

STATE OF WISCONSIN

IN SUPREME COURT

In the Matter of the Amendment of

SCR 20:1.15 Safekeeping Property;
SCR 20:1.0 Definitions;
SCR 21.16 Discipline; and
SCR 12.04 Wisconsin Lawyers Fund for Client Protection

PETITION

TO: Chief Justice Shirley S. Abrahamson
Justice Jon P. Wilcox
Justice Ann Walsh Bradley
Justice N. Patrick Crooks
Justice David T. Prosser, Jr.
Justice Patience D. Roggensack
Justice Louis Butler

Filed with Cornelia G. Clark, Clerk of Supreme Court

Office of Clerk of Supreme Court
110 E. Main Street, Suite 215
Madison, WI 53703

BACKGROUND

In October, 2004, Michelle A. Behnke, Past President of the State Bar of Wisconsin, appointed a committee (the Trust Account Rule Working Group) to study SCR 20:1.15 and propose modifications to the trust account rule.

The members of the Trust Account Rule Working Group (“Working Group”) included: Attorney Michael Olds, Chairperson; Attorney Barry Cohen; Cathleen Dettman, State Bar Public Policy and Media Assistant; Attorney Diane Diel, Attorney Dean Dietrich, Mary Hoeft Smith, OLR Trust Account Program Administrator; Attorney Gerald Mowris, Attorney Timothy Pierce, State Bar Ethics Counsel; Attorney Sheila Romell, Attorney Keith Sellen, OLR Director; and Attorney Daniel Shneidman.

The Working Group also received input and guidance from the following individuals and organizations: Attorney Kristine Cleven, Director, Legal Department of Wisconsin Bankers Association; Attorney Gerald Connolly; De Ette Tomlinson, Executive Director of WisTAF; Attorney George Dionosopoulos; Attorney Len

Levenson; Attorney Jon Lhost; and Attorney Rose Oswald Poels, Wisconsin Bankers Association.

This Petition is filed jointly by Attorney Keith L. Sellen, Director, Office of Lawyer Regulation and Attorney D. Michael Guerin, President, State Bar of Wisconsin.

GENERAL COMMENTS

The attached proposal, concerning amendments to SCR 20:1.15, SCR 20:1.0, SCR 21.16 and SCR 12.04, presents the current rules in a red-line format that highlights all proposed changes (i.e. amendments to current rules, proposed new rules, and proposed deletions from current rules). (Appendices A - D).

Also attached are three lists which provide synopses of the rules to which changes are proposed. The first list contains all of the changes to the above-referenced rules. (Appendix E). The second list is limited to the substantive changes. (Appendix F). The final list is limited to the non-substantive, “housekeeping” changes to SCR 20:1.15. (Appendix G).

KEY PROPOSALS

The Petitioners recognize that certain proposals involve significant changes that should be specially brought to the court’s attention. The following proposals fall in that category:

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

SCR 20:1.15(b)(4m) Alternative protection for advanced fees. This proposal is a new provision that will allow a lawyer to deposit unearned, advanced fees into his/her business account, rather than a trust account, subject to certain conditions. Those conditions include providing clients with written notice of the lawyer’s obligation to refund any unearned fee and to submit any disputed fee to binding arbitration. A lawyer is further required to notify the client that the client may submit a claim to the Fund for Client Protection in the event the lawyer fails to refund an unearned fee. The proposal also specifies the steps that a lawyer must take to protect the client at the termination of a representation, the steps that must be taken if the client disputes the lawyer’s fee, and the steps that must be taken following a determination that a refund is owed.

SCR 20:1.15(e)(4)h. Fee advances by credit card, debit card and other electronic deposit. This proposal is a new provision that will allow lawyers to accept credit and debit card payments as well as other forms of electronic deposit in payment of fee advances, provided that a separate trust account is established for this purpose.

SCR 20:1.15(g) Withdrawal of non-contingent fees from trust account. This proposal amends the existing rule to allow fees paid pursuant to a court order to be withdrawn without the five day waiting period prior to withdrawal. It also includes a new provision that allows lawyers to withdraw funds on the date that the invoice is mailed to the client, provided that the client has previously been advised in writing that the fee will be withdrawn at that time. Finally, the proposal repeals the existing rule regarding what

the lawyer is required to do when a client objects to the fee and creates a new rule that more clearly defines when a disputed fee must be returned to the trust account.

SCR 20:1.15(k)(4) Exceptions to SCR 20:1.15. This proposal adds an exception to the trust account rule for lawyers whose employer is not engaged in the practice of law, provided that the employment is not ancillary to the lawyer's law practice.

SCR 21.16 Discipline.

SCR 21.16(5m) Restitution. This proposal is a final component of the alternative protection for advanced fees. In order to assure that the Fund for Client Protection is protected to the extent authorized by law, this rule requires that, whenever the court orders restitution to the Fund, the court shall issue a judgment in favor of the Fund, which judgment has the same force and effect as judgments docketed pursuant to Wis. Stat. Secs. 809.25 and 806.16.

SCR 12.04 Wisconsin lawyers' fund for Client Protection: creation and purpose; definitions.

SCR 12.04(2)(e) "Dishonest Conduct." This proposal is a key component of the alternative protection for advanced fees, which is proposed in SCR 20:1.15(b)(4m). In order to assure that the Fund for Client Protection will reimburse a client if the client's lawyer fails to refund an unearned fee, the definition of "dishonest conduct" must be expanded to include the failure to refund an unearned fee.

