

In the Matter of the Petition
For Amendment to Rules Relating
to Electronic Banking

TO: Chief Justice Shirley S. Abrahamson
Justice Ann Walsh Bradley
Justice N. Patrick Crooks
Justice David T. Prosser, Jr.
Justice Patience D. Roggensack
Justice Annette Kingsland Ziegler
Justice Michael J. Gableman

Filed with the Clerk of Court Diane Fremgen
Clerk of Supreme Court
110 E. Main Street
Suite 215
Madison, WI 53703

The Office of Lawyer Regulation, by Director Keith L. Sellen, hereby petitions the Supreme Court of Wisconsin for an order establishing and amending rules to provide for electronic banking procedures for lawyer trust accounts. Specifically, the petition seeks to re-create Supreme Court Rule 20:1.15, Supreme Court Rule 20:1.0 Terminology, and Supreme Court Rule 22.39 Burden of proof; and to amend Supreme Court Rule 20:1.5 Fees.

Petitioner submits Appendices A through E, Supporting Memorandum, and Cover Sheet in support of this request.

Respectfully submitted this 17th day of December,
2014.

Keith L. Sellen
Director
Office of Lawyer Regulation
State Bar No. 1001088

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SCR 20:1.15 Safekeeping property; trust accounts and fiduciary accounts.

(a) Definitions.

In this section:

(1) "Draft account" means an account from which funds are withdrawn through a properly payable instrument or an electronic transaction.

(2) "Electronic transaction" means a paperless transfer of funds to or from a trust or fiduciary account. Electronic transactions do not include transfers initiated by voice or automated teller or cash dispensing machines.

(3) "Fiduciary" means an agent, attorney-in-fact, conservator, guardian, personal representative, special administrator, trustee, or other position requiring the lawyer to safeguard the property of a client or 3rd party.

(4) "Fiduciary account" means an account in which a lawyer deposits fiduciary property.

(5) "Fiduciary property" means funds or property of a client or 3rd party that is in a lawyer's possession in a fiduciary capacity. Fiduciary property includes, but is not limited to, property held as agent, attorney-in-fact, conservator, guardian, personal representative, special administrator, or trustee, subject to the exceptions identified in sub. (m).

(6) "Financial institution" means a bank, savings bank, trust company, credit union, savings and loan association, or investment institution, including a brokerage house.

(7) "Immediate family member" means a lawyer's spouse, registered domestic partner, child, stepchild, grandchild, sibling, parent, stepparent, grandparent, aunt, uncle, niece, or nephew.

(8) "Interest on Lawyer Trust Account or "IOLTA account"" means a pooled interest-bearing or dividend-paying draft trust account, separate from a lawyer's business and personal accounts, which is maintained at an IOLTA participating institution. Typical funds that would be placed in an IOLTA account include earnest monies, loan proceeds, settlement proceeds, collection proceeds, cost advances, and advanced payments of fees that have not yet been earned. An IOLTA account is subject to the provisions of SCR Chapter 13 and the trust account provisions of subs. (a) - (i), including the IOLTA account provisions of subs. (c) and (d).

(9) "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 sub. (d).

(10) "Properly payable instrument" means an instrument that, if presented in the normal course of business, is in a form requiring payment

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pursuant to the laws of this state.

(11) "Trust account" means an account in which a lawyer deposits trust property.

(12) "Trust property" means 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.

(13) "WisTAF" means the Wisconsin Trust Account Foundation, Inc.

(b) Segregation and safekeeping of trust property.

(1) **Separate account.** A lawyer shall hold in trust, separate from the lawyer's own property, that property of clients and 3rd parties that is in the lawyer's possession in connection with a representation. All funds of clients and 3rd parties paid to a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable trust accounts.

(2) **Identification and location of account.** Each trust account shall be clearly designated as a "Client Account," a "Trust Account," or words of similar import. The account shall be identified as such on all account records, including signature cards, monthly statements, checks, and deposit slips. An acronym, such as "IOLTA," "IOTA," or "LTAB," without further elaboration, does not clearly designate the account as a client account or trust account. Each trust account shall be maintained in a financial institution that is authorized by federal or state law to do business in Wisconsin and that is located in Wisconsin or has a branch office located in Wisconsin and which agrees to comply with the overdraft notice requirements of sub. (h). A trust account may be maintained at a financial institution located in the jurisdiction where the lawyer principally practices law if that jurisdiction has an overdraft notification requirement.

(3) **Lawyer funds.** No funds belonging to a lawyer or law firm, except funds reasonably sufficient to pay monthly account service charges, may be deposited or retained in a trust account. Each lawyer or law firm that receives trust funds shall maintain at least one draft account, other than the trust account, for funds received and disbursed other than in a trust capacity, which shall be entitled "Business Account," "Office Account," "Operating Account," or words of similar import.

(4) **Trust property other than funds.** Unless a client otherwise directs in writing, a lawyer shall keep securities in bearer form in a safe deposit box at a financial institution authorized to do business in Wisconsin. The safe deposit box shall be clearly designated as a "Client Account" or "Trust Account." The lawyer shall clearly identify and appropriately safeguard other property of a client or 3rd party.

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(5) **Insurance and safekeeping requirements.** 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 securities investor protection corporation, or any other investment institution financial guaranty insurance. IOLTA accounts shall also comply with the requirements of sub. (d) (3). Lawyers using the alternative to the E-Banking Trust Account shall comply with the requirements of sub. (f)(3)c. Except as provided in subs. (b) (4) and (d) (3) b. and c., trust property shall be held in an account in which each individual owner's funds are eligible for insurance.

(c) **Types of trust accounts.**

(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 draft trust account in an IOLTA participating institution.

(2) **Non-IOLTA accounts.** A lawyer 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 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;

d. an income-generating investment vehicle selected by the lawyer to protect and maximize the return on funds in a bankruptcy estate, which investment vehicle is approved by the bankruptcy trustee or by a bankruptcy court order, or otherwise consistent with 11 U.S.C. § 345; or

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e. a draft account or other account that does not bear interest or pay dividends because it holds funds 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 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 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;

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

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.

(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.

(d) Interest on Lawyer Trust Account (IOLTA) requirements.

(1) **Location.** An IOLTA account shall be maintained only at an IOLTA participating institution.

(2) Certification by IOLTA participating institutions.

a. Each IOLTA participating institution shall certify to WisTAF annually that the financial institution meets the requirements of subs. (d) (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

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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. (d) (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. (d) (2) d.

(3) **Safekeeping requirements.**

a. An IOLTA participating institution shall comply with the insurance and safety requirements of sub. (b) (5).

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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

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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. (d) (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

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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.

(e) **Prompt notice and delivery of property.**

(1) **Notice and delivery.** Upon receiving funds or other property in which a client has an interest, or in which a lawyer has received notice that a 3rd party has an interest identified by a lien, court order, judgment, or contract, the lawyer shall promptly notify the client or 3rd party in writing. Except as stated in this rule or otherwise permitted by law or by agreement with the client, the lawyer shall promptly deliver to the client or 3rd party any funds or other property that the client or 3rd party is entitled to receive.

(2) **Accounting.** Upon final distribution of any trust property or upon request by the client or a 3rd party having an ownership interest in the property, a lawyer shall promptly render a full written accounting regarding the property.

