



KEITH L. SELLEN
DIRECTOR

Supreme Court of Wisconsin

OFFICE OF LAWYER REGULATION

110 EAST MAIN STREET, SUITE 315

MADISON, WI 53703-3383

Telephone: (608) 267-7274

Toll Free: (877) 315-6941

Fax: (608) 267-1959

Web Site: www.wicourts.gov/olr

April 5, 2007

RECEIVED

APR 05 2007

CLERK OF SUPREME COURT
OF WISCONSIN

Hand-Delivered

Office of the Clerk of Supreme Court
110 East Main Street, Suite 215
Madison, WI 53703

Re: In the Matter of the Amendment of SCR 20.1.15 Safekeeping Property;
SCR 20.1.0 Definitions; SCR 21.16 Discipline; and
SCR 12.04 Wisconsin Lawyers Fund for Client Protection
Petition No. 04 - 06

Dear Clerk:

Enclosed for filing please find an original and eight copies of a *Summary of Post-Hearing Work of the Trust Account Rule Working Group*. Please note that, in order to assist the justices in identifying the proposed changes, we are providing color copies of Appendices A, B, E, F and G with the original Summary and with each of the eight copies.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Keith L. Sellen".

Keith L. Sellen
Director

KLS/mrh

Enclosures

cc: Attorney Michael Olds

**SUMMARY OF POST-HEARING WORK
OF THE
TRUST ACCOUNT RULE WORKING GROUP**

FILED

APR 05 2007

CLERK OF SUPREME COURT
OF WISCONSIN

06-04

Background

On May 22, 2006, the Office of Lawyer Regulation and the State Bar of Wisconsin filed a petition with the Wisconsin Supreme Court, seeking amendments to the trust account rule (SCR 20:1.15) and several related rules (SCR 20:1.0, SCR 12.04 and SCR 21.16). A public hearing on that petition was held on January 17, 2007.

Concerns of the Court

At both the public hearing and the administrative conference that followed it, the Court expressed the following concerns regarding the proposed amendments:

- 1) the lack of input from the public;
- 2) the lack of comment from practicing lawyers;
- 3) the fact that the Court is being asked to authorize lawyers to utilize unearned fees, rather than requiring such fees to be held in trust; and
- 4) the overall complexity of the trust account rules.

Synopsis of Post-Hearing Activity of Working Group

In response to those concerns, the Trust Account Rule Working Group took the following steps:

- 1) Added five public members to the Group (Claire Fowler, Mary Beth Growney Selene, Carolyn Morgan, Dr. Thomas Radmer, and Robert Miller);
- 2) Held meetings on February 22 and March 26, 2007, the primary purpose of which was to elicit comments and concerns from the public members;
- 3) Requested and obtained input from the Administrator of the Wisconsin Lawyer's Fund for Client Protection regarding the ramifications of the proposed changes for clients;

- 4) Made a presentation to the Inns of Court in Madison on February 21, 2007, to further educate the Bar regarding the proposed changes and to elicit additional comments;
- 5) Sought further input and comments from the Bar on the proposed changes via postings on the Family Law Listserv, the Criminal Law Listserv, and the BICR (Bankruptcy, Insolvency and Creditor's Rights) Listserv; and
- 6) Researched trust account rules throughout the country with respect to the handling of advanced fees, flat fees and retainers, and prepared an abstract relating to that research.

Results of Post-Hearing Activity

Input from Public Members

The public members, as a group, appeared to agree with a statement made by one such member that clients are not overly concerned about what their lawyers are required to do with respect to trust account recordkeeping and holding advanced fees in trust. Their concerns appear to be more pragmatic. Clients want lawyers to perform the services for which they are hired; they want to win their cases; and they want a prompt refund, if one is owed. Another public member suggested that it might be helpful to have a definition of the term "earned." Whether fees are earned will depend upon the facts of each particular case. Current case law, the proposed definitions of types of fees, and the procedure for binding arbitration provide as much guidance and as efficient a dispute resolution process as can be implemented at this time.

Timing Requirements of Refund Process

In connection with the promptness of refunds, one of the public members questioned why the rules provide 30 day deadlines for clients to take certain actions, but do not provide similar, straightforward deadlines for lawyers. The public member was particularly concerned that the public would have no way to determine the meaning of the terms "promptly" and "immediately," which are used to identify the timeframe in which attorneys must take certain actions. [See, SCR 20:1.15(b)(4m)b.3. and SCR 20:1.15(b)(4m)c.]

Under the proposed language in SCR 20:1.15(b)(4m)b.3., when a lawyer's services are terminated, the lawyer is required to provide an accounting to the client for the fees that have been earned and refund any unearned portion. In addition, the lawyer is required to inform the client that, if the client disputes the fee, the client must provide the lawyer with written notice of that dispute within **30 days**. Furthermore, the rule requires the lawyer to inform the client that, if there is a dispute that cannot be resolved within **30 days**, the lawyer must "**promptly**" submit that dispute to binding arbitration.

