

22.39 Burden of proof. (Effective July 1, 2016)

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

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

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

WISCONSIN COMMENT

While the director of the office of lawyer regulation or a special investigator appointed by the director pursuant to SCR 22.25 has the burden of proving misconduct in most circumstances, par. (2) establishes a rebuttable presumption of certain violations based solely upon a lawyer's failure to deliver property, produce records or provide accountings. The conduct that will lead to the presumptions of a violation, and the rules to which the presumptions relate are as follows:

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

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

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