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(3) **Disputes regarding trust property.** When a lawyer and another person or a client and another person claim ownership interest in trust property identified by a lien, court order, judgment, or contract, the lawyer shall hold that property in trust until there is an accounting and severance of the interests. If a dispute arises regarding the division of the property, the lawyer shall hold the disputed portion in trust until the dispute is resolved. Disputes between the lawyer and a client are subject to the provisions of SCR 20:1.5(h).

(4) **Standard of proof.** A lawyer's failure to promptly deliver trust property to a client or 3rd party entitled to such property or to promptly submit trust account records to the office of lawyer regulation shall result in a presumption that the lawyer has failed to hold trust property in trust, contrary to SCR 20:1.15(b)(1). A lawyer's failure to promptly provide an accounting of trust property to the office of lawyer regulation shall result in a presumption that the lawyer has converted trust property in violation of SCR 20:8.4(c). These presumptions may be rebutted by the lawyer's production of records or an accounting that overcome such presumption by clear, satisfactory, and convincing evidence.

(f) Security requirements and restricted transactions.

(1) **Security of transactions.** A lawyer shall be responsible for the security of each transaction in the lawyer's trust account and shall not conduct or authorize transactions for which the lawyer does not have commercially reasonable security measures in place. A lawyer shall establish and maintain safeguards to assure that each disbursement from a trust account has been authorized by the lawyer and that each disbursement is made to the appropriate payee. Only a lawyer admitted to practice law in this jurisdiction or a person under the supervision of a lawyer having responsibility under SCR 20:5.3 shall have signatory and transfer authority for a trust account.

(2) **Prohibited transactions.**

a. **Cash.** No withdrawal of cash shall be made from a trust account or from a deposit to a trust account. No check shall be made payable to "Cash." No withdrawal shall be made from a trust account by automated teller or cash dispensing machine.

b. **Telephone transfers.** No deposits or disbursements shall be made to or from a pooled trust account by a telephone transfer of funds. Exception: Wire transfers may be initiated by telephone, and telephone transfers may be made between non-pooled trust accounts that a lawyer maintains for a particular client.

c. **Electronic transfers by 3rd parties.** A lawyer shall not authorize a 3rd party to electronically withdraw funds from a trust account. A

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lawyer shall not authorize a 3rd party to deposit funds into the lawyer's trust account through a form of electronic deposit that allows the 3rd party making the deposit to withdraw the funds without the permission of the lawyer.

(3) **Electronic transactions.** A lawyer shall not make deposits to or disbursements from a trust account by way of an electronic transaction, except as provided in subs a. through c.

a. **Remote Deposit.** A lawyer may make remote deposits to a trust account, provided that the lawyer keeps a record of the client or matter to which each remote deposit relates, and that the lawyer's financial institution maintains an image of the front and reverse of each remote deposit for a period of at least six years.

b. **E-Banking Trust Account.** A lawyer may accept funds paid by credit card, debit card, pre-paid or other types of payment cards, and other electronic deposits, and may disburse funds by electronic transactions that are not prohibited by sub. (f)(2)c., provided that the lawyer:

1. Maintains an IOLTA account, which shall be the primary IOLTA account, in which no electronic transactions shall be conducted other than those authorized by subs. (3)(a), (3)b.4.a, and (3)b.4.d.;

2. Maintains a separate IOLTA account with commercially reasonable account security for electronic transactions, which shall be entitled: "E-Banking Trust Account";

3. Holds lawyer or law firm funds in the E-Banking Trust Account, reasonably sufficient to cover monthly account fees and fees deducted from deposits and maintains a ledger for such account fees; and

4. Transfers the gross amount of each deposit within 3 business days after the deposit is available for disbursement, and if necessary, adds funds belonging to the lawyer or law firm to cover any deduction of fees and surcharges relating to the deposit, in accordance with subs. a. through d., below:

a. All advanced costs and advanced fees held in trust under SCR 20:1.5(f) shall be transferred to the primary IOLTA account by check or electronic transaction.

b. Earned fees, cost reimbursements, and advanced fees that are subject to the requirements of SCR 20:1.5(g) shall be transferred to the business account by check or by electronic transaction.

c. Any funds that the client has directed be disbursed by electronic transfer shall be promptly disbursed from the E-Banking Trust Account by electronic transaction.

d. All funds received in trust other than funds identified in subs. a., b. and c., shall be transferred to the primary IOLTA

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account by check or by an electronic transaction.

e. Except for funds identified in sub. a. and sub. b., a lawyer or law firm shall not be prohibited from deducting electronic transfer fees or surcharges from the client's funds, provided the client has agreed in writing to accept the electronic payment after being advised of the anticipated fees and surcharges.

5. Disbursements of funds by check shall require the check to identify the client matter and the reason for disbursement on the memo line. Disbursements of funds by electronic transaction shall be recorded in the financial institution's electronic payment system and shall include the date, amount, payee, client matter and reason for the disbursement. No disbursements shall be made by credit card, debit card, pre-paid or other types of payment cards, or any other electronic payment system that does not generate a record of the date, amount, payee, client matter and reason for the disbursement in the financial institution's electronic payment system.

6. Within 3 business days of receiving actual notice that a chargeback, surcharge, or ACH reversal has been made against the E-Banking Trust Account, the lawyer or law firm shall replace any and all funds that have been withdrawn from the E-Banking Trust Account by the financial institution or card issuer; and shall reimburse the account for any shortfall or negative balance caused by a chargeback, surcharge, or reversal. The lawyer shall reimburse the E-Banking Trust Account for any chargeback, surcharge, or reversal prior to accepting a new electronic deposit or transferring funds from the primary IOLTA to the E-Banking Trust Account for purposes of making an electronic disbursement.

c. **Alternative to E-Banking Trust Account.** A lawyer may deposit funds paid by credit card, debit card, pre-paid or other types of payment cards, and other electronic deposits into a trust account, and may disburse funds from that trust account by electronic transactions that are not prohibited by sub. (f)(2)c., without establishing a separate E-Banking Trust Account, provided that:

1. Commercially reasonable account security for electronic transactions shall be maintained;

2. A bond or crime policy shall be maintained in an amount sufficient to cover the maximum daily account balance during the prior calendar year; and

3. All chargebacks, ACH reversals, monthly account fees, and fees deducted from deposits shall be deducted from the lawyer's or law firm's business account; or the lawyer or law firm shall within 3 business days of receiving actual notice that a chargeback, surcharge, or

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ACH reversal has been made against the trust account, replace any and all funds that have been withdrawn from the trust account by the financial institution or card issuer; and shall reimburse the account for any shortfall or negative balance caused by a chargeback, surcharge, or reversal. The lawyer shall reimburse the trust account for any chargeback, surcharge, or reversal prior to disbursing funds from the trust account.

