Supreme Court Order 06-04:
Court Amends Lawyers' Trust Account Rules

The Wisconsin Supreme Court, following study of the petitions advanced and additional review, has adopted a petition by the Trust Account Rule Working Group to amend the lawyers' trust account rules, effective July 1, 2007.

Trust Account Rule

In the matter of Creating SCR 20:1.15 Safekeeping Property; and Amending SCR 20:1.0 Definitions; SCR 21.16 Discipline; and SCR 12.04 Wisconsin Lawyers' Fund for Client Protection (2007 WI 48)

Order 06-04

On May 22, 2006, the Office of Lawyer Regulation and the State Bar of Wisconsin filed a joint petition proposing certain modifications to SCR 20:1.15, the "trust account" rule, together with related amendments to SCR 20:1.0 (Definitions), SCR 21.16 (Discipline), and SCR 12.04 (Wisconsin Lawyers' Fund for Client Protection). A public hearing on the petition was conducted on Jan. 17, 2007. At the ensuing open administrative conference the court expressed concern about aspects of the proposal, notably the complexity of the proposal and the absence of nonlawyers on the Trust Account Rule Working Group responsible for the proposal. The court directed the petitioners to convene a review committee consisting of nonlawyers and certain other interested parties to review the proposal in light of the court's concerns. The court stated it would reconsider the petition following this review at an open administrative conference on April 12, 2007.

In response to the court's concerns, the Trust Account Rule Working Group added five public members to the Working Group and conducted two additional meetings to elicit comments and concerns from the public members. The Working Group also researched trust account rules throughout the country with respect to the handling of advanced fees, flat fees and retainers, obtained input from the administrator of the Wisconsin Lawyers' Fund for Client Protection, and sought further input and comments from members of the State Bar of Wisconsin. On April 5, 2007, the Working Group submitted a report of its post-hearing work, including modifications to the proposed amendments. In addition, a number of individual attorneys and law firms filed letters with the court generally expressing support for the petition. Some criminal law practitioners wrote expressing concern about the treatment of flat fees under the proposed amendments.

On April 12, 2007, the court conducted an open administrative conference at which members of the Working Group responded to questions from the court regarding the petition. The court voted 6:1 to adopt the petition, as amended by the modifications recommended in the post-hearing report. Justice Bradley dissented from that portion of the petition permitting alternative protection for advanced fees, SCR 20:1.15(b)(4m). The court indicated it would like the language of the rule to clarify that submission of a fee dispute to binding arbitration requires the client's consent, and recommended that fee agreements reflecting these new rules clarify that an attorney should obtain a client's consent to the election of the alternative set forth in 20:1.15(b)(4m), as described herein. Finally, the court ruled that the effective date of these amendments shall be July 1, 2007. Therefore,

IT IS ORDERED that:

Section 1. 12.04 (title) of the Supreme Court Rules is amended to read:

SCR 12.04 (title) **Wisconsin lawyers' fund for client protection: creation and purpose~~; definitions~~.**

Section 2. 12.04 (1) of the Supreme Court Rules is renumbered SCR 12.04.

Section 3. 12.04 (2) of the Supreme Court Rules is renumbered SCR 12.045, and SCR 12.045 (5) and (7), as renumbered, are amended to read:

12.045 **(5)** "Dishonest Conduct" means any of the following:

(a) ~~a~~ A willful act committed by an attorney that causes a reimbursable loss to a client in the manner of defalcation or embezzlement of money.~~or~~

(b) ~~the~~ The intentional taking or conversion of money, property or other things of value. ~~which causes a reimbursable loss to a client.~~

(c) The failure to refund an unearned advanced fee.

12.045 **(7)** (a) "Reimbursable Loss" ~~is~~ means a loss of money or other property of a client ~~which~~ that meets all of the following conditions:

~~(i)~~ 1. The loss was caused by the dishonest conduct of an attorney while performing services under his or her license to practice law in Wisconsin~~;~~.

~~(ii)~~ 2. The attorney was acting either as attorney in the matter out of which the loss arose or in a fiduciary capacity customary to the practice of law~~;~~.

~~(iii)~~ 3. The attorney has:

~~1.~~ a. ~~died,~~ Died;

~~2.~~ b. ~~been~~ Been adjudicated a bankrupt~~;~~;

~~3.~~ c. ~~been~~ Been adjudicated ~~an~~ incompetent~~;~~;

~~4.~~ d. ~~been~~ Been disbarred or suspended from the practice of law~~;~~; ~~or has~~

e. ~~consented~~ Consented to the revocation of his or her license to practice law~~;~~;

f. Failed to refund an unearned advanced fee;

~~5.~~ g. ~~become~~ Become a judgment debtor of the person claiming the loss~~;~~;

~~6.~~ h. ~~been~~ Been adjudicated guilty of a crime~~, which adjudication shall have been~~ based upon the dishonest conduct of the attorney~~;~~; or

~~7.~~ i. ~~left~~ Left the jurisdiction or cannot be found.

