

SUPPORTING MEMORANDUM

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 (OLR) provides the following memorandum in support of the petition to amend rules of professional conduct relating to electronic banking in the trust account rule, Supreme Court Rule (SCR) 20:1.15.

Seven years have passed since the last significant revisions to the trust account rule. The current version includes provisions to accommodate modernization of business and banking transactions, including procedures for lawyers to receive legal fees by credit or debit card, procedures for collections practitioners to use electronic

transactions in trust accounts, and record-keeping procedures for electronic transactions. During the past seven years, OLR has observed no significant harm to the public interest arising from the adoption of these procedures. On the other hand, OLR has seen the types and frequency of electronic transactions in business and banking dramatically increase, and expects this will continue. Checks will become less and less a part of business and banking. The results are that practitioners will find it increasingly difficult to serve clients consistent with the current trust account rule, and that OLR will find it increasingly difficult to investigate and audit lawyer trust accounts.

These concerns caused OLR to form a committee to study developments in business and electronic banking and to develop proposals for improving the regulation of lawyer trust accounts. Members of the committee include: Attorney Kristine Cleven (Wisconsin Bankers Association), Attorney Diane Diel (Family Law Practitioner), Attorney Dean Dietrich (Respondent's Counsel), Ms. Claire Fowler (Public Member, formerly a public member of the Board of Administrative Oversight and Preliminary Review Committee), Ms. Mary Gilmeister (Wisconsin ACH Association-WACHA), Ms. Mary Hoeft Smith (OLR Trust Account Program Administrator),

Attorney Aviva Kaiser (State Bar Assistant Ethics Counsel), Mr. Matthew Katz (Wisconsin Association of Legal Administrators-WALA), Mr. Rick McGuigan (Community Bankers of Wisconsin-CBW), Attorney John McNamara (Vice Chairperson, Board of Administrative Oversight), Mr. Robert Mueller (Godfrey & Kahn; Estates and Trusts), Attorney Gerry Mowris (Stafford Rosenbaum; Criminal Law Practitioner), Attorney Tim Pierce (State Bar Ethics Counsel), Attorney Tom Shellander (Neider & Boucher; Real Estate Practitioner), Attorney Bill Sturm (Rausch, Sturm; Collections Practitioner), Ms. De Ette Tomlinson (WI Trust Account Foundation-WisTAF), Attorney Adam Wiensch (Foley & Lardner; Estates and Trusts Practitioner), and Attorney Jo Whiting (Wisconsin Credit Union League).

The committee met from June 2012 through July 2014. The committee's objectives were: 1) provide procedures for lawyers to use electronic transactions to better serve clients, 2) manage the risk of the loss of accountability and the loss of funds, 3) address the fiduciary requirements for record-keeping and record production, 4) leverage information technology to improve the accuracy and efficiency of record-keeping. The last objective is still under study and is presently not expected to require changes to Supreme Court Rules. The first three objectives

are addressed in the proposals recommended by this petition.

Many important trust account provisions remain the same or without substantial change, including: 1) the rules regarding the treatment of non-contingent fees in trust and the advanced fee alternatives, 2) the IOLTA program, and 3) the trust account overdraft program.

The proposed changes are contained in Appendix A [re-created trust account rule, SCR 20:1.15], Appendix B [additions to the fee rule, SCR 20:1.5], Appendix C [re-created burden of proof rule, SCR 22.39], and Appendix D [recreated SCR 20:1.0, with new citations in the definitions of advanced fee and flat fee, and renumbered subparagraphs]. OLR Record-keeping guidelines (previously found in SCR 20:1.15) are provided in Appendix E.

The most significant changes proposed include: 1) procedures providing for the use of electronic transactions for trust and fiduciary account deposits and disbursements, 2) revision of the record-keeping requirements to provide general standards in the disciplinary rule and to transfer the detailed procedures from the rule to guidelines published by OLR, 3) a rebuttable presumption that shifts the burden of proof to the respondent upon a showing by OLR that the respondent failed to promptly deliver trust or

fiduciary property or failed to provide records accounting for trust or fiduciary property, and 4) transfer of the fee provisions of the trust account rule to the fee rule.

Procedures for use of electronic transactions.

Subparagraph (f) of proposed SCR 20:1.15 [Appendix A] provides procedures for electronic transactions in trust accounts. Electronic transactions are defined in subparagraph (a)(2) of the proposed rule as paperless transfers of funds to or from a trust or fiduciary account. Electronic transactions do not include transfers initiated by telephone or automated teller or cash dispensing machines.

Subparagraph (f)(1) describes the lawyer's responsibility for trust account transactions, and requires that lawyers ensure commercially reasonable security measures are in place to ensure funds are safeguarded and that all disbursements are authorized by the lawyer and made to the correct payee.

Subparagraph (f)(2) prohibits withdrawals of cash, deposits or disbursements by telephone transfers, and electronic withdrawals by third parties. These prohibitions are required to ensure disbursements are authorized, approved by the lawyer, and accompanied by appropriate records.