(4) **Availability of funds for disbursement.**

a. **Standard for trust account transactions.** A lawyer shall not disburse funds from any trust account unless the deposit from which those funds will be disbursed has cleared, and the funds are available for disbursement.

b. **Exception: Real estate transactions.** In closing a real estate transaction, a lawyer's disbursement of closing proceeds from funds that are received on the date of the closing, but that have not yet cleared, shall not violate sub. (f)(4)a. provided that the lawyer complies with sub. (f)(4)c., and that the closing proceeds are deposited no later than the first business day following the closing and are comprised of the following types of funds:

1. a cashier's check, teller's check, money order, official check or electronic transfer of funds, issued or transferred by a financial institution insured by the federal deposit insurance corporation or a comparable agency of the federal or state government;

2. a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state;

3. a check issued by the state of Wisconsin, the United States, or a political subdivision of the state of Wisconsin or the United States;

4. a check drawn on the account of or issued by a lender approved by the federal department of housing and urban development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. s. 202.2;

5. a check from a title insurance company licensed in Wisconsin, or from a title insurance agent of the title insurance company, if the title insurance company has guaranteed the funds of that title insurance agent;

6. a non-profit organization check in an amount not exceeding \$5000 per closing if the lawyer has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the trust account; and

7. a personal check or checks in an aggregate amount not exceeding \$5000 per closing if the lawyer has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the trust account.

c. **Uncollected funds.** Without limiting the rights of the

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lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for any funds described in sub. (f)(4)b. that are not collected and for any fees, charges, and interest assessed by the financial institution on account of the funds being disbursed before the related deposit has cleared and the funds are available for disbursement. The lawyer shall maintain a subsidiary ledger for funds of the lawyer that are deposited in the trust account to reimburse the account for uncollected funds and to accommodate any fees, charges, and interest.

d. **Exception: Collection trust accounts.** When handling collection work for a client and maintaining a separate trust account to hold funds collected on behalf of that client, a lawyer's disbursement to the client of collection proceeds that have not yet cleared does not violate sub. (f)(4)a. so long as those collection proceeds have been deposited prior to the disbursement.

(g) **Record-keeping requirements for all trust accounts.**

(1) **Record retention.** A lawyer shall maintain and preserve complete records of trust account funds, all deposits and disbursements, and other trust property and shall preserve those records for at least 6 years after the date of termination of the representation. Electronic records shall be backed up by an appropriate storage device. The office of lawyer regulation shall publish guidelines for trust account recordkeeping.

(2) **Record production.** All trust account records have public aspects related to a lawyer's fitness to practice. Upon request of the office of lawyer regulation, or upon direction of the supreme court, the records shall be submitted to the office of lawyer regulation for its inspection, audit, use, and evidence under any conditions to protect the privilege of clients that the court may provide. The records, or an audit of the records, shall be produced at any disciplinary proceeding involving the lawyer, whenever material.

(3) **Standard of Proof.** A lawyer's failure to promptly deliver trust property to a client or 3rd party entitled to such property or to promptly submit trust account records to the office of lawyer regulation shall result in a presumption that the lawyer has failed to hold trust property in trust, contrary to SCR 20:1.15(b)(1). A lawyer's failure to promptly provide an accounting of trust property to the office of lawyer regulation shall result in a presumption that the lawyer has converted trust property in violation of SCR 20:8.4(c). These presumptions may be rebutted by the lawyer's production of records or an accounting that overcome such presumption by clear, satisfactory, and convincing evidence.

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(h) Dishonored payment notification (Overdraft notices). All draft trust accounts, and any draft fiduciary account that is not subject to an alternative protection under sub. (k)(10), shall be subject to the following provisions on dishonored payment notification:

(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 sub. (h).

(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.

(3) **Content of report.** All reports made by a financial institution under this subsection shall be substantially in the following form:

a. In the case of a dishonored instrument or electronic transaction, the report shall be identical to an overdraft notice customarily forwarded to the depositor or investor, accompanied by the dishonored instrument or electronic transaction, if a copy is normally provided to the depositor or investor.

b. In the case of instruments or electronic transactions that are presented against insufficient funds and are honored, the report shall identify the financial institution involved, the lawyer or law firm, the account, the date on which the instrument or electronic transaction is paid, and the amount of overdraft created by the payment.

(4) **Timing of report.** A report made under this subsection shall be made simultaneously with the overdraft notice given to the depositor or investor.

(5) **Confidentiality of report.** A report made by a financial institution under this subsection shall be subject to SCR 22.40, Confidentiality.

(6) **Withdrawal of report by financial institution.** The office of lawyer regulation shall hold each overdraft report for 10 business days to enable the financial institution to withdraw a report provided by inadvertence or mistake. The deposit of additional funds by the lawyer or law firm shall not constitute reason for withdrawing an overdraft report.

(7) **Lawyer compliance.** Every lawyer 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

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account and each draft-type fiduciary account that is not subject to an alternative protection under sub. (k) (10).

(8) **Service charges.** A financial institution may charge a lawyer or law firm for the reasonable costs of producing the reports and records required by this rule.

(9) **Immunity of financial institution.** This subsection does not create a claim against a financial institution or its officers, directors, employees, or agents for failure to provide a trust account overdraft report or for compliance with this subsection.

(i) **Trust account certificate and acknowledgements.**

(1) **Annual requirement.** A member of the state bar of Wisconsin shall file with the state bar of Wisconsin annually, with payment of the member's state bar dues or upon any other date approved by the supreme court, a statement as to whether the member is engaged in the practice of law in Wisconsin. If the member is practicing law, the member shall state the name, address, and telephone number of each financial institution in which the member maintains a trust account, a fiduciary account or a safe deposit box. The state bar shall supply to each member, with the annual dues statement, or at any other time directed by the supreme court, a form on which this statement shall be made.

(2) **Certification by law firm.** A law firm shall file one certificate of accounts on behalf of the lawyers in the firm who are required to file a certificate under par. (1).

(3) **Compliance with SCR 20:1.15.** Each state bar member shall acknowledge on the annual dues statement, or another form approved by the supreme court, that the member is aware of each of the following requirements of this rule:

a. that SCR 20:1.15 establishes fiduciary obligations for trust and fiduciary property that comes into the member's possession, including the duty to hold such property in trust separate from the member's own property, to safeguard such property, to maintain complete records of such property, to account fully for such property, and to promptly deliver such property to the owner; and

b. that SCR 20:1.15 requires a member to maintain each IOLTA account in an IOLTA participating institution, to file an overdraft agreement with the office of lawyer regulation for each account that is subject to SCR 20:1.15(h) and (k)(10), and to annually report all trust and fiduciary accounts to the state bar of Wisconsin that are not subject to an exception under SCR 20:1.15(m).

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(4) **Suspension for non-compliance.** A state bar member who fails to file the acknowledgements required by par. (i)(3), and a trust account certificate, unless a certificate of accounts is filed by the law firm, shall be subject to the automatic suspension of the member's membership in the state bar in the same manner provided in SCR 10.03(6) for nonpayment of dues.

(j) **Multi-jurisdictional practice.** If a lawyer also licensed in another state is entrusted with funds or property in connection with a representation in the other state, the provisions of this rule shall not supersede the applicable rules of the other state.

(k) **Fiduciary property.**

(1) **Segregation of fiduciary property.** A lawyer shall hold in trust, separate from the lawyer's own funds or property, those funds or that property of clients or 3rd parties that are in the lawyer's possession when acting in a fiduciary capacity.

(2) **Accounting.** Upon final distribution of any fiduciary property or upon request by a client or a 3rd party having an ownership interest in the property, a lawyer shall promptly render a full written accounting regarding the property.