SCR 12.04(2)(g)(iii)4. "Reimbursable Loss." This proposal, like the prior one, is a key component of the alternative protection for advanced fees. In order to assure that the Fund for Client Protection will reimburse a client if the client's lawyer fails to refund an unearned fee, the definition of "reimbursable loss" must be expanded to include a lawyer's failure to refund an unearned fee.

CONCLUSION

Attached to this Petition are the Proposed Amendments to Supreme Court Rules 20:1.15, 20:1.0, 21.16 and 12.04.

Respectfully submitted, this _____ day of May, 2006.

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

SCR 20:1.15(a)	Definitions.	SCR 20:1.15(g)	Withdrawal of fees from trust account.
SCR 20:1.15(b)	Segregation of trust property.	SCR 20:1.15(h)	Dishonored instrument notification; (Overdraft notices).
SCR 20:1.15(c)	Types of trust accounts.	SCR 20:1.15(i)	Certification of compliance with trust account rules.
SCR 20:1.15(d)	Prompt notice and delivery of property.	SCR 20:1.15(j)	Fiduciary property.
SCR 20:1.15(e)	Operational requirements for trust accounts.	SCR 20:1.15(k)	Exceptions to SCR 20:1.15.
SCR 20:1.15(f)	Record-keeping requirements for trust accounts.		

(a) Definitions.

In this section:

(1) "Demand account" means an account upon which funds are disbursed through a properly payable instrument.

(2) "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 3rd party.

(3) "Fiduciary account" means an account in which the lawyer deposits fiduciary property.

(4) "Fiduciary property" means funds or property of a client or 3rd party that is in the lawyer's possession in a fiduciary capacity that directly arises in the course of, or as a result of, a lawyer-client relationship ~~or an appointment by a court.~~ 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 SCR 20:1.15(k).~~

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

(6) "Immediate family member" means the lawyer's spouse, child, stepchild, grandchild, sibling, parent, grandparent, aunt, uncle, niece, or nephew.

(7) "Interest of Lawyer Trust Account ("IOLTA") account" means a pooled, interest-bearing, demand account, separate from the lawyer's business and personal accounts, via which the lawyer deposits, holds, and disburses funds received in trust on behalf of a client or 3rd party, the interest on which does not go to the client. Typical funds that would be placed in an IOLTA account include earnest monies, loan proceeds, settlement proceeds, collection proceeds, cost advances, and advance payments for fees that have not yet been earned. These accounts are subject to the provisions of SCR Chapter 13, Interest on Trust Accounts Program.

(8) "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.

(9) "Trust account" means an account in which the lawyer deposits trust property.

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

(b) Segregation 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 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.

(3) **Lawyer funds.** No funds belonging to the lawyer or law firm, except funds reasonably sufficient to pay monthly account service charges, may be deposited or retained in a trust account.

(4) **Unearned fees and cost advances.** Except as set forth in sub. (4m), unearned fees and advanced payments of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to SCR 20:1.15 (g). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred.

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(4m) **Alternative protection for advanced fees.** A lawyer who accepts advanced payments of fees may deposit the funds in the lawyer's business account, provided that a court of competent jurisdiction must ultimately approve the lawyer's fee, or that the lawyer complies with each of the following requirements:

a. That, upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client in writing all of the following information:

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1. the amount of the advanced payment;
2. the basis or rate of the lawyer's fee;
3. any expenses for which the client will be responsible;
4. the lawyer's obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation;
5. the requirement that the lawyer submit any dispute about a requested refund of advanced fees to binding arbitration within 30 days of receiving a request for such a refund; and
6. the ability of the client to file a claim with the Wisconsin Lawyers' Fund for Client Protection in the event the lawyer fails to abide by an arbitration award or final decision of a court of competent jurisdiction directing the lawyer to provide a refund of advanced fees.

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b. That, upon termination of the representation, if any fees are then unearned, the lawyer shall deliver to the client in writing all of the following:

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1. a final accounting regarding the payment of advanced fees with a refund of any unearned advanced fees;
2. 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; and
3. 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 promptly submit the dispute to binding arbitration.

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c. That, upon receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and that, if the dispute is not resolved within 30 days of the lawyer's receipt of the written notice of dispute from the client, the lawyer shall immediately submit the dispute to binding arbitration; and

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d. That, upon receipt of an arbitration award requiring the lawyer to make a payment to the client, the lawyer shall pay such arbitration award within 30 days, unless the client fails to agree to be bound by the award of the arbitrator.

(5) Trust property other than funds. Unless the 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.

Deleted: (5) Probate accounts. Trust property of a probate estate shall be maintained in a separate account that is subject to the requirements of subs. (b) through (i).

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(6) 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.

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(c) **Types of trust accounts.**

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(1) **IOLTA accounts.** A lawyer who receives client funds shall maintain a pooled interest-bearing, demand account for deposit of client or 3rd-party funds that are:

- a. nominal in amount or expected to be held for a short period of time; or
- b. not deposited in an account or investment under SCR 20:1.15 (c) (2); or
- c. not eligible for an account or investment under SCR 20:1.15 (c) (2), because the client is a corporation or organization not permitted by law to maintain such an account or the terms of the account are not consistent with a need to make funds available without delay.

(1m) The interest accruing on an account under par. (1), less any transaction costs, shall be paid to the Wisconsin Trust Account Foundation, Inc., which shall be considered the beneficial owner of the accrued interest, pursuant to SCR Chapter 13, Interest on Trust Accounts Program. A lawyer may notify the client of the intended use of these funds.

