

Summary of Draft Amendments to the Trust Account Rules Proposed by the “Trust Account Rules Working Group”

December, 2005

The “Trust Account Rule Working Group” was appointed by State Bar President Michelle Behnke in October, 2004, to propose revisions of the Supreme Court Rules affecting trust accounts which were made effective on July 1, 2004. The core “Group” committee included: Michael Olds, Madison, Chair, and Barry Cohen, Diane Diel, Dean Dietrich, Len Levenson, Gerry Mowris, Sheila Romell, Dan Schneidman, Keith Sellen, Mary Hoeft Smith, and Tim Pierce. The Group received significant input from members of the Real Property and Probate Section and from environmental lawyers.

The following chart identifies the areas of most concern to practitioners in the State and the “Fixes” recommended to the Board of Governors are:

<i>The “Troublesome” Areas</i>	<i>The Proposed “Fixes”</i>
1) Lack of clear definition of what is an advance fee affected by the requirement to be held in trust.	Definitions proposed as amendment to 20:1.0. Please note if these “fixes” are adopted all advance fees will now be able to be deposited in a lawyer’s general business account. If there is a dispute over the fee at a later date, the lawyer may be required to “account” for the fee per 20:1.15(b)(4m) This includes a so called “flat fee.”
2) The absolute requirement that all advance fees be deposited in trust and be made subject to the billing, deferred transfer to general account and other bookkeeping requirements of 20:1.5.	Proposal at 20:1.15(b)(4m) <i>allows lawyers to deposit advance fees to their general business account provided that:</i> The lawyer provides the client with a written fee agreement advising the client of the amount of the advanced payment; the basis or rate of the lawyer’s fee; any expenses for which the client will be responsible; <i>and of the following:</i> the lawyer’s obligation to refund any unearned advanced fee, and provide an accounting, at the termination of the representation; the requirement that the lawyer submit any dispute about a requested refund of advanced fees to binding arbitration within 30 days of receiving a request for such a refund; and of

	<p>the ability of the client to file a claim with the Wisconsin Lawyers' Fund for Client Protection in the event the lawyer fails to abide by an arbitration award or final decision of a court of competent jurisdiction directing the lawyer to provide a refund of advanced fees.</p> <p><i>If client is due a refund at the end of the representation,</i> the lawyer must provide the client with the following, in writing:</p> <ul style="list-style-type: none"> a final accounting AND a refund of any unearned advanced fees; 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 promptly submit the dispute to binding arbitration.
<p>3) The absolute prohibition of telephone transfer of funds to or from any trust account.</p>	<p>The rule against telephone transfers is now limited to <i>pooled</i> trust accounts. Also, the rule is expressed to “not prohibit” transfers between separate non pooled demand and non demand trust accounts for a particular client.</p>
<p>4) Electronic transfers to/from trust by 3rd party are generally prohibited.</p>	<p>Deposits are prohibited if the form of deposit allows the 3rd party to withdraw same. <i>Note that this provision is under review by the Banker's Association.</i> <i>OLR has entered into separate agreements with collection firms who do a volume business and comply with stringent alternative protections authorizing the use of electronic funds transfers.</i></p>
<p>5) The absolute prohibition of advance fees paid by Credit Card to trust.</p>	<p>The Draft Rule permits the establishment of a separate credit card trust account. The trust must be separately named “credit card trust account;” may hold law firm funds sufficient to cover credit card company charges and fees and the lawyer is obligated to restore any funds</p>

	<p>charged back to the account by the credit card company within three days of notice of the charge back, and all funds “including if necessary, a reimbursement by the lawyer or law firm for any deduction” by the credit card company must be transferred to the lawyer’s IOLTA trust account as soon as those funds are “available” for disbursement</p>
<p>6) The Nonwaiveable five day required wait after billing before withdrawal of fees from trust.</p>	<p>Waiver of the five day limit is proposed with the following language creating a restated SCR 1.15(g)2: The lawyer may withdraw earned fees on the date the invoice is mailed to the client, provided that the lawyer has notified the client in writing that earned fees will be withdrawn on the date the invoice is mailed. The invoice shall include each of the elements required by sub (g)1, a, b and c.</p>
<p>7) The client’s unlimited time to object to a fee already transferred from trust to the business account with the requirement that the fee be returned to trust until the objection be resolved.</p>	<p>A time limit of 30 days is added to the section “Objection to Disbursement” which becomes SCR 1.15(g)3</p>
<p>8) The client’s unlimited opportunity to make a general objection which triggers a requirement that the lawyer not disburse funds to the general account or, if disbursed, return any and all fees paid from trust to trust at any time by simply making an objection and demanding return.</p>	<p>SCR 1.15(g) is proposed to be amended to require that the client’s objection must be “particularized and reasonable.” If this standard is met, then the disputed portion must be returned to the trust account until the dispute is resolved, <i>unless</i> “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.” Further, the lawyer making such a determination has a “safe harbor” as follows: “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.”</p>
<p>9) The limitations on forms of investment of Fiduciary Funds posed by lack of direction by the client, the governing trust, etc.</p>	<p>Draft provides lawyers with discretion on where to invest funds where there is no direction from the client, governing trust, etc. The lawyer is able to make decisions on the location of investments in good faith without fear of a charge of an ethical violation. When funds may be disbursed by the lawyer or an</p>

	employee of the law firm from an account not located in Wisconsin, the account must be either independently audited annually or countersigned by a co-fiduciary.
10) Lack of clarity regarding the definition and handling of Fiduciary property in 20:1.15(a)(4) and 20:1.15(j)(8)	Clarifications specifying that tangible personal property and bearer securities must be received for and inventoried in a property ledger by a lawyer fiduciary.
11) Client Protection Fund provisions required to be coordinated with the “alternate protection” plan outlined in Box 2, above	See proposed rule changes to SCR 12.04 redefining “Dishonest Conduct” to include a failure to refund an unearned advanced fee upon award of an arbitrator, judgment of a court, order of the supreme court, or acknowledgment by the attorney that the fee is unearned. Also, SCR 21.16 requires that a lawyer must make restitution to the Client Protection Fund if the Fund has advanced monies upon a finding that the lawyer has failed to refund unearned fees.