

SUPREME COURT OF WISCONSIN

NOTICE

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

No. 08-03

**In the matter of amendment of SCR 20:1.15
Safekeeping property; trust accounts and
fiduciary accounts.**

FILED**JUL 1, 2009**

David R. Schanker
Clerk of Supreme Court
Madison, WI

On March 12, 2008, the Wisconsin Trust Account Foundation, Inc. (WistAF) Board of Directors petitioned this court to amend Supreme Court Rule 20:1.15, relating to interest paid on Interest on Lawyers Trust Accounts (IOLTA accounts). On August 22, 2008, WistAF Board of Directors filed an amended petition. WistAF requested the court adopt an interest comparability rule for IOLTA accounts. Petitioner's proposed amendments would require attorneys to hold IOLTA funds in the account with the highest interest rate that is available to other customers at that financial institution when the IOLTA account meets the same minimum balance and other account qualifications.

The court held a public hearing and administrative conference on November 18, 2008, on the petition. Following modifications to the amended petition, the court held

administrative conferences on May 4 and May 22, 2009. Upon consideration of matters presented at the public hearing and submissions made in response to the proposed amendment, the court granted the petition with modifications. Justice Ziegler did not participate. Justice Roggensack dissented from the adoption of the removal provision, SCR 20:1.15 (cm)(2)d., of the rule, and Justice Roggensack and Justice Gableman dissented from the adoption of that portion of the rule which permits the use of sweep accounts for IOLTA accounts. On July 1, 2009, the court sent a directive to the State Bar of Wisconsin and WisTAF to explore options that may guarantee the principal transferred to sweep accounts under this rule amendment.

Therefore,

IT IS ORDERED that effective January 1, 2010:

SECTION 1. SCR 20:1.15 (a) (1) of the Supreme Court Rules is repealed.

SECTION 2. SCR 20:1.15 (a) (1m) of the Supreme Court Rules is created to read:

20:1.15 (a) (1m) "Draft account" means an account upon which funds are disbursed through a properly payable instrument.

SECTION 3. SCR 20:1.15 (a) (7) of the Supreme Court Rules is amended to read:

20:1.15 (a) (7) "Interest ~~of~~ on Lawyer Trust Account or ("IOLTA account")" means a pooled, interest-bearing, or dividend-paying demand draft trust 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.~~ An IOLTA account must be established in an IOLTA participating institution pursuant to SCR 20:1.15 (cm) (1) and (2), and may contain only funds that cannot earn income for the benefit of the client or 3rd party in excess of the costs to secure that income. 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~~ An IOLTA account is subject to the provisions of SCR Chapter 13, ~~Interest on Trust Accounts Program~~ and the trust account provisions of subs. (a) to (i), including the IOLTA account provisions of sub. (cm).

SECTION 4. SCR 20:1.15 (a) (7m) of the Supreme Court Rules is created to read:

20:1.15 (a) (7m) "IOLTA participating institution" means 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.

SECTION 5. SCR 20:1.15 (a) (11) of the Supreme Court Rules is created to read:

20:1.15 (a) (11) "WisTAF" means the Wisconsin Trust Account Foundation, Inc.

SECTION 6. SCR 20:1.15 (c) (1) (intro.) of the Supreme Court Rules is renumbered SCR 20:1.15 (c) (1) and amended to read:

20:1.15 (c) (1) **IOLTA accounts.** A lawyer or law firm who receives client or 3rd-party funds that the lawyer or law firm determines to be nominal in amount or that are expected to be held for a short period of time such that the funds cannot earn income for the benefit of the client or 3rd party in excess of the costs to secure that income, shall maintain a pooled interest-bearing, or dividend-paying demand draft trust account ~~for deposit of client or 3rd party funds that are:~~ in an IOLTA participating institution.

SECTION 7. SCR 20:1.15 (c) (1) a., b., and c. of the Supreme Court Rules are repealed.

SECTION 8. SCR 20:1.15 (c) (1m) of the Supreme Court Rules is repealed.