(2) **Other client accounts.** A lawyer shall deposit all client funds in an account specified in par. (1) unless the funds are deposited in any of the following:

- a. a separate interest-bearing trust account for the particular client or client's matter, the interest on which shall be paid to the client, less any transaction costs;
- b. a pooled interest-bearing trust account with sub-accounting by the financial institution, the lawyer, or the law firm that will provide for computation of interest earned by each client's funds and the payment of the interest to the client, 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 as directed by the court or other tribunal, less any transaction costs; or

~~d.~~ an income generating investment vehicle selected by the lawyer to protect and maximize the return of funds in a bankruptcy estate, which investment vehicle is approved by the trustee in bankruptcy and by a bankruptcy court order, consistent with 11 USC 345; or

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~~e.~~ a demand deposit or other non-interest-bearing account for funds that are neither nominal in amount nor expected to be held for a short term, if the client specifically so approves.

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(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 funds could be utilized to provide a positive net return to the client by taking into consideration all of the following:

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a. the amount of income that the funds would earn during the period the funds are expected to be on deposit;

b. the cost of establishing and administering the 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 benefit; and

c. the capability of financial institutions to calculate and pay interest or other income to individual clients.

(4) **Professional judgment.** The determination whether funds to be invested could be utilized to provide a positive net return to the client 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.

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(5) **WisTAF.** For accounts created under par. (1), the lawyer or law firm shall direct the financial institution to remit to the Wisconsin Trust Account Foundation, Inc., also known as "WisTAF," at least quarterly, all of the following:

a. the interest or dividends, less any service charges or fees, on the average monthly balance in the account or as otherwise computed in accordance with an institution's standard accounting practice; and

b. a statement showing the name of the lawyer or law firm for whose account the remittance is sent, the rate of interest applied, the amount of service charges deducted, if any, and the account balance for the period for which the report is made. A copy of the statement shall be provided to the lawyer or law firm.

(d) Prompt notice and delivery of property.

(1) **Notice and disbursement.** Upon receiving funds or other property in which a client has an interest, or in which the 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, the lawyer shall promptly render a full written accounting regarding the property.

(3) **Disputes regarding trust property.** When the lawyer and another person or the client and another person claim 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 sub. (g) (2).

(e) Operational requirements for trust accounts.

(1) **Location.** 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).

(2) **Insurance requirements.** Each trust account shall be maintained at a financial institution that is insured by the federal deposit insurance corporation, the national credit union share insurance fund, the Wisconsin credit union savings insurance corporation, the securities investor protection corporation, or any other investment institution financial guaranty insurance.

(3) **Interest requirements.** An interest-bearing trust account shall bear interest at a rate of not less than that applicable to individual accounts of the same type, size, and duration and in which withdrawals or transfers can be made without delay when funds are required, subject only to any notice period that the depository institution is required to observe by law.

(4) **Prohibited transactions.**

a. **Cash.** No disbursement of cash shall be made from a trust account or from a deposit to a trust account, and no check shall be made payable to "Cash."

b. **Telephone transfers.** No deposits or disbursements shall be made to or from a pooled trust account by a telephone transfer of funds. This section does not prohibit wire transfers. It also does not prohibit telephone transfers between separate, non-pooled demand and separate, non-pooled non-demand trust accounts that a lawyer maintains for a particular client.

c. **Internet transactions.** A lawyer shall not make deposits to or disbursements from a trust account by way of an Internet transaction.

d. **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 a 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.

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e. **Credit card transactions.** A lawyer shall not authorize transactions by way of credit card to or from a trust account. However, earned fees may be deposited by way of credit card to a lawyer's business account.

f. **Debit card transactions.** A lawyer shall not use a debit card to make deposits to or disbursements from a trust account.

g. **Exception: Collection trust accounts.** Upon demonstrating to the office of lawyer regulation that a transaction prohibited by sub. (e) (4)c., e., or f. constitutes an integral part of the lawyer's practice, a lawyer may petition that office for a separate, written agreement, permitting the lawyer to continue to engage in the prohibited transaction, provided the lawyer identifies the excepted account, provides adequate account security, and complies with specific record-keeping and production requirements.

h. **Exception: Fee and cost advances by credit card, debit card or other electronic deposit.** A lawyer may establish a trust account, separate from the lawyer's IOLTA trust account, solely for the purpose of receiving advanced payments of legal fees and costs by credit card, debit card or other electronic deposit, subject to the following conditions:

1. the separate trust account shall be entitled: "credit card trust account";

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2. law firm funds, reasonably sufficient to cover all monthly account fees and charges and, if necessary, any deductions by the financial

institution and/or card issuer from a client's payment via credit card, debit card or other electronic deposit, shall be maintained in the credit card trust account, and a ledger for account fees and charges shall be maintained;

3. each payment via credit card, debit card or other electronic deposit, including, if necessary, a reimbursement by the lawyer or law firm for any deduction by the financial institution and/or card issuer from the gross amount of each payment, shall be transferred from the credit card trust account to the IOLTA trust account immediately upon becoming available for disbursement; and

4. that, within three business days of receiving actual notice that a chargeback or surcharge has been made against the credit card trust account, the lawyer shall replace any and all funds that have been withdrawn from the credit card trust account by the financial institution and/or card issuer; and shall reimburse the account for any shortfall or negative balance caused by a chargeback or surcharge. The lawyer shall not accept new payments to the credit card trust account until the lawyer has reimbursed the credit card trust account for the chargeback or surcharge.