(3) **Fiduciary accounts.** A lawyer shall deposit all fiduciary funds specified in par. (1) in any of the following:

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 entities, less any transaction costs;

b. an income-generating investment vehicle, on which income shall be paid to the fiduciary entity or its beneficiary or beneficiaries, less any transaction costs;

c. an income-generating investment vehicle selected by the lawyer and approved by a court for guardianship funds if the lawyer serves as guardian for a ward under chs. 54 and 881, stats.;

d. an income-generating investment vehicle selected by the lawyer to protect and maximize the return on funds in a bankruptcy estate, which investment vehicle is approved by the bankruptcy trustee, by a bankruptcy court order, or otherwise consistent with 11 U.S.C. § 345; or

e. a draft account or other account that does not bear interest or pay dividends when, in the lawyer's professional judgment, placement in such an account is consistent with the needs and purposes of the fiduciary

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entity or its beneficiary or beneficiaries.

(4) **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 draft account 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. (k)(10)b., c., d., e., or f.

(5) **Prohibited transactions.**

a. **Cash.** No withdrawal of cash shall be made from a fiduciary account or from a deposit to a fiduciary account. No check shall be made payable to "Cash." No withdrawal shall be made from a fiduciary account by automated teller or cash dispensing machine.

b. **Card transactions.** A lawyer shall not authorize transactions by way of credit, debit, pre-paid or other types of payment cards to or from a fiduciary account.

(6) **Availability of funds for disbursement.** A lawyer shall not disburse funds from a fiduciary account unless the deposit from which those funds will be disbursed has cleared, and the funds are available for disbursement. The exception for real estate transactions in sub. (f)(4)b. shall apply to fiduciary accounts.

(7) **Record retention.** A lawyer shall maintain and preserve complete records of fiduciary account funds, all deposits and disbursements, and other fiduciary property and shall preserve those records for the 6 most recent years during which the lawyer served as a fiduciary and shall preserve at a minimum, a summary accounting of all fiduciary funds and property for prior years during which the lawyer served as a fiduciary. After the termination of the fiduciary relationship, the lawyer shall preserve the records required by this sub. for at least 6 years. The office of lawyer regulation shall publish guidelines for fiduciary account recordkeeping.

(8) **Record production.** All fiduciary account records have public aspects related to a lawyer's fitness to practice. Upon request of the office of lawyer regulation, or upon direction of the supreme court, the records shall be submitted to the office of lawyer regulation for its inspection, audit, use, and evidence under any conditions to protect the privilege of clients that the court

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may provide. The records, or an audit of the records, shall be produced at any disciplinary proceeding involving the lawyer, whenever material.

(9) **Standard of Proof.** A lawyer's failure to promptly deliver fiduciary property to a client or 3rd party entitled to such property or to promptly submit fiduciary account records to the office of lawyer regulation shall result in a presumption that the lawyer has failed to hold fiduciary property in trust, contrary to SCR 20:1.15(k)(1). A lawyer's failure to promptly provide an accounting of fiduciary property to the office of lawyer regulation shall result in a presumption that the lawyer has converted fiduciary property in violation of SCR 20:8.4(c). These presumptions may be rebutted by the lawyer's production of records or an accounting that overcome such presumption by clear, satisfactory, and convincing evidence.

(10) **Dishonored payment notification or alternative protection.** A lawyer who holds fiduciary property in a draft account from which funds are disbursed through a properly payable instrument or electronic transaction shall take one of the following actions:

a. comply with the requirements of sub. (h) dishonored payment notification (overdraft notices);

b. have the account independently audited by a certified public accountant on at least an annual basis;

c. hold 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;

d. require and document 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;

e. in the case of an estate or trust, provide an accounting of the administration at least annually to all beneficiaries currently eligible to receive income distributions; or

f. in the case of a guardianship proceeding in which annual financial accountings must be reviewed by a court, timely file such annual financial accountings with the court.

(11) **Fiduciary account certificate and acknowledgements.** Funds held by a lawyer in a fiduciary account are subject to the requirements of sub. (i).

(m) **Exceptions to this section.** This rule does not apply in any of the following instances in which a lawyer is acting in a fiduciary capacity:

(1) the lawyer is serving as a bankruptcy trustee, subject to the oversight and accounting requirements of the bankruptcy court or the office of

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U.S. Trustee;

(2) the lawyer is serving as an assignee or receiver under the provisions of Ch. 128, stats.;

(3) the property held by the lawyer when acting in a fiduciary capacity is property held for the benefit of an "immediate family member" of the lawyer;

(4) 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; or

(5) the lawyer is acting in the course of the lawyer's employment by an employer not itself engaged in the practice of law, provided that the lawyer's employment is not ancillary to the lawyer's practice of law.

WISCONSIN COMMENT

A lawyer must hold the property of others with the care required of a professional fiduciary. All property that is the property of clients or 3rd parties must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust or fiduciary accounts. Lawyers have duties to keep clear, distinct, and accurate records of all trust transactions, and to be able always to make a full accounting. *See, In re Trust Estate of Martin*, 39 Wis.2d 437, 159 N.W.2d 660 (1968).

SCR 20:1.15(a)(2) Electronic transaction. The types of electronic transactions are developing. For examples of current types of electronic transactions see the record keeping guidelines published by the office of lawyer regulation.

SCR 20:1.15(b)(1) Separate accounts. With respect to probate matters, a lawyer's role may be to serve in a fiduciary capacity as the personal representative, to represent an estate's personal representative, or to act as both personal representative and attorney for an estate. SCR 20:1.15(k) applies to funds and property which a lawyer receives, holds and distributes while serving in the fiduciary role of personal representative. Such funds and property may include, but are not limited to bank and investment accounts, stocks and bonds. SCR 20:1.15(b)-(i) apply to funds and property which a lawyer receives, holds and distributes in connection with the representation of a client/personal representative or an estate. Such funds include, but are not limited to, advanced legal fees and advanced costs. If a lawyer acts in good faith to safeguard funds and property received in connection with a probate matter, the lawyer is not subject to any charge of ethical impropriety for holding what may be determined to be fiduciary funds in a segregated trust account or in an IOLTA account for a limited period of time, or for holding what may be determined to be trust funds in a fiduciary account.

SCR 20:1.15(b)(5) Insurance and safekeeping requirements. Pursuant to SCR 20:1.15(b)(5), trust accounts are required to be held in financial or IOLTA participating institutions that are insured by the federal deposit insurance corporation (FDIC), the national credit union share insurance fund (NCUSIF), the securities investor protection corporation (SIPC) or any other investment institution financial guaranty insurance. However, since federal law dictates the amount of insurance coverage available from the FDIC, the NCUSIF and the SIPC, funds in excess of those limits are not insured. Federal law also limits the types of losses that are covered by SIPC insurance. 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 financial or IOLTA participating institutions and that the funds are eligible for the insurance that is available. The exceptions to the SCR 20:1.15(b)(5) requirement relate to trust property other than funds and to IOLTA accounts that are subject to the safety requirements of SCR 20:1.15(d)(3)b. and c.

SCR 20:1.15(d)(3) Safekeeping requirements. See comment to SCR 20:1.15(b)(5).