~~(iv)~~ 4. The act ~~which~~ that occasioned the loss occurred on or after March 1, 1981.

~~The following are not reimburseable losses:~~

(b) "Reimbursable Loss" does not include any of the following:

~~(i)~~ 1. Losses of a spouse, child, parent, grandparent, sibling, partner, associate, or employee of the ~~attorney(s)~~ attorney or attorneys causing the losses.

~~(ii)~~ 2. Losses covered by any bond, surety agreement or insurance contract to the extent covered thereby, including any loss to which any bondsman or surety or insurer is subrogated to the extent of that subrogated interest.

~~(iii)~~ 3. Losses of any financial institution that could be recoverable under a "banker's blanket bond" or similar insurance or surety contract, whether or not the institution had such bond or contract in force.

~~(iv)~~ 4. Losses ~~which~~ that are recoverable from some other source.

~~(v)~~ 5. Losses barred under any applicable statute of limitations.

Section 4. SCR 12.045 (title) is created to read:

12.045 (title) **Definitions**.

Section 5. Supreme Court Rule 20:1.0 (a), as affected by Supreme Court Order Number 04-07, is renumbered 20:1.0(ar).

Section 6. Supreme Court Rule 20:1.0 (ag), (dm) and (mm) are created to read:

20:1.0 (ag) "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, SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(e)(4)h., SCR 20:1.15(g), and SCR 20:1.16(d).

20:1.0 (dm) "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, SCR 20:1.15(b)(4) or (4m), SCR 20:1.15(e)(4)h., SCR 20:1.15(g), and SCR 20:1.16(d).

20:1.0 (mm) "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).

Section 7. The following Comment to SCR 20:1.0 (dm) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the Wisconsin Rules of Professional Conduct:

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 20:1.15(b)(4m), alternative protection for advanced fees. In addition, as specified in the definition, flat fees are subject to the requirements of all rules to which advanced fees are subject.

Section 8. The Wisconsin Committee Comment to SCR 20:1.5, pertaining to advances and retainers, as affected by Supreme Court Order Number 04-07, is amended to read:

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 ~~true~~ retainer. A ~~true nonrefundable~~ retainer is a fee that a lawyer charges the client not ~~necessarily~~ for specific services to be performed but~~, for example,~~ 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 ~~presumed to be nonrefundable, provided that they meet the "reasonable" standard of SCR 20:1.5.~~ subject to SCR 20:1.15 and SCR 20:1.16. ~~Such retainers~~ Retainers are to be distinguished from an ~~"advance"~~ "advanced fee" which ~~generally is considered to be~~ is paid for future services and earned only as services are performed~~, and which should be deposited into the lawyer's trust account~~. ~~See~~ Advanced fees are subject to SCR 20:1.5, SCR 20:1.15, and SCR 20:1.16. ~~These funds do not belong to the lawyer and should be returned if not earned. SCR 20:1.16(d) expressly provides that any "advance payment of fee that has not been earned" should be returned to the client upon termination of the representation.~~ See also State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-93-4 (1993).

Section 9. SCR 20:1.9 (b) (2), as affected by Supreme Court Order Number 04-07, is amended to read:

20:1.9(b)(2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 ~~and SCR 20:1.9 (c)~~ that is material to the matter; unless the former client gives informed consent, confirmed in a writing signed by the client.

Section 10. SCR 20:1.15, as affected by Supreme Court Order Number 04-07, is repealed and recreated to read:

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

(a) Definitions.

In this section:

(1) "Demand account" means an account upon which funds are disbursed through a properly payable instrument.

(2) "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 3rd party.

(3) "Fiduciary account" means an account in which the lawyer deposits fiduciary property.

(4) "Fiduciary property" means funds or property of a client or 3rd party that is in

the lawyer's possession in a fiduciary capacity that directly arises in the course of, or as a result of, a lawyer-client relationship or an appointment by a court. 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. (k).

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

(6) "Immediate family member" means the lawyer's spouse, child, stepchild, grandchild, sibling, parent, grandparent, aunt, uncle, niece, or nephew.