(5) **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. (e) (5)a. if those proceeds are deposited no later than the first business day following the closing and are comprised of the following types of funds:

1. a certified check;
2. a cashier's check, teller's check, bank money order, official bank check or electronic transfer of funds, issued or transferred by a financial institution insured by the federal deposit insurance corporation or a comparable agency of the federal or state government;
3. a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state;
4. a check issued by the state of Wisconsin, the United States, or a political subdivision of the state of Wisconsin or the United States;

5. 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 CFR 202.2;
6. 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;
7. a non-profit organization check in an amount not exceeding \$5,000 per closing if the lawyer has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the trust account; and
8. a personal check or checks in an aggregate amount not exceeding \$5,000 per closing if the lawyer has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the trust account.

bm. Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for any funds described in sub. (e) (5)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.

c. **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. (e) (5)a. so long as those collection proceeds have been deposited prior to the disbursement.

(6) **Record retention.** A lawyer shall maintain complete records of trust account funds and other trust property and shall preserve those records for at least 6 years after the date of termination of the representation.

(7) **Production of records.** 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. Failure to produce the records constitutes unprofessional conduct and grounds for disciplinary action.

(8) **Business account.** Each lawyer who receives trust funds shall maintain at least one demand account, other than the trust account, for funds received and disbursed other than in the lawyer's trust capacity, which shall be entitled "Business Account," "Office Account," "Operating Account," or words of similar import.

(f) **Record-keeping requirements for trust accounts.**

(1) **Demand accounts.** Complete records of a trust account that is a demand account shall include a transaction register; individual client ledgers; a ledger for account fees and charges, if law firm funds are held in the account pursuant to sub. (b) (3); deposit records; disbursement records; monthly statements; and reconciliation reports, subject to all of the following:

a. **Transaction register.** The transaction register shall contain a chronological record of all account transactions, and shall include all of the following:

1. the date, source, and amount of all deposits;
2. the date, check or transaction number, payee and amount of all disbursements, whether by check, wire transfer, or other means;
3. the date and amount of every other deposit or deduction of whatever nature;
4. the identity of the client for whom funds were deposited or disbursed; and
5. the balance in the account after each transaction.

b. **Individual client ledgers.** A subsidiary ledger shall be maintained for each client or matter for which the lawyer receives trust funds, and the lawyer shall record each receipt and disbursement of that client's funds and the balance following each transaction. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client or matter.

c. **Ledger for account fees and charges.** A subsidiary ledger shall be maintained for funds of the lawyer deposited in the trust account to accommodate monthly service charges. Each deposit and expenditure of the lawyer's funds in the account and the balance following each transaction shall be identified in the ledger.

d. **Deposit records.** Deposit slips shall identify the name of the lawyer or law firm, and the name of the account. The deposit slip shall identify the amount of each deposit item, the client or matter associated with each deposit item, and

the date of the deposit. The lawyer shall maintain a copy or duplicate of each deposit slip. All deposits shall be made intact. No cash, or other form of disbursement, shall be deducted from a deposit. Deposits of wired funds shall be documented in the account's monthly statement.

e. **Disbursement records.**

1. **Checks.** Checks shall be pre-printed and pre-numbered. The name and address of the lawyer or law firm, and the name of the account shall be printed in the upper left corner of the check. Trust account checks shall include the words "Client Account," or "Trust Account," or words of similar import in the account name. Each check disbursed from the trust account shall identify the client matter and the reason for the disbursement on the memo line.

2. **Canceled checks.** Canceled checks shall be obtained from the financial institution. Imaged checks may be substituted for canceled checks.

3. **Imaged checks.** Imaged checks shall be acceptable if they provide both the front and reverse of the check and comply with the requirements of this paragraph. The information contained on the reverse side of the imaged checks shall include any endorsement signatures or stamps, account numbers, and transaction dates that appear on the original. Imaged checks shall be of sufficient size to be readable without magnification and as close as possible to the size of the original check.

4. **Wire transfers.** Wire transfers shall be documented by a written withdrawal authorization or other documentation, such as a monthly statement of the account that indicates the date of the transfer, the payee, and the amount.

f. **Monthly statement.** The monthly statement provided to the lawyer or law firm by the financial institution shall identify the name and address of the lawyer or law firm and the name of the account.

g. **Reconciliation reports.** For each trust account, the lawyer shall prepare and retain a printed reconciliation report on a regular and periodic basis not less frequently than every 30 days. Each reconciliation report shall show all of the following balances and verify that they are identical:

(1) the balance that appears in the transaction register as of the reporting date;

(2) the total of all subsidiary ledger balances for IOLTA accounts and other pooled accounts, determined by listing and totaling the balances in

the individual client ledgers and the ledger for account fees and charges, as of the reporting date; and

(3) the adjusted balance, determined by adding outstanding deposits and other credits to the balance in the financial institution's monthly statement and subtracting outstanding checks and other deductions from the balance in the monthly statement.

(2) **Non-demand accounts.** Complete records of a trust account that is a non-demand account shall include all of the following:

a. all monthly or other periodic statements provided by the financial institution to the lawyer or law firm; and

b. all transaction records, including passbooks, records of electronic fund transactions, duplicates of any instrument issued by the financial institution from funds held in the account, duplicate deposit slips identifying the source of any deposit, and duplicate withdrawal slips identifying the purpose of any withdrawal.