Similarly, under SCR 20:1.15(b)(4m)c., if a lawyer is unable to resolve a fee dispute within **30 days**, the lawyer is required to “**immediately**” submit the dispute to binding arbitration.

In addition to the timing issues raised by the public members, OLR Director Keith Sellen pointed out that, as currently proposed in SCR 20:1.15(b)(4m), a client is required to notify the lawyer of a dispute within 30 days of receiving a final accounting from the lawyer; however, the lawyer is not required to send that final accounting if the lawyer believes that all advanced fees have been earned. Consequently, in such cases, there would be no notice to the client of the 30 day period in which to make an objection. [See, SCR 20:1.15(b)(4m)b. and b.1.].

Based upon these concerns, the Working Group concluded that each of the above-referenced paragraphs should be modified. Consequently, the Group recommends:

- 1) that the word “promptly” be eliminated from SCR 20:1.15(b)(4m)b.3.;
- 2) that SCR 20:1.15(b)(4m)c. should be revised to provide a 30 day deadline for resolution of disputes or submission of the disputes to binding arbitration;
- 3) that the words “if any fees are then unearned” be eliminated from SCR 20:1.15(b)(4m)b.; and
- 4) That SCR 20:1.15 (b)(4m)b.1. should be revised so as to require a final accounting or an accounting since the lawyer’s most recent statement to the client.

(See Revisions, Appendix A).

Given the short period of time in which to address the Court’s concerns, the proposed changes have not been reviewed and approved by the State Bar Board of Governors. The Executive Committee of the Board of Governors has been notified of the proposed changes 1 and 2 above. The view of the Executive Committee is that those changes are not controversial to the members of the State Bar. The Board of Governors and the Executive Committee have not been notified of the proposed changes 3 and 4 above. These changes have been reviewed by the Trust Account Rule Working Group and are not believed to be controversial to the members of the State Bar.

Input from Representatives of the Fund for Client Protection

The Working Group asked Kris Wenzel, Administrator of the Wisconsin Lawyer’s Fund for Client Protection, for information relating to the current handling of claims against the Client Protection Fund. Based upon the information that she provided, the Working Group discovered that the proposed amendments to SCR 20:1.15(b)(4m) and SCR 12.04 may actually increase the number of hurdles that clients need to clear in

order to obtain refunds of unearned fees. This is due to the fact that the proposed amendments to SCR 20:1.15(b)(4m)a.6., SCR 12.04(2)(e), and SCR 12.04(2)(g)(iii)4. all tie a client's ability to obtain payment from the Fund to the existence of a fee arbitration award or a court order. Historically, some claims have been paid from the Fund without the need for an arbitration award or a court order.

In order to address this concern, the Working Group concluded that the above-referenced rules should be modified. Attorney David M. Reddy, Chairperson of the Fund for Client Protection, agreed that these changes are needed. Consequently, the Group recommends:

the elimination of certain language from SCR 20:1.15(b)(4m)a.6., SCR 12.04(2)(e), and SCR 12.04(2)(g)(iii)4., which could be interpreted to require clients to obtain a judgment or arbitration award before filing a claim with the Fund for Client Protection. (*See Revisions, Appendix B*).

Again, the Working Group's proposed changes have been reviewed only by the Executive Committee of the State Bar Board of Governors and are seen as not controversial.

Additional Input from the Bar

As previously noted, the Group solicited comments from the Bar via various Listserv postings and at a presentation to the Inns of Court. In addition, an attorney member of the Working Group submitted a letter on behalf of the nearly two dozen attorneys in his firm who practice in the areas of estate planning, probate and trust law, describing the benefits of the proposed changes to attorneys in those practice areas. The Family Law Listserv generated several responses uniformly approving the petition. The BICR Listserv posting generated no adverse commentary and several favorable comments. However, the Criminal Law Listserv posting generated many more responses, expressing concerns regarding the treatment of flat fees and a sense that the Court is attempting to eliminate the flat fee, the fee type most often utilized in criminal defense work.

The presentation to the Inns of Court resulted in a spirited discussion regarding the current and proposed changes to the rule. The Working Group heard comments from a number of lawyers and legal administrators, disparaging the limitations on credit cards and electronic transactions, questioning the definitions and handling of fees, contending that the trust account rule is not keeping pace with modern banking practices, and criticizing the current rule for its complexity. The complexity of the rule in general was a cause of concern for many of the Inns of Court attendees, as it is for this Court. However, it is fair to say that the sense of the Bar, the Inns of Court, and the substantive law sections which vetted the rule before the petition for amendment was filed with the Court, is that the petition represents a considerable improvement in the ease of administration of trust accounts for Wisconsin lawyers.