(7) "Interest of Lawyer Trust Account ("IOLTA")" means a pooled, interest-bearing, demand account, separate from the lawyer's business and personal accounts, via which the lawyer deposits, holds, and disburses funds received in trust on behalf of a client or 3rd party, the interest on which does not go to the client. Typical funds that would be placed in an IOLTA account include earnest monies, loan proceeds, settlement proceeds, collection proceeds, cost advances, and advance payments for fees that have not yet been earned. These accounts are subject to the provisions of SCR Chapter 13, Interest on Trust Accounts Program.

(8) "Properly payable instrument" means an instrument that, if presented in the normal course of business, is in a form requiring payment pursuant to the laws of this state.

(9) "Trust account" means an account in which the lawyer deposits trust property.

(10) "Trust property" means funds or property of clients or 3rd parties that is in the lawyer's possession in connection with a representation, which is not fiduciary property.

(b) Segregation 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 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.

(3) **Lawyer funds.** No funds belonging to the lawyer or law firm, except funds reasonably sufficient to pay monthly account service charges, may be deposited or retained in a trust account.

(4) **Unearned fees and cost advances.** Except as provided in par. (4m), unearned fees and advanced payments of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to sub. (g). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred.

(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 a court of competent jurisdiction must ultimately approve the lawyer's fee, or 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 dispute about a requested refund of advanced fees to binding arbitration within 30 days of receiving a request for such a refund; 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.

(6) **Trust property other than funds.** Unless the 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.

(7) **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.

(c) Types of trust accounts.

(1) **IOLTA accounts.** A lawyer who receives client funds shall maintain a pooled interest-bearing, demand account for deposit of client or 3rd-party funds that are:

a. nominal in amount or expected to be held for a short period of time; or

b. not deposited in an account or investment under par. (2); or

c. not eligible for an account or investment under par. (2), because the client is a corporation or organization not permitted by law to maintain such an account or the terms of the account are not consistent with a need to make funds available without delay.

(1m) The interest accruing on an account under par. (1), less any transaction

costs, shall be paid to the Wisconsin Trust Account Foundation, Inc., which shall be considered the beneficial owner of the accrued interest, pursuant to SCR Chapter 13, Interest on Trust Accounts Program. A lawyer may notify the client of the intended use of these funds.

(2) **Other client accounts.** A lawyer shall deposit all client funds in an account specified in par. (1) unless the funds are deposited in any of the following:

a. a separate interest-bearing trust account for the particular client or client's matter, the interest on which shall be paid to the client, less any transaction costs;

b. a pooled interest-bearing trust account with sub-accounting by the financial institution, the lawyer, or the law firm that will provide for computation of interest earned by each client's funds and the payment of the interest to the client, 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 as directed by the court or other tribunal, less any transaction costs; or

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

e. a demand deposit or other non-interest-bearing account for funds that are neither nominal in amount nor expected to be held for a short term, if the client specifically so approves.

(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 funds could be utilized to provide a positive net return to the client by taking into consideration all of the following:

a. the amount of income that the funds would earn during the period the funds are expected to be on deposit;

b. the cost of establishing and administering the 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 benefit; and

c. the capability of financial institutions to calculate and pay interest or other income to individual clients.

(4) **Professional judgment.** The determination whether funds to be invested could be utilized to provide a positive net return to the client 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.

(5) **WisTAF.** For accounts created under par. (1), the lawyer or law firm shall direct the financial institution to remit to the Wisconsin Trust Account Foundation, Inc., also known as "WisTAF," at least quarterly, all of the following:

a. the interest or dividends, less any service charges or fees, on the average monthly balance in the account or as otherwise computed in accordance with an institution's standard accounting practice; and

b. a statement showing the name of the lawyer or law firm for whose account the remittance is sent, the rate of interest applied, the amount of service charges deducted, if any, and the account balance for the period for which the report is made. A copy of the statement shall be provided to the lawyer or law firm.

(d) Prompt notice and delivery of property.

(1) **Notice and disbursement.** Upon receiving funds or other property in which a client has an interest, or in which the 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, the lawyer shall promptly render a full written accounting regarding the property.

(3) **Disputes regarding trust property.** When the lawyer and another person or the 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 sub. (g)(2).

(e) Operational requirements for trust accounts.

(1) **Location.** 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).

(2) **Insurance 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 Wisconsin credit union savings insurance corporation, the securities investor protection corporation, or any other investment institution financial guaranty insurance.

(3) **Interest requirements.** An interest-bearing trust account shall bear interest at a rate of not less than that applicable to individual accounts of the same type, size, and duration and in which withdrawals or transfers can be made without delay when funds are required, subject only to any notice period that the depository institution is required to observe by law.