(3) **Tangible trust property and bearer securities.**

a. **Property ledger.** A lawyer who receives in trust, tangible, personal property or securities in bearer form, shall maintain a property ledger that identifies the property, date of receipt, owner, client or matter, and location of the property. The ledger shall also identify the disposition of all of the trust property received by the lawyer.

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b. **Receipt upon taking custody.** Upon taking custody, in trust, of any tangible, personal property or securities in bearer form, the lawyer shall provide to the previous custodian a signed receipt, with a description of the property and the date of receipt.

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c. **Dispositional receipt.** Upon disposition of any tangible, personal property or securities in bearer form held in trust, the lawyer shall obtain a signed receipt, with a description of the property and the date of disposition, from the recipient.

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(4) **Electronic record retention.**

a. **Back-up of records.** A lawyer who maintains trust account records by computer shall maintain the transaction register, client ledgers, and reconciliation reports in a form that can be reproduced to printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

b. **IOLTA account records.** In addition to the requirements of sub. (f) (4)a., the transaction register, the subsidiary ledger, and the reconciliation report shall

be printed every 30 days for the IOLTA account. The printed copy shall be retained for at least 6 years, as required under sub. (e) (6).

(g) Withdrawal of non-contingent fees from trust account.

(1) **Notice to client.** 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, the lawyer shall transmit to the client in writing all of the following:

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- a. an itemized bill or other accounting showing the services rendered;
- b. notice of the amount owed and the anticipated date of the withdrawal; and
- c. a statement of the balance of the client's funds in the lawyer trust account after the withdrawal.

(2) Alternative notice to client. 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 by sub. (g)(1) a., b. and c.

Deleted: Objection to disbursement. If a client objects to the disbursement described in sub. (g) (1), the funds shall remain in the trust account until the dispute is resolved. If the client objects after the funds have been withdrawn, the disputed portion shall be returned to the trust account.

(3) Objection to disbursement. If a client makes a particularized and reasonable objection to the disbursement described in sub. (g)(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 sub (g)(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 this subsection. 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.

(h) Dishonored instrument notification; (Overdraft notices).

All demand trust accounts and demand fiduciary accounts are subject to the following provisions on dishonored instrument notification:

(1) **Overdraft reporting agreement.** A lawyer shall maintain demand trust accounts only in a financial institution that has agreed to provide an overdraft report to the office of lawyer regulation under SCR 20:1.15 (h) (3).

- (2) **Identification of accounts subject to SCR 20:1.15 (h).** 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 SCR 20:1.15 (h) and shall provide the financial institution with a list of all existing accounts at that institution that are subject to SCR 20:1.15 (h).
- (3) **Overdraft report.** In the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored, the financial institution shall report the overdraft to the office of lawyer regulation.
- (4) **Content of report.** All reports made by a financial institution under SCR 20:1.15 (h) shall be substantially in the following form:
- a. In the case of a dishonored instrument, the report shall be identical to an overdraft notice customarily forwarded to the depositor or investor, accompanied by the dishonored instrument, if a copy is normally provided to the depositor or investor.
- b. In the case of instruments that are presented against insufficient funds and are honored, the report shall identify the financial institution involved, the lawyer or law firm, the account number, the date on which the instrument is paid, and the amount of overdraft created by the payment.
- (5) **Timing of report.** A report made under this subsection shall be made simultaneously with the overdraft notice given to the depositor or investor.
- (6) **Confidentiality of report.** A report made by a financial institution under SCR 20:1.15 (h) shall be subject to SCR 22.40, Confidentiality.
- (7) **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.
- (8) **Lawyer compliance.** Every lawyer practicing or admitted to practice in Wisconsin shall comply with the reporting and production requirements of SCR 20:1.15 (h).
- (9) **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.
- (10) **Immunity of financial institution.** SCR 20:1.15 (h) 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 SCR 20:1.15 (h).

(i) **Certification of compliance with trust account rules.**

(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 certificate stating whether the member is engaged in the practice of law in Wisconsin. If the member is practicing law, the member shall state the account number of any trust account, and the name of each financial institution in which the member maintains a trust account, a safe deposit box, or both, as required by SCR 20:1.15. 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 the certification must be made.

(2) **Trust account record compliance.** Each state bar member shall explicitly certify on the state bar certificate described in sub. (i) (1) that the member has complied with each of the record-keeping requirements set forth in subs. (f) and (j) (5).

(3) **Certification by law firm.** A law firm shall file one certificate on behalf of the lawyers in the firm who are required to file a certificate under SCR 20:1.15 (i) (1). The law firm shall give a copy of the certificate to each lawyer in the firm.

(4) **Suspension for non-compliance.** The failure of a state bar member to file the certificate is grounds for 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. The filing of a false certificate is unprofessional conduct and is grounds for disciplinary action. **(j) Fiduciary property.**

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(1) **Separate account.** 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 that directly arises in the course of, or as a result of, a lawyer-client relationship or an appointment by a court.

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

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

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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;

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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 chs. 880 and 881, 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 trustee in bankruptcy and by a bankruptcy court order, consistent with 11 USC 345; or

e. a demand deposit or other non-interest bearing account when, in the sound professional judgment of the lawyer, placement in such an account is consistent with the needs and purposes of the fiduciary entity or its beneficiary or beneficiaries.

(2) **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 which, in the lawyer's professional judgment, will best serve the needs and/or 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 demand account from which funds are disbursed through a properly payable instrument issued directly by the lawyer or a member or employee of the lawyer's firm 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. (j)(9) b. or c.