SECTION 9. SCR 20:1.15 (c) (2) (intro.), a., b., c. and e., and (3) of the Supreme Court Rules are amended to read:

20:1.15 (c) (2) ~~Other client~~ **Non-IOLTA 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:~~ or law firm who receives client or 3rd-party funds that the lawyer or law firm determines to be capable of earning income for the benefit of the client or 3rd party shall maintain an interest-bearing or dividend-paying non-IOLTA trust account. A non-IOLTA trust account shall be established as any of the following:

a. a separate interest-bearing or dividend-paying trust account maintained for the particular client ~~or client's matter~~ 3rd party, the interest or dividends on which shall be paid to the client or 3rd party, less any transaction costs;

b. a pooled interest-bearing or dividend-paying trust account with sub-accounting by the financial institution, the lawyer, or the law firm that will provide for computation of interest or dividends earned by each client's or 3rd party's funds and the payment of the interest or dividends to the client or 3rd party, 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 3rd party or as directed by the court or other tribunal, less any transaction costs; ~~or~~

e. a ~~demand deposit~~ draft account or other ~~non interest-bearing~~ account that does not bear interest or pay dividends because it holds for funds that the lawyer has determined are not eligible for deposit in an IOLTA account because they are neither nominal in amount nor expected to be held for a short term, if the client specifically so approves such that the funds cannot earn income for the client or 3rd party in excess of the costs to secure the income, provided that such account has been designated in specific written instructions from the client or 3rd party.

(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 or 3rd party funds could be utilized to provide a positive net return to the client or 3rd party by taking into consideration all of the following:

a. the amount of interest, dividends, or other income that the funds would earn or pay during the period the funds are expected to be on deposit;

b. the cost of establishing and administering ~~the~~ a non-IOLTA trust 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 or 3rd party's benefit; ~~and~~

c. the capability of the financial ~~institutions~~ institution, lawyer, or law firm to calculate and pay interest, dividends, or other income to individual clients ~~or 3rd parties;~~ and

SECTION 10. SCR 20:1.15 (c) (3) d. of the Supreme Court Rules is created to read:

20:1.15 (c) (3) d. any other circumstance that affects the ability of the client's or 3rd party's funds to earn income in excess of the costs to secure such income for the client or 3rd party.

SECTION 11. SCR 20:1.15 (c) (4) of the Supreme Court Rules is amended to read:

SCR 20:1.15 (c) (4) **Professional judgment.** The determination whether funds to be invested could be utilized to provide a positive net return to the client or 3rd party 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.

SECTION 12. SCR 20:1.15 (c) (5) of the Supreme Court Rules is repealed.

SECTION 13. SCR 20:1.15 (cm) of the Supreme Court Rules is created to read:

20:1.15 (cm) **Interest on Lawyer Trust Account (IOLTA) requirements.** An IOLTA account must meet the following requirements:

(1) **Location.** An IOLTA account shall be held in an IOLTA participating institution that shall comply with location requirements of sub. (e) (1).

(2) **Certification by IOLTA participating institutions.**

a. Each IOLTA participating institution shall certify to WisTAF annually that the financial institution meets the requirements of sub. (cm) (3) to (6) for IOLTA accounts 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 institution's agreements with those lawyers and law firms. WisTAF shall by rule adopted under SCR 13.03(1) establish the date by which IOLTA participating institutions shall certify their compliance.

b. WisTAF shall confirm annually, by a date established by WisTAF by rule adopted under SCR 13.03(1), the accuracy of a financial institution's certification under sub. (cm)(2)a. by reviewing one or more of the following:

1. the IOLTA comparability rate information form submitted by the financial institution to WisTAF;

2. rate and product information published by the financial institution; and

3. other publicly or commercially available information regarding products and interest rates available at the financial institution.

c. WisTAF shall publish annually, no later than the date on which the state bar mails annual dues statements to members of the bar, a list of all financial institutions that have certified, and have been confirmed by WisTAF as IOLTA participating institutions. WisTAF shall update the published list located on its website to add newly confirmed IOLTA participating institutions and to remove financial institutions that WisTAF cannot confirm as IOLTA participating institutions.

d. Prior to removing any financial institution from the list of IOLTA participating institutions or failing to include any financial institution on the list of IOLTA participating institutions, WisTAF shall first provide the financial institution with notice and sufficient time to respond. In the event a financial institution is removed from the list of IOLTA participating institutions, WisTAF shall notify the office of lawyer regulation and provide that office with a list of the lawyers and law firms maintaining IOLTA accounts at that financial institution. The office of lawyer regulation shall notify those lawyers and law firms of the removal of the financial institution from the list, and provide time for those

lawyers and law firms to move their IOLTA accounts to an IOLTA participating institution.

e. Lawyers and law firms shall be entitled to rely on the most recently published list of IOLTA participating institutions for purposes of compliance with sub. (c) (1), except when the office of lawyer regulation notifies the lawyer or law firm of removal, in accordance with sub. (cm) (2) d.