(4) **Prohibited transactions.**

a. **Cash.** No disbursement of cash shall be made from a trust account or from a deposit to a trust account, and no check shall be made payable to "Cash."

b. **Telephone transfers.** No deposits or disbursements shall be made to or from a pooled trust account by a telephone transfer of funds. This section does not prohibit any of the following:

1. wire transfers.

2. telephone transfers between separate, non-pooled demand and separate, non-pooled, non-demand trust accounts that a lawyer maintains for a particular client.

c. **Internet transactions.** A lawyer shall not make deposits to or disbursements from a trust account by way of an Internet transaction.

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

e. **Credit card transactions.** A lawyer shall not authorize transactions by way of credit card to or from a trust account. However, earned fees may be deposited by way of credit card to a lawyer's business account.

f. **Debit card transactions.** A lawyer shall not use a debit card to make deposits to or disbursements from a trust account.

g. **Exception: Collection trust accounts.** Upon demonstrating to the office of lawyer regulation that a transaction prohibited by sub. (e)(4)c., e., or f., constitutes an integral part of the lawyer's practice, a lawyer may petition that office for a separate, written agreement, permitting the lawyer to continue to engage in the prohibited transaction, provided the lawyer identifies the excepted account, provides adequate account security, and complies with specific record-keeping and production requirements.

h. **Exception: Fee and cost advances by credit card, debit card or other electronic deposit.** A lawyer may establish a trust account, separate from the lawyer's IOLTA trust account, solely for the purpose of receiving advanced payments of legal fees and costs by credit card, debit card or other electronic deposit, subject to the following conditions:

1. the separate trust account shall be entitled: "Credit Card Trust Account";

2. lawyer and law firm funds, reasonably sufficient to cover all monthly account fees and charges and, if necessary, any deductions by the financial institution or card issuer from a client's payment by credit card, debit card, or other electronic deposit, shall be maintained in the credit card trust account, and a ledger for account fees and charges shall be maintained;

3. each payment by credit card, debit card or other electronic deposit, including, if necessary, a reimbursement by the lawyer or law firm for any deduction by the financial institution or card issuer from the gross amount of each payment, shall be transferred from the credit card trust account to the IOLTA trust account immediately upon becoming available for disbursement; and

4. within 3 business days of receiving actual notice that a chargeback or surcharge has been made against the credit card trust account, the lawyer shall replace any and all funds that have been withdrawn from the credit card trust account by the financial institution or card issuer; and shall reimburse the account for any shortfall or negative balance caused by a chargeback or surcharge. The lawyer shall not accept new payments to the credit card trust account until the lawyer has reimbursed the credit card trust account for the chargeback or surcharge.

(5) **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. (e)(5)a. if those proceeds are deposited no later than the first business day following the closing and are comprised of the following types of funds:

1. a certified check;

2. a cashier's check, teller's check, bank money order, official bank 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;

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

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

5. 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;

6. 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;

7. 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

8. 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.

bm. Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for any funds described in sub. (e)(5)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.

c. **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. (e)(5)a. so long as those collection proceeds have been deposited prior to the disbursement.

(6) **Record retention.** A lawyer shall maintain complete records of trust account funds and other trust property and shall preserve those records for at least 6 years after the date of termination of the representation.

(7) **Production of records.** 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. Failure to produce the records constitutes unprofessional conduct and grounds for disciplinary action.

(8) **Business account.** Each lawyer who receives trust funds shall maintain at least one demand account, other than the trust account, for funds received and disbursed other than in the lawyer's trust capacity, which shall be entitled "Business Account," "Office Account," "Operating Account," or words of similar import.

(f) Record-keeping requirements for trust accounts.

(1) **Demand accounts.** Complete records of a trust account that is a demand account shall include a transaction register; individual client ledgers; 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, subject to all of the following:

a. **Transaction register.** The transaction register shall contain a chronological record of all account transactions, and shall 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, whether by check, wire transfer, or other means;

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 shall be maintained for each client or matter for which the lawyer receives trust funds, and the lawyer shall record each receipt and disbursement of that client's funds and the balance following each transaction. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client or matter.

c. **Ledger for account fees and charges.** A subsidiary ledger shall 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 shall be identified in the ledger.

d. **Deposit records.** Deposit slips shall identify the name of the lawyer or law firm, and the name of the account. The deposit slip shall identify the amount of each deposit item, the client or matter associated with each deposit item, and the date of the deposit. The lawyer shall maintain a copy or duplicate of each deposit slip. All deposits shall be made intact. No cash, or other form of disbursement, shall be deducted from a deposit. Deposits of wired funds shall be documented in the account's monthly statement.

e. **Disbursement records.**

1. **Checks.** Checks shall be pre-printed and pre-numbered. The name and address of the lawyer or law firm, and the name of the account shall be printed in the upper left corner of the check. Trust account checks shall include the words "Client Account," or "Trust Account," or words of similar import in the account name. Each check disbursed from the trust account shall identify the client matter and the reason for the disbursement on the memo line.