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(3) **Prohibited transactions.**

a. **Cash.** No disbursement of cash shall be made from a fiduciary account or from a deposit to a fiduciary account, and no check shall be made payable to "Cash."

b. **Internet transactions.** A lawyer shall not make deposits to or disbursements from a fiduciary account by way of an Internet transaction.

c. **Credit card transactions.** A lawyer shall not authorize transactions by way of credit card to or from a fiduciary account.

d. **Debit card transactions.** A lawyer shall not use a debit card to make deposits to or disbursements from a fiduciary account.

(4) **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. However, the exception for real estate transactions under sub. (e) (5)b. shall apply to fiduciary accounts.

(5) **Records.** For each fiduciary account, the lawyer shall retain records of receipts and disbursements as necessary to document the transactions. The lawyer shall maintain all of the following:

a. all monthly or other periodic statements provided by the financial institution to the lawyer or law firm; and

b. all transaction records, including canceled or imaged checks, passbooks, records of electronic fund transactions, duplicates of any instrument issued by the financial institution from funds held in the account, duplicate deposit slips identifying the source of any deposit, and duplicate withdrawal slips identifying the purpose of any withdrawal.

(6) **Record retention.** A lawyer shall maintain complete records of fiduciary accounts and other fiduciary property during the course of the fiduciary relationship. A lawyer shall maintain a complete record of the fiduciary account for the 6 most recent years of the account's existence and shall maintain, at a minimum, a summary accounting of the fiduciary account for prior years of the account's existence. After the termination of the fiduciary relationship, the lawyer shall preserve complete records for at least 6 years.

(7) **Production of records.** 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. Failure to produce the records constitutes unprofessional conduct and grounds for disciplinary action.

(8) **Tangible fiduciary property, and bearer securities.**

a. **Property ledger.** A lawyer who, as a fiduciary, receives tangible personal property, or securities in bearer form shall maintain a property ledger that identifies the property, date of receipt, owner, and location of the property. The ledger shall also identify the disposition of all such fiduciary property received by the lawyer.

b. **Receipt upon taking custody.** Upon taking custody, as a fiduciary, of any tangible personal property or securities in bearer form, the lawyer shall provide to

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the previous custodian a signed receipt, with a description of the property, and the date of receipt.

c. **Dispositional receipt.** Upon disposition of any tangible, personal property or securities in bearer form held by the lawyer as a fiduciary, the lawyer shall obtain a signed receipt, with a description of the property and the date of disposition, from the recipient.

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(9) **Dishonored instrument notification or alternative protection.** A lawyer who holds fiduciary property in a demand account from which funds are disbursed through a properly payable instrument issued directly by the lawyer or a member or employee of the lawyer's firm shall take one of the following actions:

a. comply with the requirements of SCR 20:1.15 (h) Dishonored instrument notification (Overdraft notices); or

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

c. hold the funds in a demand account, which requires the approving signature of a co-trustee, co-agent, co-guardian, or co-personal representative before funds may be disbursed from the account.

(10) **Certification requirements.** Funds held by a lawyer in a fiduciary account shall comply with the certification requirements of SCR 20:1.15 (i).

(k) Exceptions to SCR 20:1.15.

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;

(2) 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; or

(3) 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; or,

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(4) 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 such employment is not ancillary to the lawyer's practice of law.

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.

SCR 20:1.15 (b) (4) Advances for fees and costs.

Lawyers often receive funds from 3rd parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

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 bank 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 20:1.15 (b) (4),
SCR 20:1.15(b)(4m) Alternative protection for advanced fees

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This section allows lawyers to deposit advanced fees into the lawyer's business account, as an alternative to SCR 20:1.15(b)(4). The lawyer's fee remains subject to the requirement of reasonableness (SCR 20:1.5) as well as the requirement that unearned fees be refunded upon termination of the representation [SCR 20:1.16(d)]. A lawyer must comply either with SCR 20:1.15(b)(4), or with SCR 20:1.15(b)(4m), and a lawyer's failure to do so shall be professional misconduct and grounds for discipline.

The writing required by SCR 20:1.15(b)(4m)a. 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 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 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(d)(3).

This alternative 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, or an electronic transfer of funds. A cost advance cannot be paid by credit card, debit card or an electronic transfer of funds under this section. Such payments are subject to SCR 20:1.15(b)(1) or SCR 20:1.15(e)(4)h.

SCR 20:1.15 (b) Probate accounts.

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With respect to probate matters, a lawyer's role may be to represent the estate's personal representative, to serve as the personal representative, or to act as both personal representative and attorney for an estate. SCR 20:1.15 (b) identifies the rules that apply when a lawyer holds trust property as the attorney for a client/personal representative. Those rules, SCR 20:1.15 (b)-(i), also apply when the lawyer serves as both the attorney and personal representative for an estate. However, if the lawyer serves solely as an estate's personal representative, the lawyer acts as a fiduciary and is subject to the requirements of SCR 20:1.15 (j).

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SCR 20:1.15 (d) Interest of 3rd parties.

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 (d), 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) (2) Insurance requirements.

Pursuant to SCR 20:1.15 (e) (2), trust funds are required to be held in accounts that are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, the Wisconsin Credit Union Savings Insurance Corporation, the Securities Investor Protection Corporation or any other investment institution financial guaranty insurance. However, since federal law limits the amount of the insurance coverage, funds in excess of the limit are not insured. Consequently, the purpose of the insurance requirement is not to guarantee that all funds are adequately insured. Rather, it is to assure that trust funds are held in reputable financial institutions.