(3) Insurance and safety requirements.

a. An IOLTA participating institution shall comply with the insurance and safety requirements of sub. (e) (2).

b. A repurchase agreement utilized for an IOLTA account may be established only at an IOLTA participating institution deemed to be "well-capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

c. An open-end money market fund utilized for an IOLTA account may be established only at an IOLTA participating institution in a fund that holds itself out as a money market fund as defined under the Investment Act of 1940 and, at the time of investment, has total assets of at least \$250,000,000.

(4) Income requirements.

a. **Beneficial owner.** The interest or dividends accruing on an IOLTA account, less any allowable reasonable fees, as allowed under par. (5), shall be paid to WisTAF, which shall be considered the beneficial owner of the earned interest or dividends, pursuant to SCR Chapter 13.

b. **Interest and dividend requirements.** An IOLTA account shall bear the highest non-promotional interest rate or dividend

that is generally available to non-IOLTA customers at the same branch or main office location when the IOLTA account meets or exceeds the same eligibility qualifications, if any, including a minimum balance, required at that same branch or main office location. In determining the highest rate or dividend available, the IOLTA participating institution may consider factors in addition to the IOLTA account balance that are customarily considered by the institution at that branch or main office location when setting interest rates or dividends for its customers, provided the institution does not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. However, IOLTA participating institutions may voluntarily choose to pay higher rates.

c. **IOLTA account.** An IOLTA participating institution may establish an IOLTA account as, or convert an IOLTA account to, any of the following types of accounts, assuming the particular financial institution at that branch or main office location offers these account types to its non-IOLTA customers, and the particular IOLTA account meets the eligibility qualifications to be established as this type of account at the particular branch or main office location:

1. a business checking account with an automated or other automatic investment sweep feature into a daily financial institution repurchase agreement or open-end money market fund. A daily financial institution repurchase agreement must be invested in United States government securities. An open-end

money market fund must consist solely of United States government securities or repurchase agreements fully collateralized by United States government securities, or both. In this subd. c. 1., "United States government securities" include securities of government-sponsored entities, such as, but not limited to, securities of, or backed by, the federal national mortgage association, the government national mortgage association, and the federal home loan mortgage corporation;

2. a checking account paying preferred interest rates, such as money market or indexed rates;

3. an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account or business checking account with interest; and

4. any other suitable interest-bearing or dividend-paying account offered by the institution to its non-IOLTA customers.

d. Options for compliance.

1. An IOLTA participating institution may establish the comparable product for qualifying IOLTA accounts, subject to the direction of the lawyer or law firm; or,

2. an IOLTA participating institution may pay the highest non-promotional interest rate or dividend, as defined in sub. (cm) (4) b., less any allowable reasonable fees charged in connection with the comparable highest interest rate or dividend product, on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product.

e. **Paying rates above comparable rates.** An IOLTA participating institution may pay a set rate above its comparable rates on the IOLTA checking account negotiated with WisTAF that is fixed over a period of time set by WisTAF, such as 12 months.

(5) **Allowable reasonable fees on IOLTA accounts.**

a. Allowable reasonable fees on an IOLTA account shall be as follows:

1. per check charges;
2. per deposit charges;
3. fees in lieu of minimum balance;
4. sweep fees;
5. an IOLTA administrative fee approved by WisTAF; and
6. federal deposit insurance fees.

b. Allowable reasonable fees may be deducted from interest earned or dividends paid on an IOLTA account, provided that such charges shall be calculated in accordance with an IOLTA participating institution's standard practice for non-IOLTA customers. Fees in excess of the interest earned or dividends paid on the IOLTA account for any month or quarter shall not be taken from interest or dividends of any other IOLTA accounts. No fees that are authorized under this subsection shall be assessed against or deducted from the principal of any IOLTA account. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. IOLTA participating institutions may elect to waive any or all fees on IOLTA accounts.

(6) **Remittance and reporting requirements.** A lawyer or law firm shall direct the IOLTA participating institution at which the lawyer or law firm's IOLTA account is located to do all of the following, on at least a quarterly basis:

a. Remit to WisTAF the interest or dividends, less allowable reasonable fees as allowed under par. (5), if any, on the average monthly balance in the account or as otherwise computed in accordance with the IOLTA participating institution's standard accounting practice.

b. Provide to WisTAF a remittance report showing for each IOLTA account the name of the lawyer or law firm for whose IOLTA account the remittance is sent, the rate and type of interest or dividend applied, the amount of allowable reasonable fees deducted, if any, the average account balance for the period for which the report is made, and the amount of remittance attributable to each IOLTA account.

c. Provide to the depositing lawyer or law firm a remittance report in accordance with the participating institution's normal procedures for reporting account activity to depositors.

d. Respond to reasonable requests from WisTAF for information needed for purposes of confirming the accuracy of an IOLTA participating institution's certification.