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

3. **Imaged checks.** Imaged checks shall be acceptable if they provide both the front and reverse of the check and comply with the requirements of this paragraph. The information contained on the reverse side of the imaged checks shall include any endorsement signatures or stamps, account numbers, and transaction dates that appear on the original. Imaged checks shall 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 shall 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.

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

g. **Reconciliation reports.** For each trust account, the lawyer shall prepare and retain a printed reconciliation report on a regular and periodic basis not less frequently than every 30 days. Each reconciliation report shall 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 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-demand accounts.** Complete records of a trust account that is a non-demand account shall 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 electronic fund transactions, 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.

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

a. **Property ledger.** A lawyer who receives, in trust, tangible personal property or securities in bearer form shall maintain a property ledger that identifies the property, date of receipt, owner, client or matter, and location of the property. The ledger shall 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 shall 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 shall 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 shall maintain the transaction register, client ledgers, and reconciliation reports in a form that can be reproduced to printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

b. **IOLTA account records.** In addition to the requirements of sub. (f)(4)a., the transaction register, the subsidiary ledger, and the reconciliation report shall be printed every 30 days for the IOLTA account. The printed copy shall be retained for at least 6 years, as required under sub. (e)(6).

(g) Withdrawal of non-contingent fees from trust account.

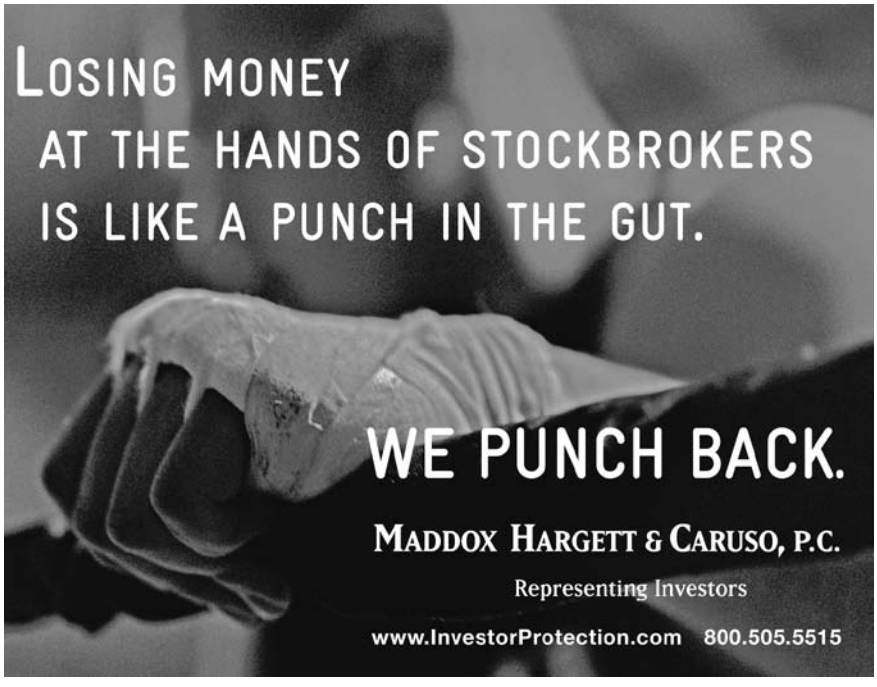
(1) **Notice to client.** At least 5 business days before the date on which a disbursement is made from a trust account for the purpose of paying fees, with the exception of contingent fees or fees paid pursuant to court order, the lawyer shall transmit to the client in writing all of the following:

a. an itemized bill or other accounting showing the services rendered;

b. notice of the amount owed and the anticipated date of the withdrawal; and

c. a statement of the balance of the client's funds in the lawyer trust account after the withdrawal.

(1m) **Alternative notice to client.** 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. (g)(1)a., b., and c.

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

(h) Dishonored instrument notification; (Overdraft notices).

All demand trust accounts and demand fiduciary accounts are subject to the following provisions on dishonored instrument notification:

(1) **Overdraft reporting agreement.** A lawyer shall maintain demand trust accounts only in a financial institution that has agreed to provide an overdraft report to the office of lawyer regulation under par. (3).

(2) **Identification of accounts subject to this subsection.** 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 this sub. (h) and shall provide the financial institution with a list of all existing accounts at that institution that are subject to this subsection.

(3) **Overdraft report.** In the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored, the financial institution shall report the overdraft to the office of lawyer regulation.