SCR 20:1.15(d)(4) Income requirements. Pursuant to SCR 20:1.15 (d)(4), IOLTA accounts shall bear the

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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.

SCR 20:1.15(e) Prompt notice and delivery of property. Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law, including SCR 20:1.15(e), to protect such 3rd-party claims against wrongful interference by the client, and accordingly, may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the 3rd party. If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest in it, the lawyer is free to deliver the property to the person to whom it belongs.

SCR 20:1.15(e)(4) Standard of proof. 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). A lawyer's failure to comply with the accounting requirements of SCR 20:1.15(e)(2) will result in a presumption that the lawyer has converted trust property, contrary to SCR 20:8.4(c). Each presumption can be rebutted by the lawyer's production of records or an accounting that overcome such presumption by clear and convincing evidence. (*See, In re Trust Estate of Martin*, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

SCR 20:1.15(f)(2)c. Electronic transfers by 3rd parties. Many forms of electronic deposit allow the transferor to remove the funds without the consent of the account holder. A lawyer must not only be aware of the financial institution's policy but also federal regulations pertaining to the specific form of electronic deposit, and must ensure that the transferor is prohibited from withdrawing deposited funds without the lawyer's consent.

SCR 20:1.15(f)(3)a. Remote deposit. A remote deposit is an electronic deposit of a paper check to a lawyer's trust account. Subject to a lawyer's compliance with the requirements of this subsection, such transactions are permitted in an IOLTA account that is not an E-Banking IOLTA. Unlike other types of electronic transactions, remote deposits can be traced to images of the front and reverse of the deposited check, which are retained for at least 6 years by the lawyer's financial institution, pursuant to banking regulations. This exception was established to facilitate deposits to an IOLTA account of a lawyer who does not utilize multiple types of electronic transactions, making the expense relating to an E-Banking IOLTA unnecessary. Remote deposits may also be made to a non-pooled account for a particular client, subject to those same requirements.

SCR 20:1.15(f)(3)b. Exception: E-Banking Trust Account. Financial institutions, as credit card issuers, routinely impose charges on vendors when a customer pays for goods or services with a credit card. That charge is deducted directly from the customer's payment. Vendors who accept credit cards routinely credit the customer with the full amount of the payment and absorb the charges. Before holding a client responsible for such charges, a lawyer needs to disclose this practice to the client in advance, and assure that the client understands and consents to the charges. In addition, the lawyer needs to investigate the following concerns before accepting payments by credit card:

1. **Does the credit card issuer prohibit a lawyer/vendor from requiring the customer to pay the charge?** If a lawyer intends to credit the client for anything less than the full amount of the credit card payment, the lawyer needs to assure that this practice is not prohibited by the credit card issuer's regulations and/or by the agreement between the lawyer and the credit card issuer. Entering into an agreement with a credit card issuer with the intent to violate this type of requirement may constitute conduct involving dishonesty, fraud, or deceit, in violation of SCR 20:8.4(c).

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2. **Does the credit card issuer require services to be rendered before a credit card payment for legal fees is accepted?** If a lawyer intends to accept fee advances by credit card, the lawyer needs to assure that fee advances are not prohibited by the credit card issuer's regulations and/or by the agreement between the lawyer and the credit card issuer. Entering into an agreement with a credit card issuer with the intent to violate this type of requirement may constitute conduct involving dishonesty, fraud, or deceit, in violation of SCR 20:8.4(c).

3. **By requiring clients to pay the credit cards charges, is the lawyer required to make certain specific disclosures to such clients and offer cash discounts to all clients?** If a lawyer intends to require clients to pay credit card charges, the lawyer needs to assure that the lawyer complies with all state and federal laws relating to such transactions, including, but not limited to, Regulation Z of the Truth in Lending Act, 12 C.F.R. s. 206.

SCR 20:1.15(f)(3)c. Alternative E-Banking Trust Account. As an alternative to establishing an E-Banking Trust Account for the purpose of making electronic deposits and disbursements, a lawyer may make electronic deposits and disbursements from an IOLTA when additional protections are in place. This alternative may reduce the expense of maintaining two accounts. On the other hand, the alternative requires that the lawyer prevent the electronic withdrawal of funds from the IOLTA that could occur through chargebacks or reversals against a credit card deposit, or other electronic withdrawals. Specifically, the lawyer must either establish agreements with the lawyer's financial institution and with payment providers to deduct fees, surcharges, and chargebacks from the law firm business account or reimburse the account for such deductions with funds belonging to the lawyer or law firm within 3 business days after receiving notice of the deductions. In addition, the lawyer must establish an agreement with the financial institution to block debits from the IOLTA.

SCR 20:1.15(f)(4)b. Exception: Real estate transactions. SCR 20:1.15(f)(4)b. establishes an exception to the requirement that a lawyer only disburse funds that are available for disbursement, i.e., funds that have been credited to the account. This exception was created in recognition of the fact that real estate transactions in Wisconsin require a simultaneous exchange of funds. However, even under this exception, the funds from which a lawyer disburses the proceeds of the real estate transaction, i.e., the lender's check, draft, wire transfer, etc., must be deposited no later than the first business day following the date of the closing. In refinancing transactions, the lender's funds must be deposited as soon as possible, but no later than the first business day after the loan proceeds are distributed. Proceeds are generally distributed three days after the closing date.

SCR 20:1.15(g)(2) Record production. The duty of the lawyer to produce client trust account records for inspection under SCR 20:1.15(g)(2) is a specific exception to the lawyer's responsibility to maintain the confidentiality of the client's information as required by SCR 20:1.6.

SCR 20:1.15(g)(3) Standard of proof. A lawyer's failure to comply with the record production requirements of SCR 20:1.15(g)(2) will result in a presumption that the lawyer has failed to hold property in trust, contrary to SCR 20:1.15(b)(1). A lawyer's failure to provide an accounting for trust property will result in a presumption that the lawyer has converted trust property, contrary to SCR 20:8.4(c). Each presumption can be rebutted by the lawyer's production of records or an accounting that overcome such presumption by clear and convincing evidence. *See*, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

SCR 20:1.15(k)(1) Segregation of fiduciary property. See comment to SCR 20:1.15(b)(1).

SCR 20:1.15(k)(9) Standard of proof. A lawyer's failure to comply with the record production requirements of SCR 20:1.15(k)(8) will result in a presumption that the lawyer has failed to hold fiduciary property in trust, contrary to SCR 20:1.15(k)(1). A lawyer's failure to provide an accounting for fiduciary property will result in a presumption that the lawyer has converted fiduciary property, contrary to SCR 20:8.4(c). Each presumption can be rebutted by the lawyer's production of records or an accounting that overcome such presumption by clear and convincing evidence. *See*, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

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SCR 20:1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b)(1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney's fees, is more than \$1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by par. (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written

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statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

(f) Except as provided in par. (g), unearned fees and funds advanced by a client or 3rd party for payment of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to sub. (h). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred.

