diel, Past-President of the State Bar of Wisconsin; Michele Barlow, Mid-Atlantic ACH Association; Attorney Tim Pierce and Attorney Aviva Kaiser, State Bar Ethics Counsel; and Rebecca Murray and Tehmina Islam, Wisconsin Trust Account Foundation. In addition, the

OLR presented these 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 and General Practice Section of the State Bar of Wisconsin; Attorney Helen Ludwig, Chairperson of the Bankruptcy, Insolvency and Creditors Rights Section of the State Bar of Wisconsin; and Attorney Michael O'Hear, Chairperson of the Criminal Law Section of the State Bar of Wisconsin.

The court voted to seek written comments and schedule a public hearing. A letter soliciting comments was sent to interested persons on December 1, 2022. The court received comments from the State Bar of Wisconsin, the State Bar Professional Ethics Committee, Attorney Dean R. Dietrich, and the Wisconsin Trust Account Foundation. By letter dated December 1, 2022, the court asked certain questions of the OLR, which the OLR responded to by letter dated December 28, 2022. The OLR filed a supplemental response on January 13, 2023, requesting certain additional amendments to the comment to SCR 20:1.5(g) to ensure consistency with the other requested amendments.

A public hearing notice issued on January 6, 2023, and the court conducted a public hearing on February 24, 2023. OLR Director Timothy Samuelson and Trust Account Program Administrator Travis J. Stieren presented the petition to the court. Attorney Tim Pierce from the State Bar Professional Ethics Committee spoke in favor of the petition. Following the public hearing, and in response to questions for the court, the OLR submitted an additional revision to one of the proposed changes.

At the ensuing closed administrative rules conference, the court voted to grant the petition, as amended, and to revise the rules as requested.

Therefore,

IT IS ORDERED that effective July 1, 2023:

SECTION 1. Supreme Court Rule 20:1.0 (ag) is amended to read:

(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, 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. Supreme Court Rule 20:1.0 (dm) is amended to read:

(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, 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). Notwithstanding that lawyers have a property interest

upon receipt of flat fees, such fees can be earned only by the provision of legal services.

SECTION 3. The Comment to Supreme Court Rule SCR 20:1.5 (g) is amended to read:

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~~ held in the lawyer's trust account pursuant to SCR 20:1.15(b) (1) and SCR 20:1.15(b) (6).

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~~ and SCR 20:1.15(b) (6).

SECTION 4. Supreme Court Rule 20:1.15 (b) (1) is amended to read:

(b) (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. Except as provided by sub. (b) (3), a

lawyer shall not hold any funds in a trust account that are unrelated to a representation.

SECTION 5. Supreme Court Rule 20:1.15 (b) (5) is amended to read:

(b) (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.

SECTION 6. Supreme Court Rule 20:1.15 (b) (6) (title), (6) a., and b. are created to read:

(b) (6) **Advanced legal fees and costs.** 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, except as follows:

a. The lawyer complies with the requirements of SCR 20:1.5(g).

b. 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 days of receipt.

SECTION 7. A Comment to Supreme Court Rule 20:1.15 (b) (6) is created to read:

COMMENT

SCR 20:1.15 (b) (6) Advanced legal fee and costs. While the general rule is that a lawyer must hold trust property separate from the lawyer's own property, SCR 20:1.15(b) (6) allows very limited short-term temporary commingling when accepting an electronic payment for advanced fees or costs. Considering the expense of electronic payment processing providers, this allows a lawyer to maintain only one electronic payment processing provider service and to have it connected to just one bank account, e.g. the law firm's operating account. The lawyer may accept electronic payments for advanced fees or costs to that account without violating SCR 20:1.15(a), so long as any payments for advanced fees or costs are promptly transferred to the lawyer's trust account within two business days.

SECTION 8. Supreme Court Rule 20:1.15 (f) (1) is amended to read:

(f) (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. 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. A lawyer shall reimburse the trust account for any shortfall or negative balance caused by a chargeback, surcharge, or ACH reversal by a financial institution or card issuer 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 shortfall or negative balance caused by a chargeback, surcharge, or ACH reversal prior to disbursing funds from the trust account.~~

SECTION 9. A Comment to Supreme Court Rule 20:1.15 (f) (1) is created to read:

COMMENT

SCR 20:1.15 (f) (1) Security of transactions.

SCR 20:1.15(f)(1) takes into account the modern banking and payments industry, allowing for electronic transfers to and from the trust account, so long as such transfers are authorized in advance by a lawyer in the law firm or a person under a lawyer's direct supervision. Should there be any shortfall or negative balance caused by a chargeback, surcharge, or ACH reversal of an electronic payment to the trust account, the lawyer is responsible for replacing any and all such funds within three business days of actual notice of the chargeback,

surcharge, or ACH reversal, and the lawyer must reimburse the account prior to disbursing funds from the trust account.

Approval of disbursements

This rule requires the signature of a lawyer, or a person under the lawyer's direct supervision, on all checks issued from a firm trust account and also requires a lawyer's authorization for all electronic disbursements from a firm trust account. Written confirmation of authorization for electronic disbursements should be maintained as part of complete trust account records.

Costs associated with electronic payments

Electronic payment systems, such as credit cards, routinely impose charges on vendors when a customer pays for goods or services. That charge may be 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 should disclose this practice to the client in advance, and assure that the client understands and consents to the charges. This disclosure should be in writing if necessary to comply with SCR 20:1.5(b). In addition, the lawyer should ensure that holding the client responsible for transaction costs does not violate the terms of service of the payment system provider or other law.

SECTION 10. Supreme Court Rule 20:1.15 (f) (2) c. is repealed.

SECTION 11. The Comment to Supreme Court Rule 20:1.15 (f) (2) c. is repealed.

SECTION 12. Supreme Court Rule 20:1.15 (f) (3) is repealed.

SECTION 13. The Comments to Supreme Court Rule 20:1.15 (f) (3) are repealed.

SECTION 14. A Comment to Supreme Court Rule 20:1.15 (j) is created to read:

SCR 20:1.15 (j) Multi-jurisdictional practice.

This rule does not prohibit a lawyer whose principal office is in another jurisdiction and who permissibly represents clients in Wisconsin matters from using a trust account for Wisconsin matters that is compliant with the rules of the other jurisdiction.

SECTION 15. Supreme Court Rule 20:1.15 (k) (5) (title) and (5) a. are amended to read:

(5) ~~Prohibited transactions~~ Cash transactions prohibited.

~~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.

Section 16. Supreme Court Rule 20:1.15 (k) (5) b. is repealed.

IT IS FURTHER ORDERED that the Comments to Supreme Court Rules 20:1.5(g), 20:1.15 (b) (6), 20:1.15 (f) (1), and 20:1.15 (j) are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rules.

IT IS FURTHER ORDERED that the amendments to Supreme Court Rules 20:1.0 and 20:1.15, 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 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 website. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 30th day of March, 2023.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