SCR 20:1.15(e)(4)d. Electronic transfers by 3rd parties.

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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 bank’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.

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SCR 20:1.15 (e) (4)g. Exception: Collection trust accounts.

This exception was adopted in response to concerns raised by members of the collection bar who presently rely on certain electronic banking practices that were not expressly prohibited prior to the adoption of this rule. The court acknowledges that electronic banking practices are increasingly used in the practice of law. However, the court also acknowledges that such transactions will require new approaches to alleviate legitimate concerns about the potential for fraud and risk of conversion with respect to their usage in connection with trust accounts. Collection lawyers may be able to satisfy these concerns because of security measures inherent in their practice. This exception is intended as a temporary measure, pending further consideration of the issue and eventual adoption of a rule that will permit electronic banking procedures in additional practice areas, conditioned upon the implementation of appropriate safeguards. The agreement referenced in the exception is available from the office of lawyer regulation.

SCR 20:1.15 (e)(4)h.3. Exception: Fee and cost advances by credit card, debit card or other electronic deposit.

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 such 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).

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2. Does the credit card issuer require services to be rendered before a credit card payment is accepted? If a lawyer intends to accept fee advances by credit card, the

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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 cards 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 CFR Sec. 206.

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SCR 20:1.15 (e) (5)b. Real estate transactions.

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SCR 20:1.15 (e) (5)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 three days after the closing date.

SCR 20:1.15 (e) (7) Inspection of records.

The duty of the lawyer to produce client trust account records for inspection under SCR 20:1.15 (e) (7) 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) Withdrawal of non-contingent fees from trust account.

This section 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 sub. (g)(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; 2004 Wisc. App.LEXIS 229(2004)].

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.

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SCR 20:1.15 (i) and SCR 20:1.15 (j) (10) Certification of compliance.

The current rule is intended to implement the court's order of April 11, 2001; certification is required for "all trust accounts and safe deposit boxes in which the lawyer deposits clients' funds or property held in connection with a representation or held in a fiduciary capacity that directly arises in the course of or as a result of a lawyer-client relationship."

SCR 20:1.15 (j) Lawyer as professional fiduciary.

A lawyer must hold the property of others with the care required of a professional fiduciary. All property which 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 segregated accounts. SCR 20:1.15 (j) identifies the requirements and responsibilities of a lawyer with respect to the management of fiduciary property.

SCR 20:1.15 (j) (1) Probateaccounts.

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With respect to probate matters, a lawyer's role may be to represent the estate's personal representative, to serve as the personal representative, or to act as both personal representative and attorney for an estate. SCR 20:1.15 (j) applies only when the lawyer serves solely as an estate's personal representative. If the lawyer represents a client/personal representative, or when the lawyer serves as both personal representative and attorney for the estate, the lawyer is responsible for "trust" property and is subject to the requirements of SCR 20:1.15 (b)-(i).

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SCR 20:1.0 Terminology

(a) “Advanced fee”: 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 how that fee is characterized (e.g. “minimum fee” or “nonrefundable fee”). Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15(b)(4) or (4m); SCR 20:1.15(e)(4)h.; SCR 20:1.15(g) and SCR 20:1.16(d).

(b) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

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(d) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

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(e) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization, including a government entity.

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(f) “Flat fee”: 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(e)(4)h.; and SCR 20:1.15(g), and SCR 20:1.16(d).

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(g) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

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(h) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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(i) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

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(j) "Misrepresentation" does not include negligent or strict liability misrepresentation.

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(k) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

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(l) A "prosecutor" includes a government attorney or special prosecutor (i) in a criminal case or delinquency action or (ii) acting in connection with the protection of a child or (iii) acting as a municipal prosecutor;

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(m) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

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(n) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

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(o) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

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(p) "Retainer" (also called: "General Retainer," "Engagement Retainer," "Reservation Fee," or "Availability Fee"): An amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d).

(q) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

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(r) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

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(s) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

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(t) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

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COMMENT

SCR 20:1.0(f) "Flat fee"

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. In addition, as specified in the definition, flat fees are subject to the requirements of all rules to which advanced fees are subject.

SCR 21.16 Discipline.

Any of the following may be imposed on an attorney as discipline for misconduct pursuant to the procedure set forth in SCR chapter 22:

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(1) Revocation of license to practice law.

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(2) Suspension of license to practice law.

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(3) Public or private reprimand.

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(4) Conditions on the continued practice of law.

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(5) Monetary payment.

(5m) Restitution. Monetary restitution to the person whose money or property was misappropriated or misapplied in the amount or value of such money or property as found in the disciplinary proceedings.

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(a) An attorney may also be ordered to reimburse the Wisconsin Lawyers' Fund for Client Protection for awards made to the person whose money or property was misappropriated or misapplied.

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(b) Any payment made as restitution shall not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of such payment.

(c) Upon ordering restitution to the Wisconsin Lawyers' Fund for Client Protection, the supreme court shall issue a judgment and furnish a transcript of the judgment to the Fund. The transcript of the judgment may be filed and docketed in the office of the clerk of court in any county and shall have the same force and effect as judgments docketed pursuant to Wis. Stats. 809.25 and 806.16 (1997-1998).

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(6) Conditions on seeking license reinstatement.

SCR 12.04 Wisconsin lawyers' fund for Client Protection: creation and purpose; definitions.