(4) **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, the report shall be identical to an overdraft notice customarily forwarded to the depositor or investor, accompanied by the dishonored instrument, if a copy is normally provided to the depositor or investor.

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

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

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

(7) **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.

(8) **Lawyer compliance.** Every lawyer practicing or admitted to practice in Wisconsin shall comply with the reporting and production requirements of this subsection.

(9) **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.

(10) **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) Certification of compliance with trust account rules.

(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 certificate stating whether the member is engaged in the practice of law in Wisconsin. If the member is practicing law, the member shall state the account number of any trust account, and the name of each financial institution in which the member maintains a trust account, a safe deposit box, or both, as required by this section. 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 the certification must be made.

(2) **Trust account record compliance.** Each state bar member shall explicitly certify on the state bar certificate described in par. (1) that the member has complied with each of the record-keeping requirements set forth in subs. (f) and (j)(5).

(3) **Certification by law firm.** A law firm shall file one certificate on behalf of the lawyers in the firm who are required to file a certificate under par. (1). The law firm shall give a copy of the certificate to each lawyer in the firm.

(4) **Suspension for non-compliance.** The failure of a state bar member to file the certificate is grounds for 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. The filing of a false certificate is unprofessional conduct and is grounds for disciplinary action.

(j) Fiduciary property.

(1) **Separate account.** 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 that directly arises in the course of, or as a result of, a lawyer-client relationship or by appointment of a court.

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

a. a pooled interest-bearing fiduciary account with sub-accounting by the financial institution, the lawyer, or the law firm that will provide for computation of interest earned by each fiduciary entity's funds and the proportionate allocation of the interest to the fiduciary entity, 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 trustee in bankruptcy and by a bankruptcy court order, consistent with 11 U.S.C. s. 345; or

e. a demand deposit or other non-interest bearing account when, in the sound professional judgment of the lawyer, placement in such an account is consistent with the needs and purposes of the fiduciary entity or its beneficiary or beneficiaries.

(2) **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 demand account from which funds are disbursed through a properly payable instrument issued directly by the lawyer or a member or employee of the lawyer's firm 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. (j)(9)b. or c.

(3) **Prohibited transactions.**

a. **Cash.** No disbursement of cash shall be made from a fiduciary account or from a deposit to a fiduciary account, and no check shall be made payable to "Cash."

b. **Internet transactions.** A lawyer shall not make deposits to or disbursements from a fiduciary account by way of an Internet transaction.

c. **Credit card transactions.** A lawyer shall not authorize transactions by way of credit card to or from a fiduciary account.

d. **Debit card transactions.** A lawyer shall not use a debit card to make deposits to or disbursements from a fiduciary account.

(4) **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. However, the exception for real estate transactions under sub. (e)(5)b. shall apply to fiduciary accounts.

(5) **Records.** For each fiduciary account, the lawyer shall retain records of receipts and disbursements as necessary to document the transactions. The lawyer shall 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 electronic fund transactions, 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.

(6) **Record retention.** A lawyer shall maintain complete records of fiduciary accounts and other fiduciary property during the course of the fiduciary relationship. A lawyer shall maintain a complete record of the fiduciary account for the 6 most recent years of the account's existence and shall maintain, at a minimum, a summary accounting of the fiduciary account for prior years of the account's existence. After the termination of the fiduciary relationship, the lawyer shall preserve complete records for at least 6 years.

(7) **Production of records.** 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 may provide. The records, or an audit of the records, shall be produced at any disciplinary proceeding involving the lawyer, whenever material. Failure to produce the records constitutes unprofessional conduct and grounds for disciplinary action.

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

a. **Property ledger.** A lawyer who, as a fiduciary, receives tangible personal property or securities in bearer form shall maintain a property ledger that identifies the property, date of receipt, owner, and location of the property. The ledger shall 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 shall 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 shall obtain a signed receipt, with a description of the property and the date of disposition, from the recipient.

(9) **Dishonored instrument notification or alternative protection.** A lawyer who holds fiduciary property in a demand account from which funds are disbursed through a properly payable instrument issued directly by the lawyer or a member or employee of the lawyer's firm shall take one of the following actions:

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

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

c. hold the funds in a demand account, which requires the approving signature of a co-trustee, co-agent, co-guardian, or co-personal representative before funds may be disbursed from the account.

(10) **Certification requirements.** Funds held by a lawyer in a fiduciary account shall comply with the certification requirements of sub. (i).

(k) 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;

(2) 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;

(3) 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

(4) 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.

SCR 20:1.15(b)(1) Separate accounts.