Subparagraph (f)(3) provides procedures for electronic transactions in trust accounts. The rule provides two options. Subparagraph (f)(3)b. allows a lawyer to establish an E-Banking Trust Account, similar to the current credit card trust account, but now allowing disbursements by electronic transactions. This option requires the lawyer to maintain a separate IOLTA account, transfer funds from the E-Banking Trust Account promptly after available, and to reimburse chargebacks, surcharges, or reversals.

Subparagraph (f)(3)c. allows a lawyer to make electronic deposits and disbursements from the principal IOLTA account, provided the lawyer employs commercially reasonable security measures, maintains a bond or crime insurance policy; and that the lawyer either arranges for chargebacks, surcharges, and reversals to be paid from the lawyer's business account, or reimburses any shortfall prior to making further disbursements.

Under either option, the lawyer may make remote deposits of checks to the IOLTA account, subparagraph (f)(3)a.

Revision of Record-keeping Requirements

The petition proposes removing the detailed record-keeping requirements from the rule. Instead, the rule

would contain basic record-keeping standards; and OLR would provide detailed guidelines and would continue to teach record-keeping as part of its semi-annual seminars. The rule [Appendix A], subparagraph (g), would require lawyers to maintain complete records and to back up electronic records. The rule would also require lawyers to produce records. Finally, the rule would establish two rebuttable presumptions: a presumption that the lawyer has failed to hold funds in trust, contrary to SCR 20:1.15(b)(1) or (k)(1), when the lawyer fails to promptly deliver funds or to promptly produce records; and a presumption that the lawyer has converted funds, contrary to SCR 20:8.4(c), when a lawyer fails to promptly provide an accounting.

These changes are proposed for two reasons. First, the public interest is best served by focusing resources on the investigation of loss of funds and loss of accountability, and less well served by investigating compliance with detailed record-keeping procedures. Second, the increasing use of a vast variety of electronic payment methods makes it impracticable to prescribe detailed record-keeping requirements in a Supreme Court Rule.

OLR record-keeping guidelines are at Appendix E.

Rebuttable Presumptions

With the declining use of checks, and increased use of electronic transactions, OLR will face increasing difficulty auditing lawyer trust accounts. Financial institutions may not be able to provide information presently available, e.g., the physical signature of the maker and the endorsement on a cancelled check, and the client matter and reason for disbursement currently required to be recorded on the memo line. This information has been extremely useful to OLR in auditing trust accounts.

The solution, however, is not to require the use of checks, as that will become more and more impracticable and will burden lawyers and their clients. The petition proposes the use of electronic transactions with the understanding that lawyers in possession of the funds of clients and third persons will be required to show the proper safeguarding, delivery, and accounting of funds.

The petition proposes amendment of SCR 22.39 [Appendix C] and provisions in proposed SCR 20:1.15 [Appendix A, subparagraphs (e)(4), (g)(3), and (k)(9)] to provide for two rebuttable presumptions: a presumption that the lawyer has failed to hold funds in trust when the lawyer fails to promptly deliver funds or to promptly produce records

related to the funds; and a presumption that the lawyer has converted funds when a lawyer fails to promptly provide an accounting. These presumptions may be rebutted by the lawyer's production of records or an accounting that overcomes such presumption by clear, satisfactory, and convincing evidence.

These presumptions are reasonable and consistent with the lawyer's fiduciary responsibilities regarding trust funds. *Disciplinary Proceedings Against Weigel*, 2012 WI 124 (2012) and *In re Trust Estate of Martin*, 39 Wis. 2d 437, 159 N.W.2d 660 (1968). The presumptions are necessary due to the inevitable proliferation of electronic transactions. In the future, less information will be available to OLR from financial institutions. Trust account records will be in the lawyer's possession and under the lawyer's control. The lawyer in possession of client or third party funds has a fiduciary obligation to account for those funds.

Transfer of Fee Provisions to SCR 20:1.5

The petition proposes transferring the fee provisions from the trust account rule to the fee rule in order to consolidate fee rules in SCR 20:1.5. The rule requiring lawyers to hold advanced fees in trust would move from current SCR 20:1.15(b)(4) to SCR 20:1.5(f). The advanced

fee alternative would move from current SCR 20:1.15(b)(4m) to SCR 20:1.5(g). The rule on withdrawal of non-contingent fees from trust would move from current SCR 20:1.15(g) to SCR 20:1.5(h). There are no substantial changes to these rules. Appendix B contains the proposed additions to SCR 20:1.5 and proposed Wisconsin Comment additions.

Conclusion

In summary, the changes in business and banking require substantial modifications to how lawyers manage trust and fiduciary property. The proliferation of electronic payments increases the difficulty lawyers have serving clients under the present trust account rule, and the difficulty OLR has in auditing trust accounts during the course of an investigation. The proposals in Appendices A through E provide a coordinated, coherent, and responsive solution to these concerns. Petitioner therefore respectfully requests an order from the Supreme Court re-creating SCR 20:1.15 as provided in Appendix A, amending SCR 20:1.5 to add subparagraphs (f), (g), and (h) as provided by Appendix B, re-creating SCR 22.39 as provided in Appendix C, and re-creating SCR 20:1.0 to update the citations to the definitions of advanced fee and flat fee and to renumber the subparagraphs in the rule, as provided in Appendix D.

Respectfully submitted this 17th day of December,
2014.

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