(g) A lawyer who accepts advanced payments of fees may deposit the funds in the lawyer's business account, provided that review of the lawyer's fee by a court of competent jurisdiction is available in the proceeding to which the fee relates, or provided that the lawyer complies with each of the following requirements:

(1) Upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client a notice in writing containing all of the following information: the amount of the advanced payment; the basis or rate of the lawyer's fee; any expenses for which the client will be responsible; the lawyer's obligation to refund any unearned advanced fee,

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along with an accounting, at the termination of the representation; the lawyer's obligation to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of such a dispute; and the ability of the client to file a claim with the Wisconsin lawyers' fund for client protection if the lawyer fails to provide a refund of unearned advanced fees.

(2) Upon termination of the representation, the lawyer shall deliver to the client in writing all of the following: a final accounting, or an accounting from the date of the lawyer's most recent statement to the end of the representation, regarding the client's advanced fee payment; a refund of any unearned advanced fees and costs; notice that, if the client 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; and notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client within 30 days after receiving notice of the dispute from the client, the lawyer shall submit the dispute to binding arbitration.

(3) Upon timely receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and if the dispute is not resolved, the lawyer shall submit the dispute to binding arbitration with the State Bar Fee Arbitration Program or a similar local bar association program within 30 days of the lawyer's receipt of the written notice of dispute from the client.

(4) Upon receipt of an arbitration award requiring the lawyer to make a payment to the client, the lawyer shall pay the arbitration award within 30 days, unless the client fails to agree to be bound by the award of the arbitrator.

(h)(1) At least 5 business days before the date on which a disbursement is made from a trust account for the purpose of paying fees, with the exception of contingent fees or fees paid pursuant to court order, a lawyer shall transmit to the client in writing all of the following: an itemized bill or other accounting showing the services rendered; notice of the amount owed and the anticipated date of the withdrawal; and a statement of the balance of the client's funds in the lawyer trust account after the withdrawal.

(2) The lawyer may withdraw earned fees on the date that the invoice is transmitted to the client, provided that the lawyer has given prior notice to the client in writing that earned fees will be withdrawn on the date that the invoice is transmitted. The invoice shall include each of the elements required by sub. (h) (1).

(3) If a client makes a particularized and reasonable objection to the disbursement described in sub. (1), the disputed portion shall remain in the trust account until the dispute is resolved. If the client makes a particularized

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and reasonable objection to a disbursement described in sub. (1) or (2) within 30 days after the funds have been withdrawn, the disputed portion shall be returned to the trust account until the dispute is resolved, unless the lawyer reasonably believes that the client's objections do not present a basis to hold funds in trust or return funds to the trust account under this subsection. The lawyer will be presumed to have a reasonable basis for declining to return funds to trust if the disbursement was made with the client's informed consent, in writing. The lawyer shall promptly advise the client in writing of the lawyer's position regarding the fee and make reasonable efforts to clarify and address the client's objections.

WISCONSIN COMMITTEE COMMENT

Paragraph (b) differs from the Model Rule in requiring that fee and expense information usually must be communicated to the client in writing, unless the total cost of representation will be \$1000 or less. In instances when a lawyer has regularly represented a client, any changes in the basis or rate of the fee or expenses may be communicated in writing to the client by a proper reference on the periodic billing statement provided to the client within a reasonable time after the basis or rate of the fee or expenses has been changed. The communication to the client through the billing statement should clearly indicate that a change in the basis or rate of the fee or expenses has occurred along with an indication of the new basis or rate of the fee or expenses. A lawyer should advise the client at the time of commencement of representation of the likelihood of a periodic change in the basis or rate of the fee or expenses that will be charged to the client.

In addition, paragraph (b) differs from the Model Rule in requiring that the purpose and effect of any retainer or advance fee paid to the lawyer shall be communicated in writing and that a lawyer shall promptly respond to a client's request for information concerning fees and expenses. The lawyer should inform the client of the purpose and effect of any retainer or advance fee. Specifically, the lawyer should identify whether any portion, and if so what portion, of the fee is a retainer. A retainer is a fee that a lawyer charges the client not for specific services to be performed but to ensure the lawyer's availability whenever the client may need legal services. These fees become the property of the lawyer when received and may not be deposited into the lawyer's trust account. In addition, they are subject to SCR 20:1.15 and SCR 20:1.16. Retainers are to be distinguished from an "advanced fee" which is paid for future services and earned only as services are performed. Advanced fees are subject to SCR 20:1.5(h) and SCR 20:1.16. See also State Bar Professional Ethics Committee Formal Opinion E-09-03 (2009), State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-93-4 (1993) and SCR 20:1.0(a), (f) and (p).

Paragraph (d) preserves the more explicit statement of limitations on contingent fees that has been part of Wisconsin law since the original adoption of the Rules of Professional Conduct in the state.

Paragraph (e) differs from the Model Rule in several respects. The division of a fee "based on" rather than "in proportion to" the services performed clarifies that fee divisions need not consist of a percentage calculation. The rule also recognizes that lawyers who formerly practiced together may divide a fee pursuant to a separation or retirement agreement between them. In addition, the standards governing referral arrangements are made more explicit.

Dispute Over Fees

Arbitration provides an expeditious, inexpensive method for lawyers and clients to resolve disputes regarding fees. It also avoids litigation that might further exacerbate the relationship. If a procedure has been established for resolution of fee disputes, such as the procedures required by subsection (g) of this rule or an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. See also ABA Comment [9].

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Fee Estimates

Compliance with the following guidelines is a desirable practice: (a) the lawyer providing to the client, no later than a reasonable time after commencing the representation, a written estimate of the fees that the lawyer will charge the client as a result of the representation; (b) if, at any time and from time to time during the course of the representation, the fee estimate originally provided becomes substantially inaccurate, the lawyer timely providing a revised written estimate or revised written estimates to the client; (c) the client accepting the representation following provision of the estimate or estimates; and (d) the lawyer charging fees reasonably consistent with the estimate or estimates given.

WISCONSIN COMMENT

SCR 20:1.5(f) Advances for fees and costs. Lawyers are obligated to hold advanced fee payments in trust until earned, or use the alternative protection for advance fees as set forth in subsection (g) of this rule. Additional requirements for advanced fees are identified in SCR 20:1.0(a). Sometimes the lawyer may receive advanced fee payments from third parties. In such cases, the lawyer must follow the requirements of SCR 20:1.8(f). In addition, the lawyer should establish, upon receipt or prior to receipt of the advanced fee payment from a third party, whether any potential refund of unearned fees will be paid to the client or third-party payor. This may be done through agreement of the parties or by the lawyer informing the client and third-party payor of the lawyer's policy regarding such refunds. Lawyers also receive cost advances from clients or 3rd parties. Since January 1, 1987, the supreme court has required cost advances to be held in trust. Prior to that date, the applicable trust account rule, SCR 20.50(1), specifically excluded such advances from the funds that the supreme court required lawyers to hold in trust accounts. However, by order, dated March 21, 1986, the supreme court amended SCR 20.50(1) as follows: "All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable trust accounts as provided in sub. (3) maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm may be deposited in such an account except as follows" This requirement is specifically addressed in SCR 20:1.5(f).

