



WISCONSIN[®]
LAWYERS
EXPERT ADVISERS.
SERVING YOU.

RECEIVED

MAY 05 2010

CLERK OF SUPREME COURT
OF WISCONSIN

SECOND MEMORANDUM

To: Supreme Court
From: Trust Account Working Group
Date: May 4, 2010
Re: Trust Account Rule

0604

This memorandum supplements the Trust Account Working Group's previous submission. This second memorandum includes suggested revisions to SCR 20:1.15(b)(4m) intended to address some concerns raised in the group's first memorandum. Specifically, the suggested revisions below are intended to address two problems:

1. The inconsistency in the language of SCR 20:1.15(b)(4m) with respect to the type of dispute that requires a lawyer to submit a dispute with a former client to fee arbitration. SCR 20:1.15(b)(4m)a.5 requires a lawyer using the alternative protection for advanced fees notify a client upon receipt of an advanced fee that "the lawyer is required to submit any dispute about a requested refund of advanced fees to binding arbitration within 30 days of receiving a request for such a refund." SCR 20:1.15(b)(4m)b.2 requires a lawyer using the alternative protection for advanced fees, upon termination of the representation, provide the client "notice that, if the client disputes the amount of the fee and wants that dispute to be submitted to binding arbitration, the client must provide written notice of the dispute to the lawyer within 30 days of the mailing of the accounting." It is thus unclear from the language of the current Rule whether any dispute about the fee requires a lawyer to submit the dispute to fee arbitration, or whether only disputes about the return of advanced fee payments trigger the lawyer's obligation to submit the dispute to fee arbitration. The suggested revisions are intended to clarify that any dispute about the fee will trigger the lawyer's obligation to attempt to resolve the dispute and, if unsuccessful, submit the matter to fee arbitration.
2. SCR 20:1.15(b)(4m) exempts a lawyer from the requirement to place advanced fees in trust "provided that a court of competent jurisdiction must ultimately approve the lawyer's fee" in the matter. It is unclear how this exemption applies. For example, it is the understanding of the group that, in the case of fees of *Guardians ad Litem* ("GALs") in a divorce, courts routinely order the parties to pay the fees of the GAL, and will hear complaints of the parties about those fees if raised, but the court does not routinely actively supervise and "approve" those fees. Similarly, in bankruptcy proceedings, a trustee may object to a lawyer's fees and bring the matter before the court, the court usually does not actively "approve" the fees. It is uncertain whether these situations fall within this exemption. It is the intention of the suggested revisions to clarify that the

exemption applies in a proceeding in which judicial review of the lawyer's fee is readily available, even if not automatic.

SUGGESTED REVISED LANGUAGE SCR 20:1.15(b)(4m)

(4m) **Alternative protection for advanced fees.** 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:

a. 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:

1. the amount of the advanced payment;
2. the basis or rate of the lawyer's fee;
3. any expenses for which the client will be responsible;
4. that the lawyer has an obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation;
5. that the lawyer is required to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of such a dispute; and
6. 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.

b. Upon termination of the representation, the lawyer shall deliver to the client in writing all of the following:

1. 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 with a refund of any unearned advanced fees;
2. 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
3. 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.

c. 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.

d. 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.

COMMENT - SCR 20:1.15(b)(4m) Alternative protection for advanced fees.

This section allows lawyers to deposit advanced fees into the lawyer's business account, as an alternative to SCR 20:1.15(b)(4). The provision regarding court review applies to lawyers' 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 SCR 20:1.15(b)(4m). The lawyer's fee remains subject to the requirement of reasonableness (SCR 20:1.5) 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 20:1.15(b)(4), or with SCR 20:1.15(b)(4m), and a lawyer's failure to do so shall be professional misconduct and grounds for discipline.

(4m) **Alternative protection for advanced fees.** 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 must ultimately approve the lawyer's fee is available in the proceeding to which the fee relates, or provided that the lawyer complies with each of the following requirements:

a. 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:

1. the amount of the advanced payment;
2. the basis or rate of the lawyer's fee;
3. any expenses for which the client will be responsible;
4. that the lawyer has an obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation;
5. that the lawyer is required to submit any unresolved dispute about a ~~requested refund of advanced~~ the fees to binding arbitration within 30 days of receiving a request for such a refund written notice of such a dispute; and
6. 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.

b. Upon termination of the representation, the lawyer shall deliver to the client in writing all of the following:

1. 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 with a refund of any unearned advanced fees;
2. 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
3. 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.

c. 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.

d. 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.

COMMENT - SCR 20:1.15(b)(4m) Alternative protection for advanced fees.

This section allows lawyers to deposit advanced fees into the lawyer's business account, as an alternative to SCR 20:1.15(b)(4). The provision regarding court review applies to lawyers' 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 SCR 20:1.15(b)(4m). The lawyer's fee remains subject to the requirement of reasonableness (SCR 20:1.5) 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 20:1.15(b)(4), or with SCR 20:1.15(b)(4m), and a lawyer's failure to do so shall be professional misconduct and grounds for discipline.

The writing required by SCR 20:1.15(b)(4m)a. 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(d)(3).

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, or an electronic transfer of funds. A cost advance cannot be paid by credit card, debit card, 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(e)(4)h.