Court's Concern regarding Proposed Handling of Unearned Fees

OLR Director Keith Sellen has researched disciplinary rules and ethics opinions throughout the country in order to determine the treatment of legal fees in other jurisdictions. That research revealed that a number of states currently allow unearned advanced fees (either hourly, flat or both) to be placed in accounts other than a trust account, with the most common condition being the client's consent [*See, e.g.,* Connecticut—hourly and flat fees; District of Columbia—hourly fees; Georgia—hourly and flat fees; Indiana—flat fees; Louisiana—flat fees; Maryland—hourly and flat fees; Minnesota—hourly and flat fees; Mississippi—flat fees; North Carolina—flat fees; New York—hourly and flat fees, Oklahoma—flat fees; Oregon—flat fees; and Wisconsin—flat fees). This research has been reduced to an abstract, which summarizes each state's treatment of fees. (*See, Appendix C*).

The proposed amendment to Wisconsin's trust account rule, which would allow lawyers to hold both flat and hourly advanced fees in an account other than the trust account, provides greater protection for clients than any other state's rule currently does. That is because Wisconsin's proposed rule requires notice to the client at the beginning of the representation and resolution of any fee dispute or submission to binding arbitration. Additionally, the Petition provides broader and clearer authority for the Fund for Client Protection to pay claims in the event the lawyer does not refund an unearned fee.

This proposal simply changes the focus of the potential misconduct from failing to hold unearned fees in trust to failing to return unearned fees. While the Court has found violations of the former SCR 20:1.15(a) and the current SCR 20:1.15(b)(4) with respect to a lawyer's failure to hold unearned fees in trust, in many such cases, that same failure to hold funds in trust is also found to constitute either dishonesty SCR 20:8.4(c) or a criminal act SCR 20:8.4(b). The latter violations may still be found by the court, but the basis for future findings would be a lawyer's failure to refund an unearned fee, i.e., SCR 20:1.16(d), rather than the former SCR 20:1.15(a) or the current SCR 20:1.15(b)(4).

Furthermore, under the proposal, any lawyer who fails to hold unearned fees in trust and fails to abide by the requirements of SCR 20:1.15(b)(4m), will be subject to findings of multiple violations, i.e., failing to hold unearned fees in trust; failing to refund unearned fees, and potentially engaging in dishonest conduct or criminal conduct.

Complexity of the Trust Account Rule

When the Trust Account Rule Working Group was established by the State Bar in late 2004, it was assigned the task of "fixing" the problems that had come to light after the new trust account rule took effect on July 1, 2004. The Group was not directed to re-create or simplify the trust account rule, but to make adjustments that would reduce the recordkeeping burdens and unnecessary impediments to the provision of legal services. An Executive Summary of the "problems" and "fixes" provides a concise summary of the Working Group's efforts. (*See, Appendix D*).

Wisconsin's trust account rule is clearly complex. However, the regulations to which Wisconsin financial institutions are subject are much more complex. Since lawyers are not typically trained in accounting practices, Wisconsin's rule enumerates certain basic accounting requirements which are necessary to ensure the proper handling of funds belonging to clients and third persons. The rules are further designed to prohibit practices that interfere with a lawyer's ability to safeguard funds, i.e., electronic transactions, simultaneous deposits and disbursements, etc.

The proposed amendments to the rule, while increasing its complexity, will afford lawyers a number of alternatives for handling fees that do not currently exist. For example:

- 1) A lawyer may choose to deposit and utilize unearned fees upon receipt, provided that the lawyer complies with the requirements of SCR 20:1.15(b)(4m), including the requirement to submit to binding arbitration in the event of a fee dispute.
- 2) If a lawyer does not want to arbitrate fee disputes, the lawyer must hold the unearned fees in trust until earned and comply with all of the recordkeeping and billing requirements of SCR 20:1.15(f) and (g).
- 3) If a lawyer wants to accept credit card payments for legal fees, the lawyer may either:
 - a) set up a credit card trust account and follow the requirements set forth in SCR 20:1.15(e)(4)h., as well as the recordkeeping and billing requirements of SCR 20:1.15(f) and (g), or
 - b) place the credit card payment in his business account and follow the requirements set forth in SCR 20:1.15(b)(4m).

Fee Agreements under SCR 20:1.15(b)(4m)

The Working Group has concluded that the notice requirements of SCR 20:1.15(b)(4m) will not unduly lengthen a fee agreement. The required notifications can be provided in a single paragraph, which could replace whatever language describes the current requirements.

(See Sample Agreements under the current rules, Appendix E, and under the proposed rules, Appendices F & G).