SCR 20:1.5(g) Alternative protection for advanced fees. This section allows lawyers to deposit advanced fees into the lawyer's business account, as an alternative to SCR 20:1.5(f). The provision regarding court review applies to a lawyer's fees in proceedings in which the lawyer's fee is subject to review at the request of the parties or the court, such as bankruptcy, formal probate, and proceedings in which a guardian ad litem's fee may be subject to judicial review. In any proceeding in which the lawyer's fee must be challenged in a separate action, the lawyer must either deposit advanced fees in trust or use the alternative protections for advanced fees in this subsection. The lawyer's fee remains subject to the requirement of reasonableness [SCR 20:1.5(a)] as well as the requirement that unearned fees be refunded upon termination of the representation [SCR 20:1.16(d)]. A lawyer must comply either with SCR 20:1.5(f), or SCR 20:1.5(g), and a lawyer's failure to do so shall be professional misconduct and grounds for discipline. The writing required by SCR 20:1.5(g)(1) must contain language informing the client that the lawyer is obligated to refund any unearned advanced fee at the end of the representation, that the lawyer will submit any dispute regarding a refund to binding arbitration, such as the programs run by the State Bar of Wisconsin and Milwaukee Bar Association, within 30 days of receiving a request for refund, and that the lawyer is obligated to comply with an arbitration award within 30 days of the award. The client is not obligated to arbitrate the fee dispute and may elect another forum in which to resolve the dispute. The writing must also inform the client of the opportunity to file a claim in the event an unearned advanced fee is not refunded, and should provide the address of the Wisconsin lawyers' fund for client protection.

If the client's fees have been paid by one other than the client, then the lawyer's responsibilities are governed by SCR 20:1.8(f). If there is a dispute as to the ownership of any refund of unearned advanced fees paid by one other than the client, the unearned fees should be treated as trust property pursuant to SCR 20:1.15(e)(3).

APPENDIX B

This alternative applies only to advanced fees for legal services. Cost advances must be deposited into the lawyer's trust account.

Advanced fees deposited into the lawyer's business account pursuant to this subsection may be paid by credit card, debit card, pre-paid or other types of payment cards, or an electronic transfer of funds. A cost advance cannot be paid by credit card, debit card, pre-paid or other types of payment cards, or an electronic transfer of funds under this section. Such payments are subject to SCR 20:1.15(b)(1) or SCR 20:1.15(f)(3)b.

SCR 20:1.5(h) Withdrawal of non-contingent fees from trust account. This section applies to attorney fees, other than contingent fees. It does not apply to filing fees, expert witness fees, subpoena fees, and other costs and expenses that a lawyer may incur on behalf of a client in the course of a representation. In addition, this section does not require contingent fees to remain in the trust account or to be returned to the trust account if a client objects to the disbursement of the contingent fee, provided that the contingent fee arrangement is documented by a written fee agreement, as required by SCR 20:1.5(c). While a client may dispute the reasonableness of a lawyer's contingent fee, such disputes are subject to SCR 20:1.5(a), not to this subsection. A client's objection under sub. (h)(3) must offer a specific and reasonable basis for the fee dispute in order to trigger the lawyer's obligation to keep funds in the lawyer's trust account or return funds to the lawyer's trust account. A generalized objection to the overall amount of the fees or a client's unilateral desire to abrogate the terms of a fee agreement should not ordinarily be considered sufficient to trigger the lawyer's obligation. A lawyer may resolve a dispute over fees by offering to participate and abide by the decision of a fee arbitration program. In addition, a lawyer may bring an action for declaratory judgment pursuant to § 806.04, Wis. Stats. to resolve a dispute between the lawyer and a client regarding funds held in trust by the lawyer. The court of appeals suggested employment of that method to resolve a dispute between a client and a 3rd party over funds held in trust by the lawyer. See Riegleman v. Krieg, 2004 WI App 85, 271 Wis. 2d 798, 679 N.W.2d 857, 2004 Wisc. App. LEXIS 229 (2004).

Additionally, when a lawyer's fees are subject to final approval by a court, such as fees paid to a guardian ad litem or lawyer's fees in formal probate matters, objections to disbursements by clients or 3rd party payors are properly brought before the court having jurisdiction over the matter. A lawyer should hold disputed funds in trust until such time as the appropriate court resolves the dispute.

ABA COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

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[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

APPENDIX C (AMENDED)

SCR 22.39 Burden of proof.

(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 such property or to promptly submit trust or fiduciary account records 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). A lawyer's failure to promptly provide an accounting of trust or fiduciary property to the office of lawyer regulation shall result in a presumption that the lawyer has converted trust or fiduciary property in violation of SCR 20:8.4(c). These presumptions may be rebutted by the lawyer's production of records or an accounting that overcome such 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.

COMMENT

While the director of the office of lawyer regulation or a special investigator appointed by the director pursuant to SCR 22.25 have the burden of proving misconduct in most circumstances, sub. (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 converted trust property or fiduciary property, contrary to SCR 20:8.4(c).

See, In re Trust Estate of Martin, 39 Wis. 2d 437, 159 N.W.2d 660 (1968).

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SCR 20:1.0 Terminology

(a) "Advanced fee" denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed-upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an "advanced fee," "minimum fee," "nonrefundable fee," or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), SCR 20:1.15(f)(3)b.4. and SCR 20:1.16(d).

(b) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See par. (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(e) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization, including a government entity.

(f) "Flat fee" denotes a fixed amount paid to a lawyer for specific, agreed-upon services, or for a fixed, agreed-upon stage in a representation, regardless of the time required of the lawyer to perform the service or reach the agreed-upon stage in the representation. A flat fee, sometimes referred to as "unit billing," is not an advance against the lawyer's hourly rate and may not be billed against at an hourly rate. Flat fees become the property of the lawyer upon receipt and are subject to the requirements of SCR 20:1.5, including SCR 20:1.5(f) or (g) and SCR 20:1.5(h), SCR 20:1.15(f)(3)b.4. and SCR 20:1.16(d).

(g) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(h) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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(i) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(j) "Misrepresentation" denotes communication of an untruth, either knowingly or with reckless disregard, whether by statement or omission, which if accepted would lead another to believe a condition exists that does not actually exist.

(k) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(l) A "prosecutor" includes a government attorney or special prosecutor (i) in a criminal case, delinquency action, or proceedings that could result in a deprivation of liberty or (ii) acting in connection with the protection of a child or a termination of parental rights proceeding or (iii) acting as a municipal prosecutor.

(m) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(n) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(o) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(p) "Retainer" denotes an amount paid specifically and solely to secure the availability of a lawyer to perform services on behalf of a client, whether designated a "retainer," "general retainer," "engagement retainer," "reservation fee," "availability fee," or any other characterization. This amount does not constitute payment for any specific legal services, whether past, present, or future and may not be billed against for fees or costs at any point. A retainer becomes the property of the lawyer upon receipt, but is subject to the requirements of SCR 20:1.5 and SCR 20:1.16(d).

(q) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

(r) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(s) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

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(t) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, Photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Wisconsin Committee Comment

The Committee has added definitions of "consult," "misrepresentation," and "prosecutor" that are not part of the Model Rule. In the definition of "firm," the phrase "including a government entity" is added to make the coverage more explicit. Because the provisions of the rule are renumbered to preserve the alphabetical arrangement, caution should be used when referring to the ABA Comment.

Wisconsin Comment

The definition of flat fee specifies that flat fees "become the property of the lawyer upon receipt." Notwithstanding, the lawyer must either deposit the advanced flat fee in trust until earned, or comply with the alternative in SCR 20:1.5(g). In addition, as specified in the definition, flat fees are subject to the requirements of all rules to which advanced fees are subject.