With respect to probate matters, a lawyer's role may be to represent the estate's personal representative, to serve as the personal representative, or to act as both personal representative and attorney for an estate. SCR 20:1.15(b) identifies the rules that apply when a lawyer holds trust property as the attorney for a client/personal representative. Those rules, SCR 20:1.15(b)-(i), also apply when the lawyer serves as both the attorney and personal representative for an estate. However, if the lawyer serves solely as an estate's personal representative, the lawyer acts as a fiduciary and is subject to the requirements of SCR 20:1.15(j).

SCR 20:1.15(b)(4) Advances for fees and costs.

Lawyers often receive funds from 3rd parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

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 ~~bank~~ 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 20:1.15(b)(4).

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 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.

SCR 20:1.15(d) Interest of 3rd parties.

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(d), 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)(2) Insurance requirements.

Pursuant to SCR 20:1.15(e)(2), trust funds are required to be held in accounts that are insured by the federal deposit insurance corporation (FDIC), the national credit union share insurance fund, the Wisconsin credit union savings insurance corporation, the securities investor protection corporation or any other investment institution financial guaranty insurance. However, since federal law limits the amount of the insurance coverage, funds in excess of the limit are not insured. Consequently, the purpose of the insurance requirement is not to guarantee that all funds are adequately insured. Rather, it is to assure that trust funds are held in reputable financial institutions.

SCR 20:1.15(e)(4)d. 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 bank'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(e)(4)g. Exception: Collection trust accounts.

This exception was adopted in response to concerns raised by members of the collection bar who presently rely on certain electronic banking practices that were not expressly prohibited prior to the adoption of this rule. The court acknowledges that electronic banking practices are increasingly used in the practice of law. However, the court also acknowledges that such transactions will require new approaches to alleviate legitimate concerns about the potential for fraud and risk of conversion with respect to their usage in connection with trust accounts. Collection lawyers may be able to satisfy these concerns because of security measures inherent in their practice. This exception is intended as a temporary measure, pending further consideration of the issue and eventual adoption of a rule that will permit electronic banking procedures in additional practice areas, conditioned upon the implementation of appropriate safeguards. The agreement referenced in the exception is available from the office of lawyer regulation.

SCR 20:1.15(e)(4)h.3. Exception: Fee and cost advances by credit card, debit card or other electronic deposit.

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).

2. Does the credit card issuer require services to be rendered before a credit card payment 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(e)(5)b. Real estate transactions.

SCR 20:1.15(e)(5)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(e)(7) Inspection of records.

The duty of the lawyer to produce client trust account records for inspection under SCR 20:1.15(e)(7) 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) 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. (g)(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 s. 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.

SCR 20:1.15(i) and SCR 20:1.15(j)(10) Certification of compliance.

The current rule is intended to implement the supreme court's order of April 11, 2001; certification is required for "all trust accounts and safe deposit boxes in which the lawyer deposits clients' funds or property held in connection with a representation or held in a fiduciary capacity that directly arises in the course of or as a result of a lawyer-client relationship."

SCR 20:1.15(j) Lawyer as professional fiduciary.

A lawyer must hold the property of others with the care required of a professional fiduciary. All property which 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 segregated accounts. SCR 20:1.15(j) identifies the requirements and responsibilities of a lawyer with respect to the management of fiduciary property.

SCR 20:1.15(j)(1) Separate accounts.

With respect to probate matters, a lawyer's role may be to represent the estate's personal representative, to serve as the personal representative, or to act as both personal representative and attorney for an estate. SCR 20:1.15(j) applies only when the lawyer serves solely as an estate's personal representative. If the lawyer represents a client/personal representative, or when the lawyer serves as both personal representative and attorney for the estate, the lawyer is responsible for "trust" property and is subject to the requirements of SCR 20:1.15(b)-(i).

Section 11. Supreme Court Rule 21.16 (intro.) and (1) to (6) are renumbered SCR 21.16 (1m) (intro.) and (a) to (f).

Section 12. SCR 21.16 (1m) (em) and (2m) of the Supreme Court Rules are created to read:

CORRIS

21.16(**1m**) (em) Restitution, as provided under sub. (2m).

21.16(**2m**) (a) An attorney may be ordered to do any of the following as restitution under sub. (1m)(em):

1. Pay monetary restitution to the person whose money or property was misappropriated or misapplied in the amount or value of such money or property as found in the disciplinary proceedings.

2. Reimburse the Wisconsin lawyers' fund for client protection for awards made to the person whose money or property was misappropriated or misapplied.

(b) Any payment made as restitution under par. (a) does not limit, preclude or impair any liability for damages in any civil action or proceeding for an amount in excess of the payment.