SECTION 14. SCR 20:1.15 (e) (1) of the Supreme Court Rules is renumbered SCR 20:1.15 (e) (1) a.

SECTION 15. SCR 20:1.15 (e) (1) b. of the Supreme Court Rules is created to read:

20:1.15 (e) (1) b. In addition to the requirement of subd. a., IOLTA accounts shall be maintained only at IOLTA participating institutions that meet the IOLTA account requirements under sub. (cm).

SECTION 16. SCR 20:1.15 (e) (2) of the Supreme Court Rules is renumbered SCR 20:1.15 (e) (2) a. and amended to read:

20:1.15 (e) (2) **Insurance and safety requirements.**

a. 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.

SECTION 17. SCR 20:1.15 (e) (2) b. of the Supreme Court Rules is created to read:

20:1.15 (e) (2) b. IOLTA accounts shall also comply with the requirements of sub. (cm) (3).

SECTION 18. SCR 20:1.15 (e) (3) of the Supreme Court Rules is renumbered SCR 20:1.15 (e) (3) a. and amended to read:

20:1.15 (e) (3) **Interest requirements.**

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

SECTION 19. SCR 20:1.15 (e) (3) b. of the Supreme Court Rules is created to read:

20:1.15 (e) (3) b. IOLTA accounts shall comply with the requirements of sub. (cm) (4) b.

SECTION 20. SCR 20:1.15 (e) (4) b. 2. of the Supreme Court Rules is amended to read:

20:1.15 (e) (4) b. 2. telephone transfers between ~~separate,~~ non-pooled ~~demand~~ draft and ~~separate,~~ non-pooled, ~~non-demand~~ non-draft trust accounts that a lawyer maintains for a particular client.

SECTION 21. SCR 20:1.15 (e) (4) h. (intro.) and 3. of the Supreme Court Rules are amended to read:

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

3. each payment by 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 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

SECTION 22. SCR 20:1.15 (e) (8) of the Supreme Court Rules is amended to read:

20:1.15 (e) (8) **Business account.** Each lawyer who receives trust funds shall maintain at least one ~~demand~~ draft 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.

SECTION 23. SCR 20:1.15 (f) (title), (1) (intro.), b. and g. 2. of the Supreme Court Rules are amended to read:

20:1.15 (f) (title) **Record-keeping requirements for all trust accounts.**

(1) ~~Demand~~ **Draft accounts.** (intro.) Complete records of a trust account that is a ~~demand~~ draft account shall include a transaction register; individual client ledgers for IOLTA accounts and other pooled trust accounts; 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:

b. **Individual client ledgers.** A subsidiary ledger shall be maintained for each client or ~~matter~~ 3rd party for ~~which~~ whom the lawyer receives trust funds that are deposited in an IOLTA account or any other pooled trust account, ~~and the.~~ The lawyer shall record each receipt and disbursement of ~~that~~ a client's or 3rd party's funds and the balance following each transaction. A lawyer shall not disburse funds from ~~the~~ an IOLTA account or any

pooled trust account that would create a negative balance with respect to any individual client or matter.

g. 2. the total of all subsidiary ledger balances for IOLTA accounts and other pooled trust 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

SECTION 24. SCR 20:1.15 (f) (2) (intro.) of the Supreme Court Rules is amended to read:

20:1.15 (f) (2) ~~Non-demand~~ **Non-draft accounts.** (intro.) Complete records of a trust account that is a ~~non-demand~~ non-draft account shall include all of the following:

SECTION 25. SCR 20:1.15 (h) (intro.) and (1) of the Supreme Court Rules are amended to read:

20:1.15 (h) **Dishonored instrument notification (Over-draft notices).** (intro.) All ~~demand~~ draft trust accounts and ~~demand~~ draft fiduciary accounts are subject to the following provisions on dishonored instrument notification:

(1) **Overdraft reporting agreement.** A lawyer shall maintain ~~demand~~ 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).

SECTION 26. SCR 20:1.15 (h) (8) of the Supreme Court Rules is amended to read:

20:1.15 (h) (8) **Lawyer compliance.** Every lawyer practicing or admitted to practice in Wisconsin shall comply with the reporting and production requirements of this subsection,

including filing of an overdraft notification agreement for each IOLTA account, each draft-type trust account and each draft-type fiduciary account that is not subject to an alternative protection under sub. (j) (9).