ABA Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

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[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a

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writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

APPENDIX E (AMENDED)

**OLR GUIDELINES
FOR
TRUST ACCOUNT AND FIDUCIARY ACCOUNT RECORDS**

TRUST ACCOUNT RECORDS

Pursuant to SCR 20:1.15(g)(1), the Office of Lawyer Regulation publishes the following guidelines for trust account recordkeeping.

(1) **Draft accounts.** Complete records of a trust account that is a draft account should 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, as follows:

a. **Transaction register.** The transaction register should contain a chronological record of all account transactions, whether by check, wire transfer, electronic transfer, or other means, and include all of the following:

1. the date, source, and amount of all deposits;
2. the date, check or transaction number, payee and amount of all disbursements;
3. the date and amount of every other deposit or deduction of whatever nature;
4. the identity of the client for whom funds were deposited or disbursed; and
5. the balance in the account after each transaction.

b. **Individual client ledgers.** A subsidiary ledger should be maintained for each client or 3rd party for whom the lawyer receives trust funds that are deposited in an IOLTA account or any other pooled trust account. The lawyer should record each receipt and disbursement of a client's or 3rd party's funds and the balance following each transaction. A lawyer who disburses funds from an IOLTA account or any pooled trust account that would create a negative balance with respect to any individual client or matter may be determined to have failed to hold client or third party property in trust, in violation of SCR 20:1.15(b)(1).

c. **Ledger for account fees and charges.** A subsidiary maintenance account ledger should be maintained for funds of the lawyer deposited in the trust account to accommodate monthly service charges. Each deposit and expenditure of the lawyer's funds in the account and the balance following each transaction should be identified in the ledger.

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d. **Deposit records.**

Deposit records should identify the name of the lawyer or law firm, the name of the account, the amount of each deposit item, the client or matter associated with each deposit item, and the date of the deposit.

1. A copy or duplicate of each deposit slip should be maintained by the lawyer.

2. Each deposit of wired funds should be documented in a monthly statement of the account that indicates the date of deposit, the source, and the amount.

3. Each electronic deposit, including a remote deposit, should be documented by an image of the deposit item.

e. **Disbursement records.**

1. **Checks.** Checks should be pre-printed and pre-numbered. The name and address of the lawyer or law firm, and the name of the account should be printed in the upper left corner of the check. Each check disbursed from the trust account should identify the client matter and the reason for the disbursement on the memo line.

2. **Canceled checks.** Canceled checks should be obtained from the financial institution. Imaged checks may be substituted for canceled checks.

3. **Imaged checks.** Imaged checks should provide both the front and reverse of the check. The information contained on the reverse side of imaged checks should include any endorsement signatures or stamps, account numbers, and transaction dates that appear on the original. Imaged checks should be of sufficient size to be readable without magnification and as close as possible to the size of the original check.

4. **Wire transfers.** Wire transfers should be documented by a written withdrawal authorization or other documentation, such as a monthly statement of the account that indicates the date of the transfer, the payee, and the amount.

5. **Electronic transfers.** Electronic transfers should be documented in a monthly statement of the account, and by a record of the transfer that is maintained by the lawyer or law firm, which includes the following: the payee, amount, date, client or matter, purpose, the lawyer authorizing the transfer, and the person or persons performing the transfer.

f. **Monthly statement.** The monthly statement provided to the lawyer or law firm by the financial institution should identify the name and address of the lawyer or law firm and the name of the account.

g. **Reconciliation reports.** A printed reconciliation report for each trust account should be prepared and retained on a regular and

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periodic basis not less frequently than every 30 days. Each reconciliation report should show all of the following balances and verify that they are identical:

1. the balance that appears in the transaction register as of the reporting date;
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
3. the adjusted balance, determined by adding outstanding deposits and other credits to the balance in the financial institution's monthly statement and subtracting outstanding checks and other deductions from the balance in the monthly statement.

(2) **Non-draft accounts.** Complete records of a trust account that is a non-draft account should include all of the following:

- a. all monthly or other periodic statements provided by the financial institution to the lawyer or law firm; and
- b. all transaction records, including passbooks, records of wired funds and electronic transactions, duplicates of any instrument issued by the financial institution from funds held in the account, duplicate deposit slips or records of remote deposits identifying the source of any deposit, and duplicate withdrawal slips identifying the purpose of any withdrawal.

(3) **Tangible trust property and bearer securities.**

a. **Property ledger.** A lawyer who receives, in trust, tangible personal property or securities in bearer form should maintain a property ledger that identifies the property, date of receipt, owner, client or matter, and location of the property. The ledger should also identify the disposition of all of the trust property received by the lawyer.

b. **Receipt upon taking custody.** Upon taking custody, in trust, of any tangible personal property or securities in bearer form, the lawyer should provide to the previous custodian a signed receipt, with a description of the property and the date of receipt.

c. **Dispositional receipt.** Upon disposition of any tangible personal property or securities in bearer form held in trust, the lawyer should obtain a signed receipt, with a description of the property and the date of disposition, from the recipient.

(4) **Electronic record retention.**

a. **Back-up of records.** A lawyer who maintains trust account records by computer should maintain the transaction register, client ledgers, and reconciliation reports in a form that can be reproduced to printed

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hard copy.

b. **IOLTA account records.** In addition to the guidelines in sub. (4)a., the transaction register, the subsidiary ledger, and the reconciliation report should be printed every 30 days for an IOLTA account. The printed copy should be retained for at least 6 years.

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FIDUCIARY ACCOUNT RECORDS

Pursuant to SCR 20:1.15(k)(7), the Office of Lawyer Regulation publishes the following guidelines for fiduciary account recordkeeping.

(1) **Records.** For each fiduciary account, a lawyer should retain records of receipts and disbursements as necessary to document the transactions. The lawyer should maintain all of the following:

- a. all monthly or other periodic statements provided by the financial institution to the lawyer or law firm; and
- b. all transaction records, including canceled or imaged checks, passbooks, records of wired funds and electronic transactions, including remote deposits, duplicates of any instrument issued by the financial institution from funds held in the account, duplicate deposit slips identifying the source of any deposit, and duplicate withdrawal slips identifying the purpose of any withdrawal.

(2) **Tangible fiduciary property and bearer securities.**

a. **Property ledger.** A lawyer who, as a fiduciary, receives tangible personal property or securities in bearer form should maintain a property ledger that identifies the property, date of receipt, owner, and location of the property. The ledger should also identify the disposition of all such fiduciary property received by the lawyer.

b. **Receipt upon taking custody.** Upon taking custody, as a fiduciary, of any tangible personal property or securities in bearer form, the lawyer should provide to the previous custodian a signed receipt, with a description of the property, and the date of receipt.

c. **Dispositional receipt.** Upon disposition of any tangible personal property or securities in bearer form held by the lawyer as a fiduciary, the lawyer should obtain a signed receipt, with a description of the property and the date of disposition, from the recipient.

(3) **Electronic Record retention.** A lawyer who maintains fiduciary account records by computer should maintain the transaction register and reconciliation reports in a form that can be reproduced to printed hard copy.