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MEMORANDUM

To: Supreme Court

From: Trust Account Working Group

Date: January 31, 2010

Re: Trust Account Rule

The current trust account rule, SCR 20:1.15, is the result of changes requested in a joint petition filed by the State Bar and the Office of Lawyer Regulation (OLR) in 2006. That petition was based upon the recommendations of the trust account working group (the "group") assembled at the request of then State Bar President Michelle Behnke. The members of the working group were Atty. Michael Olds (chair), Atty. Barry Cohen, Atty. Diane Diel, Atty. Dean Dietrich, Atty. Len Leverson, Atty. Gerry Mowris, Atty. Sheila Rommell, Atty. Dan Shneidman, Atty. Keith Sellen (OLR), Atty. Tim Pierce (State Bar) and Ms. Mary Hoeft Smith (OLR). When made aware that the Supreme Court was holding an administrative conference to review the rule and was inviting written comments, the group reconvened on January 21, 2009 and herewith provides its written comments.

There was a consensus among the majority of the members of group that the rule is working well. Based upon the experiences of members of the group, as well as anecdotal evidence received by members of the group, it appears most Wisconsin lawyers have adapted well to the Rule and do not want major changes. Reports from the Wisconsin Lawyers' Fund for Client Protection suggest that there is no increase in the incidence of conversion or misappropriation of fee advances by lawyers as a result of the alternate protection provisions of Sec. 20:1.15. Additionally, a goal of the restated rules was to increase the use of fee arbitration proceedings and reduce the numbers of grievances filed with the OLR which are actually fee disputes. Fee arbitration proceedings are up and OLR Director Sellen indicates that fee dispute driven grievances are decreasing. That said, members did have the following observations about specific subsections of the rule:

SCR 20:1.15(b)(4m); Alternative Protection for Advanced Fees

There is an inconsistency in the language of SCR 20:1.15(b)(4m) with respect to the type of dispute that requires a lawyer to submit a dispute with a former client to fee arbitration. SCR 20:1.15(b)(4m)a.5 requires a lawyer using the alternative protection for advanced fees notify a client upon receipt of an advanced fee that "the lawyer is required to submit any dispute about a requested refund of advanced fees to binding arbitration within 30 days of receiving a request for such a refund." SCR 20:1.15(b)(4m)b.2 requires a lawyer using the alternative protection for advanced fees, upon termination of the representation, provide the client "notice that, if the client

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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." It is thus unclear from the language of the Rule whether any dispute about the fee requires a lawyer to submit the dispute to fee arbitration, or whether only disputes about the return of advanced fee payments trigger the lawyer's obligation to submit the dispute to fee arbitration.

For example, if a lawyer requires and advanced fee payment of $3,000, earns that amount and later submits a final bill to the client for an additional $2000, it is unclear if the client's objection to paying anything beyond the initial payment of $3000 triggers the lawyer's obligation to submit the dispute to fee arbitration. It is the understanding of the majority of the members of the group that it was the intent of the rule that any dispute over fees triggers the lawyer's obligation to submit the matter to fee arbitration.

Many lawyers have also expressed the view that the requirement that lawyers who use the alternative protection must submit a final notice to the client that the lawyer is required to submit any dispute over fees to binding arbitration is an invitation to complain about fees. They also view this requirement as burdensome in that the rule requires lawyers to provide an almost identical written notice to the client at the beginning of the representation. The group notes, however, that the rule imposes a 30 day time limit in which a client may object to the lawyer's fees and trigger the obligation to submit the dispute to fee arbitration, and objection voiced outside this 30 day window do not require fee arbitration. If no final notice is required, there is a concern as to how a client would be made aware that the 30 day time period has commenced.

SCR 20:1.15(b)(4m) exempts a lawyer from the requirement to place advanced fees in trust "provided that a court of competent jurisdiction must ultimately approve the lawyer's fee" in the matter. It is unclear how this exemption applies. For example, it is the understanding of the group that, in the case of fees of *Guardians ad Litem* ("GALs") in a divorce, courts routinely order the parties to pay the fees of the GAL, and will hear complaints of the parties about those fees if raised, but the court does not routinely actively supervise and "approve" those fees. Similarly, in bankruptcy proceedings, a trustee may object to a lawyer's fees and bring the matter before the court, the court usually does not actively "approve" the fees. It is uncertain whether these situations fall within this exemption. It is the consensus of the majority of the group that our intent in suggesting this language initially was that this exemption should apply whenever judicial review of the lawyer's fees is readily available within the proceeding. In the two examples given above, it is the view of the group that the exemption should apply. In a typical matter, however, where a challenge to the lawyer's fees must be brought by a separate action, such as small claims, the exemption should not apply.

SCR 20:1.15(e)(4)h: Credit Card Trust Accounts

SCR 20:1.15(e)(4)h contains an exception to the general prohibition on credit card deposits into trust accounts. This section allows lawyers to establish a credit card trust account "solely" for the purpose of receiving advanced fee and cost payments by credit card. Essentially, this credit card trust account functions as a pass through account to protect funds held in trust from chargebacks and provide a means of identifying the client or matter to which a payment relates.

Credit card payments are initially deposited to the credit card trust account, but then shortly thereafter transferred to the IOLTA account with a check identifying the client or matter on its memo line. Lawyers also, of course, can accept earned fee payments by credit card directly into the lawyer's operating account. By use of the phrase "solely for the purpose of receiving advanced payments of legal fees and costs," the use of the credit card trust account is restricted, and lawyers who wish to accept both earned and advanced fee payments by credit card are required to have two separate credit card accounts; one for the operating account and one for the credit card trust account. This imposes additional expense and, in the opinion of the group, provides no additional safeguards for clients. Because the credit card trust account functions only as a pass through account, the group sees little risk in allowing lawyers to accept earned fee payments by credit card through the credit card trust account.