SECTION 27. SCR 20:1.15 (j) (1m) a. and e. of the Supreme Court Rules are amended to read:

20:1.15 (j) (1m) a. a pooled interest-bearing or dividend-paying fiduciary account with sub-accounting by the financial institution, the lawyer, or the law firm that will provide for computation of interest or dividends earned by each fiduciary entity's funds and the proportionate allocation of the interest or dividends to each of the fiduciary ~~entity~~ entities, less any transaction costs;

e. a ~~demand deposit~~ draft account or other ~~non-interest bearing~~ account that does not bear interest or pay dividends 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.

SECTION 28. SCR 20:1.15 (j) (2) of the Supreme Court Rules is amended to read:

20:1.15 (j) (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 that, in the lawyer's professional judgment, will best serve the needs and 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~~ draft 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.

SECTION 29. SCR 20:1.15 (j) (9) and c. of the Supreme Court Rules are amended to read:

20:1.15 (j) (9) **Dishonored instrument notification or alternative protection.** A lawyer who holds fiduciary property in a ~~demand~~ draft 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:

c. hold the funds in a ~~demand~~ draft 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.

SECTION 30. The following Comment to SCR 20:1.15 (cm) (3) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct:

COMMENT

SCR 20:1.15 (cm) (3) Insurance and safety requirements.

Pursuant to SCR 20:1.15 (cm) (3), IOLTA accounts are required to be held in IOLTA participating institutions that are insured by the federal deposit insurance corporation (FDIC), the national credit union share insurance fund, the securities investor protection corporation or any other investment institution financial guaranty insurance. However, since federal law dictates the amount of available insurance coverage, funds in excess of the limit are not insured. Consequently, the purpose of the insurance and safety requirements is not to guarantee that all funds are adequately insured. Rather, it is to assure that trust funds are held in reputable IOLTA participating institutions.

SECTION 31. The following Comment to SCR 20:1.15 (cm) (4) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct:

COMMENT

SCR 20:1.15 (cm) (4) Risk associated with sweep account option.

Pursuant to SCR 20:1.15 (cm) (4), IOLTA accounts shall bear the highest non-promotional interest rate or dividend that is generally available to non-IOLTA customers at the same branch or main office location when the IOLTA account meets or exceeds the same eligibility qualifications, if any, including a minimum balance. Investment products, including repurchase agreements

and shares of mutual funds, are neither deposits nor federally or FDIC-insured. An investment in a repurchase agreement or money market fund may involve investment risk including possible loss of the principal amount invested. The rule, however, provides safeguards to minimize any potential risk by limiting investment products to repurchase agreements and open-end money market funds that invest in United States government securities only.

SECTION 32. The Comment to SCR 20:1.15 (e) (2) pertaining to insurance requirements is amended to read:

SCR 20:1.15 (e) (2) Insurance and safety requirements.

Pursuant to SCR 20:1.15 (e) (2), trust ~~funds~~ accounts are required to be held in ~~accounts~~ financial, investment, or IOLTA participating institutions that are insured by the federal deposit insurance corporation (FDIC), 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~~ available insurance coverage, funds in excess of the limit are not insured. Consequently, the purpose of the insurance ~~requirement~~ and safety requirements is not to guarantee that all funds are adequately insured. Rather, it is to assure that trust funds are held in reputable financial, investment, or IOLTA participating institutions.

IT IS ORDERED that notice of this amendment of Supreme Court Rule 20:1.15 be given by a single publication of a copy of

this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

ANNETTE KINGSLAND ZIEGLER, J., did not participate.

Dated at Madison, Wisconsin, this 1st day of July, 2009.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

¶1 PATIENCE DRAKE ROGGENSACK, J. (*dissenting*). Because lawyers have a fiduciary duty to those for whom they hold funds in trust, which includes the funds held in IOLTA trust accounts, and because Supreme Court Rule 20:1.15(cm)(4)c.1. requires lawyers to take risks with IOLTA trust account funds that are inconsistent with the fiduciary duties of lawyers, I write in dissent from SCR 20:1.15(cm)(4)c.1., which requires lawyers to use "sweep accounts" for IOLTA trust accounts.

