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). This 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), *effective July 1, 2016*, states:

> All draft trust accounts, and any draft fiduciary account that is not subject to an alternative protection under SCR 20:1.15(k)(10), are subject to the following provision on dishonored payment notification:
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> (1) **Overdraft reporting agreement.** A lawyer shall maintain draft trust and fiduciary accounts only in a financial institution that has agreed to provide an overdraft report to the office of lawyer regulation under par. (2). 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 subsection.
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> (2) **Overdraft report.** In the event any properly payable instrument or electronic transaction is presented against or made from a lawyer trust or fiduciary account containing insufficient funds, whether or not the instrument or electronic transaction is honored, the financial institution shall report the overdraft to the office of lawyer regulation.

In order to comply with these rules, a lawyer must file an "Agreement to Notify Office of Lawyer Regulation of Overdrafts on Lawyer Trust Accounts and Fiduciary Accounts" ("Overdraft Notification Agreement") with the Office of Lawyer Regulation and the lawyer's financial institution. 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, not 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[1] trust and fiduciary accounts are subject to this requirement. In other words, if a lawyer can disburse funds from the trust account or fiduciary account by check or an electronic transaction, 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."

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[1] In SCR 20:1.15, a "draft account" is defined as "an account from which funds are withdrawn through a properly payable instrument or an electronic transaction." [*See*, SCR 20:1.15(a)(1)]

What is a Trust Account?

A "Trust Account" as an account in which a lawyer deposits funds or property of clients or 3rd parties that is in a lawyer's possession in connection with a representation, which is not fiduciary property." *See*, SCR 20:1.15(a)(11) and (12).

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

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)(8)].

Non-IOLTA Trust Accounts

In some situations when a lawyer is representing a client, there may be a financial benefit for a client or third party to receive the interest or other income generated on funds that must be held in trust. Under those circumstances, a lawyer can establish a separate trust account so that the client, the third party of both receive the income on such 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 a couple's home, pending the 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.

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

[3] An "IOLTA participating institution" is defined in SCR 20:1.15(a)(9) as "a financial institution that voluntarily offers IOLTA accounts and certifies to WisTAF annually that it meets the IOLTA account requirements of sub. (d).

What is a fiduciary account?

A "Fiduciary Account" is an account in which a lawyer deposits funds or property of a client or 3rd party that is in a lawyer's possession in a fiduciary capacity, e.g., funds or property held as an agent, attorney-in-fact, conservator, guardian, personal representative, special administrator, or trustee, subject to the exceptions identified in SCR 20:1.15(m). *See,* SCR 20:1.15(a)(4) and (5).

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 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 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 nine 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;

2. The lawyer holds the funds in a draft account, which requires the approval of a co-trustee, co-agent, co-guardian, or co-personal representative before funds may be disbursed from the account;

3. The lawyer documents the approval of two people from a group consisting of a lawyer or a member or employee of the lawyer's law firm before funds may be disbursed from the account;

4. In the case of an estate or trust, the lawyer provides an accounting of the administration at least annually to all beneficiaries currently eligible to receive income distributions;

5. In the case of a guardianship proceeding in which annual financial accountings must be reviewed by a court, the lawyer timely files those annual financial accountings with the court;

6. The lawyer serves as a bankruptcy trustee, subject to the oversight and accounting requirements of the bankruptcy court or the office of U.S. Trustee;

7. The lawyer serves as an assignee or receiver under the provisions of Ch. 128, Wis. Stats.;

8. The property held in a fiduciary capacity is property that held for the benefit of an immediate family member of the lawyer; or

9. The lawyer serves 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(k)(10) and SCR 20:1.15(m)