Accounts Subject to Overdraft Notification Requirements

The Trust Account Overdraft Program was established on January 1, 1999 by the Wisconsin Supreme Court. The requirements of this program can be found in **Supreme Court Rule (SCR) 20:1.15(h)**. The rule requires lawyers to authorize their financial institutions to notify the Office of Lawyer Regulation of overdrafts on their trust and fiduciary accounts. SCR 20:1.15(h) states:

> All draft trust accounts and draft fiduciary accounts[1] are subject to the following provisions on dishonored instrument notification:
>
> (1) **Overdraft reporting agreement.** A lawyer shall maintain draft trust accounts only in a financial institution that has agreed to provide an overdraft report to the Office of Lawyer Regulation under par. (3).
>
> (2) **Identification of accounts subject to this subsection.** A lawyer or law firm shall notify the financial institution at the time a trust account or fiduciary account is established that the account is subject to this sub. (h) and shall provide the financial institution with a list of all existing accounts at that institution that are subject to this subsection.

In order to establish compliance with this rule, lawyers must file with the Office of Lawyer Regulation and with their financial institutions an "Agreement to Notify Office of Lawyer Regulation of Overdrafts on Lawyer Trust Accounts and Fiduciary Accounts" ("Overdraft Notification Agreement"). The Overdraft Notification Agreement must be executed by the lawyer/firm and by an authorized representative of the financial institution. It is the lawyer's responsibility, <u>not</u> that of the financial institution, to see to the execution and filing of the Overdraft Notification Agreement for each account that is subject to overdraft reporting.

Not all trust and fiduciary account maintained by lawyers or law firms are subject to overdraft notification requirements. Only "draft-type" trust and fiduciary accounts are subject to this requirement. In other words, if a lawyer or his/her office can disburse funds from the trust account or fiduciary account by check, the account must normally be covered by an Overdraft Notification Agreement. There are some exceptions for fiduciary accounts, which will be identified later in this material.

In order to further clarify the types of accounts that are subject to overdraft notification requirements, it is may be helpful to be aware of the Court's definitions of the terms "trust account" and "fiduciary account."

What is a Trust Account?

SCR 20:1.15(a) defines a "Trust Account" as an account into which a lawyer deposits the funds of clients or third parties that are in the lawyer's possession in connection with a representation. [*See*, SCR 20:1.15(a)(9) and (10)] .

Lawyers and law firms generally have an IOLTA[2] trust account, but may also maintain separate trust accounts for individual clients or legal matters.

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[1] A "draft account" is defined as "an account upon which funds are disbursed through a properly payable instrument." [*See*, SCR 20:1.15(a)(1m)]

[2] IOLTA is an acronym for "Interest on Lawyer Trust Account."

IOLTA Accounts

An "IOLTA Account" is a pooled, interest-bearing or dividend-paying draft trust account, separate from a lawyer's business and personal accounts. The income generated by an IOLTA account is paid to the Wisconsin Trust Account Foundation ("WisTAF") for the purpose of providing legal assistance in civil matters to those who cannot afford it. WisTAF does this by providing grants to such organizations as Legal Action of Wisconsin, Centro Legal, and Wisconsin Judicare. Lawyers can establish an IOLTA account at any "IOLTA Participating Institution."[3] A list of IOLTA Participating Institutions is available on WisTAF's website: wistaf.org.

IOLTA accounts are to be used solely for the purpose of holding "funds that cannot earn income for the benefit of the client or 3rd party in excess of the costs to secure that income." Funds that would typically 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. [*See*, SCR 20:1.15(a)(7)].

Non-IOLTA Trust Accounts

In some situations when a lawyer is representing a client, there may be a financial benefit for the client or third party to receive the interest income generated by the holding of the funds in trust. Under those circumstances, a lawyer can establish a separate trust account so that the client or third party, rather than WisTAF, ultimately receives the interest on the funds. An example of such a situation would be a divorce proceeding where the lawyer is directed to hold the proceeds of the sale of the couple's home, pending a property division. If the sale proceeds are substantial and will need to be held for an extended period of time, a lawyer could establish a trust account for the benefit of the client and the client's spouse. If that trust account is a draft account, it would be subject to overdraft notification requirements.

What is a fiduciary account?

A "fiduciary account" is an account in which a lawyer deposits funds held by the lawyer as an agent, an attorney-in-fact, a conservator, a guardian, a personal representative, a special administrator, a trustee, or in any other fiduciary role. [*See*, SCR 20:1.15(a)(3) and (4)].

For example, Wisconsin probate courts can appoint a lawyer to serve as the personal representative of an estate. In connection with that appointment, a lawyer is normally required to set up a personal representative's account to handle the estate's financial transactions. That account is a fiduciary account, which is subject to the overdraft notification requirements, unless it is subject to one of the exceptions identified below. Similarly, if a lawyer is appointed as someone's guardian, the lawyer may be required to set up a guardianship account to handle

[3] An "IOLTA participating institution" is defined in SCR 20:1.15(a)(7m) as "a financial institution that voluntarily offers IOLTA accounts and certifies to WisTAF annually that it meets the IOLTA account requirements of SCR 20:1.15(cm) (3) to (6) and that it reports overdrafts on draft trust accounts and draft fiduciary accounts of lawyers and law firms to the Office of Lawyer Regulation, pursuant to the financial institution's agreements with those lawyers and law firms. WisTAF shall confirm the accuracy of the certifications and publish, at least annually, a list of IOLTA participating institutions."

financial transactions for the benefit of the ward. That account would also be subject to the overdraft notification requirements, unless an exception applies.

What are the exceptions to the overdraft notification requirements?

There are several circumstances where a fiduciary account, **but not an IOLTA account or any other type of trust account**, may be exempt from the overdraft notification requirements. Those circumstances are as follows:

1) the lawyer has the fiduciary account independently audited by a certified public accountant on at least an annual basis; or

2) the lawyer holds the funds in a draft fiduciary 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.

3) the lawyer is serving as a bankruptcy trustee, subject to the oversight and accounting requirements of the bankruptcy court;

4) the property held by the lawyer when acting in a fiduciary capacity is property held for the benefit of an "immediate family member"[4] of the lawyer; or

5) 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.

[*See*, SCR 20:1.15(j)(9) and SCR 20:1.15(k)]

[4] An "immediate family member" is defined as the lawyer's spouse, child, stepchild, grandchild, sibling, parent, grandparent, aunt, uncle, niece, or nephew. [*See*, SCR 20:1.15(a)(6)].