¶2 SCR 20:1.15 was amended in 2009 to create 20:1.15(cm)(4)c.1., at the request of the Wisconsin Trust Account Foundation, Inc. (WisTAF) to require lawyers to place IOLTA trust account funds into accounts that have "sweep" features, if that type of account has the potential of a higher rate of interest than other types of accounts. Funds held in sweep accounts may be moved into investment accounts comprised of United States government securities, including, but not limited to, securities of, or backed by, the federal national mortgage association (also known as "Fannie Mae") and the federal home loan mortgage corporation (also known as "Freddie Mac").¹ SCR 20:1.15(cm)(4)c.1.

¶3 The earnings on IOLTA trust accounts are not paid to the clients or third parties whose funds the trust account holds. Rather, the earnings on IOLTA trust accounts are paid to WisTAF. SCR 20:1.15(cm)(4)a.

¹ Both Fannie Mae and Freddie Mac were taken over by the United States government in September 2008 due to extensive losses.

¶4 WistAF is a corporation created at the request of the Board of Governors of the State Bar of Wisconsin to provide legal services to the poor. WistAF pays for those services with the earnings it receives on IOLTA trust accounts.

¶5 The prices of the securities into which the IOLTA trust accounts may be swept under SCR 20:1.15(cm)(4)c.1. may rise and fall with the fluctuations of the financial markets on which those securities are traded. If an IOLTA trust account is swept into an account investing in those securities, the hope of WistAF and the majority of this court is that more earnings will be generated as a result of the sweep. However, in addition to increasing in value, those securities also may decline in value.² If they decline in value during the sweep, the principal in the account will be lower than that deposited by the lawyer, when the IOLTA trust account funds are returned to the financial institution into which the lawyer deposited them. When the principal balance in the IOLTA trust account is reduced due to the fluctuation of the securities into which it was swept, the lawyer will have insufficient principal in the IOLTA trust account to satisfy the lawyer's fiduciary obligation to pay over

² In part because the Federal Reserve is injecting billions of dollars into the United States economy by buying troubled assets from failing banks, United States Treasury notes sold at lower prices on May 21, 2009, and May 22, 2009, than Treasuries did earlier in May 2009. Associated Press, Dollar Hits New Multimonth Low vs. Euro, Pound, Yen, Breitbart.com, May 22, 2009, http://www.breitbart.com/article.php?id=D98BCFJ00&show_article=1

to clients and third parties all of the funds the lawyer was entrusted with holding.

¶6 There is no potential financial benefit to lawyers' clients or to third parties whose funds the lawyer places in an IOLTA trust account due to IOLTA trust account funds being swept into the types of security accounts set out in SCR 20:1.15(cm)(4)c.1. This is so because all the interest earned belongs to WisTAF. SCR 20:1.15(4)a. Yet, it is the clients' and third parties' funds that the Supreme Court has put at risk by this rule change.

¶7 There is no potential financial benefit to lawyers that can arise by permitting IOLTA trust funds to be swept into the types of security accounts set out in SCR 20:1.15(cm)(4)c.1. Yet, the lawyer is required to permit the IOLTA approved financial institution to use sweep accounts if that produces the highest non-promotional rate of interest. SCR 20:1.15(cm)(4)b. However, it is the lawyers who will be required to cover any shortfall in the principal balance in the trust account in order to pay clients and third parties what the lawyer has collected or held for them. The majority of this court takes no heed of this, although I have brought it to their attention repeatedly.

¶8 A trustee is to use the prudent man standard in managing the trust funds of another. Wis. Stat. § 881.01; Hammes v. First Nat'l Bank & Trust Co., 79 Wis. 2d 355, 368, 255 N.W.2d 555 (1977). The trustee has a duty of loyalty to the owners of the funds that the trustee manages. § 881.01(6). We also discipline lawyers on a regular basis for shortfalls in

their trust accounts. Furthermore, the current financial climate requires increased caution when dealing with funds that are being held in trust for another. All of these principles and concerns are affected by SCR 20:1.15(cm)(4)c.1.

¶9 The majority of the court is intent on the possibility that IOLTA trust funds could generate more earnings for WisTAF, and therefore, the Supreme Court Rules have been amended. However, it is not the court's finances that the court puts at risk, but those of clients, third parties, and the lawyers who will be expected to cover any shortfall should the securities into which the IOLTA trust funds are swept decline during the sweep. Although few would argue that generating income to provide legal services for the poor is not a worthwhile goal, I cannot condone the risk the court creates with this rule change. Accordingly, I dissent.

¶10 I am authorized to state that Justice MICHAEL J. GABLEMAN joins in this dissent.