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(1) A Wisconsin Lawyers' Fund for Client Protection of the state bar of Wisconsin is created to reimburse, to the extent and in the manner provided by this chapter, losses caused by the dishonest conduct of members of the state bar of Wisconsin.

COMMENT

The Wisconsin Lawyers' Fund for Client Protection was established in 1981 and was originally entitled The Clients' Security Fund. The name change reflects amendments to the ABA Model Rules for Lawyer's Funds for Client Protection, and is more descriptive of the funds' purpose.

(2) In ss. 12.04 to 12.11:

(a) "Attorney" means a person who, at the time of the act complained of, was a member of the state bar of Wisconsin, except a person who was an inactive member at that time.

(b) "Claimant" means a person who has applied to the fund for reimbursement.

(c) "Client" means a person engaging the professional legal services of an attorney or for whose benefit the attorney is acting in a fiduciary capacity.

(d) "Committee" means the Wisconsin lawyers' fund for client protection committee.

(e) "Dishonest Conduct" means a willful act committed by an attorney which causes a reimbursable loss to a client in the manner of defalcation or embezzlement of money; the intentional taking or conversion of money, property or other things of value; or the failure to refund an unearned advanced fee upon award of an arbitrator, judgment of a court, order of the supreme court, or acknowledgment by the attorney that the fee is unearned.

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(f) "Fund" means the Wisconsin lawyers' fund for client protection of the state bar of Wisconsin.

(g) "Reimbursable Loss" is a loss of money or other property of a client which meets all of the following:

(i) The loss was caused by the dishonest conduct of an attorney while performing services under his or her license to practice law in Wisconsin;

(ii) The attorney was acting either as attorney in the matter out of which the loss arose or in a fiduciary capacity customary to the practice of law;

- (iii) The attorney has:
 - 1. died,
 - 2. been adjudicated a bankrupt,
 - 3. been adjudicated an incompetent,
 - 4. been disbarred or suspended from the practice of law or has consented to the revocation of his or her license to practice law; or has failed to refund an unearned advanced fee within 30 days of an award of an arbitrator, a judgment or order of a court, an order of the supreme court, or an acknowledgement by the attorney that the fee is unearned.
 - 5. become a judgment debtor of the person claiming the loss,
 - 6. been adjudged guilty of a crime, which adjudication shall have been based upon the dishonest conduct of the attorney, or
 - 7. left the jurisdiction or cannot be found.
- (iv) The act which occasioned the loss occurred on or after March 1, 1981.

The following are not reimbursable losses:

- (i) Losses of a spouse, child, parent, grandparent, sibling, partner, associate or employee of the attorney(s) causing the losses.
 - (ii) Losses covered by any bond, surety agreement or insurance contract to the extent covered thereby, including any loss to which any bondsman or surety or insurer is subrogated to the extent of that subrogated interest.
 - (iii) Losses of any financial institution which could be recoverable under a "banker's blanket bond" or similar insurance or surety contract, whether or not the institution had such bond or contract in force.
 - (iv) Losses which are recoverable from some other source.
 - (v) Losses barred under any applicable statute of limitations.
- (h) "State bar" means the state bar of Wisconsin.

COMPLETE LIST OF PROPOSED CHANGES TO RULES

RULE NO.	RULE TITLE OR DESCRIPTION
SCR 20:1.15(a)(4)	Definition of “Fiduciary Property”
SCR 20:1.15(a)(10)	Definition of “Trust Property”
SCR 20:1.15(b)(4m)	Alternative protection for advanced fees
Comment (b)(4m)	
SCR 20:1.15(b)(5)	Probate accounts [Section eliminated – Renumber subsequent sections]
Comment 1.15(b)	Probate accounts
SCR 20:1.15(c)(2)c.	[Add “or” as a connector]
SCR 20:1.15(c)(2)d.	Guardianship Accounts [Section moved to (j)]
SCR 20:1.15(c)(2)e.	[Renumber as section “d.”]
SCR 20:1.15(c)(2)f.	[Renumber as “e.”]
SCR 20:1.15(e)(4)b.	Telephone transfers.
SCR 20:1.15(e)(4)h.	Exception: Fee and cost advances by credit card, debit card or other electronic deposit.
Comment (e)(4)h.	
SCR 20:1.15(f)(3)	Tangible trust property and bearer securities.
SCR 20:1.15(g)	Withdrawal of <u>non-contingent</u> fees from trust account.
20:1.15(g)(1)	Notice to client.
20:1.15(g)(2)	Alternative notice to client.
20:1.15(g)(3)	Objection to disbursement.
Comment (g)	
SCR 20:1.15(j)	Fiduciary property
20:1.15(j)(1)	Separate account
Comment (j)(1)	
20:1.15(j)(1m)	Other fiduciary accounts
20:1.15(j)(2)	Location
20:1.15(j)(8)	Tangible fiduciary property and bearer securities. (Receipts)
SCR 20:1.15(k)(4)	Exceptions to SCR 20:1.15 (Corporate Employment)
SCR 20:1.0(a)	Definition of “Advanced Fees”
SCR 20:1.0(f)	Definition of “Flat Fees”
SCR 20:1.0(p)	Definition of “Retainer”
SCR 21.16(5m)	Discipline. Restitution
SCR 12.04(2)(e)	Definition of “Dishonest Conduct” - Fund for Client Protection
SCR 12.04(2)(g)(iii)4.	Definition of “Reimbursable Loss” - Fund for Client Protection

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APPENDIX E