(c) Upon ordering restitution to the Wisconsin lawyers' fund for client protection under par. (a)2., the supreme court shall issue a judgment and furnish a transcript of the judgment to the Fund. The transcript of the judgment may be filed and docketed in the office of the clerk of court in any county and shall have the same force and effect as judgments docketed under ss. 809.25 and 806.16, stats.

IT IS FURTHER ORDERED that notice of the repeal and recreation of SCR 20:1.15 and the amendments to SCR 12.04, 20:1.0, and 21.16 be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wis., this 2nd day of May, 2007.

By the court:
David R. Schanker
Clerk of Supreme Court

¶1 ANN WALSH BRADLEY, J. (concurring in part, dissenting in part). Prior to the majority's adoption of the advanced fee alternative rule, SCR 20:1.15(b)(4m),[1] attorneys were required to deposit advances of unearned hourly fees into their trust accounts and draw out amounts as they were earned. See SCR 20:1.15(b)(4) and former SCR 20:1.15(a).[2] Now, under the new rule, attorneys can deposit advances of hourly fees directly into their general business accounts rather than into their trust accounts. This allows them to spend their clients' money before it is earned.

¶ 2 Although I join the majority in all other respects, I cannot join the majority in the adoption of the advanced fee alternative rule. I believe the adoption of this rule is fundamentally wrong, calls into question our prior decisions which imposed discipline for conversion of client funds, and favors the ease of enforcement over the protection of clients.

¶ 3 The adoption of the new rule is fundamentally wrong.

¶ 4 In determining whether we should adopt this portion of the petition, we need do nothing more than apply fourth grade playground ethics: it is wrong to spend money that is not yours. Some call that stealing. As applied to attorneys, we used to call that conversion. Under the majority's decision, we now call that lawful.

¶ 5 The adoption of the advanced fee alternative rule calls into question our prior decisions which imposed discipline for conversion of client funds.

¶ 6 We have on several occasions in the past imposed discipline for the very conduct that we are now condoning. As recently as April 19, 2007, the court found that an attorney who failed to hold funds belonging to his client in trust was guilty of violating former SCR 20:1.15(a). *Disciplinary Proceedings Against Winch*, 2007 WI 41, __ Wis. 2d __, __ N.W.2d __ (one-year suspension for failing to hold funds in trust and other trust account violations). *See, e.g.,* other recent cases in which an attorney was disciplined for conduct which SCR 20:1.15(b)(4m) now condones: *Disciplinary Proceedings Against Cooper,* 2007 WI 37, __ Wis. 2d __, 729 N.W.2d 206 (three-year suspension for 35 instances of professional misconduct, including depositing $13,000 into his personal account rather than a trust account); *Disciplinary Proceedings Against Scanlan,* 2006 WI 38, 290 Wis. 2d 30, 712 N.W.2d 877 (six-month suspension for placing advanced fees into his business checking account rather than his trust account, other trust account violations, and failure to cooperate with OLR).

¶7 Admittedly, the cases cited above involved discipline for offenses in addition to discipline for conversion. The court does not break down how much of the discipline is attributable to what violation. Yet, undeniably, some period of the above suspensions are attributable to conversion.

¶8 The adoption of this rule favors the ease of enforcement over the protection of clients.

¶9 Part of the justification for proposing this new advanced fee alternative rule was that it was difficult to enforce the old rule on conversion. It makes no sense to me to make conversion lawful simply because it is difficult to enforce. The protection of clients' funds is paramount, and I fear that the adoption of this rule compromises that protection.

¶10 For the above stated reasons, I respectfully dissent to the adoption of SCR 20:1.15(b)(4m).

[1]SCR 20:1.15(b)(4m) reads in part:
(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 a court of competent jurisdiction must ultimately approve the lawyer's fee, or 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 ….

[2]SCR 20:1.15(b)(4), effective July 1, 2004, provides in relevant part:
(b) Segregation of trust property…
(4) Unearned fees and cost advances. Unearned fees and advanced payments of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to SCR 20:1.15(g)….

Former SCR 20:1.15(a) applied to misconduct committed prior to July 1, 2004, and provided in relevant part:
(a) A lawyer shall hold in trust, separate from the lawyer's own property, that property of clients and third persons that is in the lawyer's possession in connection with a representation or when acting in a fiduciary capacity… All funds of clients and third persons paid to a lawyer or law firm shall be deposited in one or more identifiable trust accounts …. The trust account shall be clearly designated as "Client's Account" or "Trust Account" or words of similar import. No funds belonging to the lawyer or law firm, except funds reasonably sufficient to pay or avoid imposition of account service charges, may be deposited in such an account….