Conclusion

The Trust Account Rule Working Group has endeavored to address the various concerns raised by the Court at the January 17, 2007 public hearing and at the administrative conference that followed. We hope that this report will be helpful to the Court in its consideration of the proposed amendments to SCR 20.1.15 Safekeeping Property; SCR 20.1.0 Definitions; SCR 21.16 Discipline; and SCR 12.04 Wisconsin Lawyers Fund for Client Protection.

Respectfully submitted this 5th day of April, 2007,

By: Trust Account Rule Working Group

Attorney Michael Olds, Chairperson

Attorney Barry Cohen

Attorney Gerald Connolly, Fiduciary Rule Sub-Committee

Attorney Diane S. Diel

Attorney Dean R. Dietrich

Attorney George Dionisopoulos, Fiduciary Rule Sub-Committee

Ms. Claire Fowler, Public Member

Ms. Mary Beth Growney Selene, Public Member

Ms. Mary Hoefl Smith, Trust Account Program Administrator, OLR

Attorney Adam Korbitz, State Bar Government Relations Coordinator

Attorney Leonard Leverson, Fiduciary Rule Sub-Committee

Attorney John Lhost, Fiduciary Rule Sub-Committee

Mr. Robert Miller, President Elect, WI Association of Legal Administrators

Ms. Carolyn Morgan, Public Member

Attorney Gerald Mowris

Attorney Timothy Pierce, State Bar Ethics Consultant

Dr. Thomas Radmer, Public Member

Attorney Sheila Romell

Attorney Keith Sellen, Director, Office of Lawyer Regulation

Attorney Daniel Shneidman

POST-HEARING REVISIONS

The post-hearing revisions are **highlighted in red bold italic print** below. The changes that appear below in **green print** are those that were submitted to the Court last year as part of the petition for changes to the rule.

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

(b) Segregation of trust property.

(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:

...

b. That, upon termination of the representation, **if any fees are then unearned,** 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 ~~of advanced fees~~ 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 **promptly** submit the dispute to binding arbitration.

c. That, upon **timely** receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and that, if the dispute is not resolved, **within 30 days 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, ~~the lawyer shall immediately submit the dispute to binding arbitration;~~ and

POST-HEARING REVISIONS

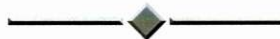
The post-hearing revisions to SCR 20:1.15(b)(4m)a.6. are **highlighted in red bold italic print** below. The changes that appear below in **green print** are those that were submitted to the Court last year as part of the petition for changes to the rule.

(b) **Segregation of trust property.**

(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. That, upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client in writing 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. the lawyer's obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation;
5. 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
6. 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 **unearned** advanced fees.



The post-hearing revisions to SCR 12.04(2)(e) and SCR 12.04(2)(g)(iii)4. are **highlighted in red bold italic print** below. The changes that appear below in **green print** are those that were submitted to the Court last year as part of the petition for changes to the rule.

SCR 12.04 Wisconsin lawyers' fund for Client Protection: creation and purpose; definitions.

(2) In ss. 12.04 to 12.11:

...

(e) "Dishonest Conduct" means a willful act committed by an attorney which causes a reimbursable loss to a client in the manner of defalcation or embezzlement of money; ~~or~~ the intentional taking or conversion of money, property or other things of value ~~which causes a reimbursable loss to a client; or the failure to refund an unearned advanced fee.~~ upon award of an arbitrator, judgment of a court, or order of the supreme court, or acknowledgment by the attorney that the fee is unearned.

...

(g) "Reimbursable Loss" is a loss of money or other property of a client which meets all of the following:

- (i) 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) 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) The attorney has:
 1. died,
 2. been adjudicated a bankrupt,
 3. been adjudicated an incompetent,
 4. been disbarred or suspended from the practice of law or has consented to the revocation of his or her license to practice law; or has failed to refund an unearned advanced fee, within 30 days of an award of an arbitrator, a judgment or order of a court, an order of the supreme court, or an acknowledgement by the attorney that the fee is unearned.
 5. become a judgment debtor of the person claiming the loss,
 6. been adjudged guilty of a crime, which adjudication shall have been based upon the dishonest conduct of the attorney, or
 7. left the jurisdiction or cannot be found.

FEE SURVEY

STATE	RETAINER	ADVANCE	FLAT	HOURLY ADVANCE IN TRUST	FLAT ADVANCE IN TRUST	TRUE RETAINER IN TRUST	RETAINER FOR FUTURE SERVICES IN TRUST
Alabama	Not Defined	Not Defined	Not Defined	Yes, 1.15a unearned fees in trust	Yes, 1.15a unearned fees in trust	Not Known	Yes, 1.15a and Opinion Number 1993-21
Alaska	Not Defined	Not Defined	Not Defined	Not Known	Not Known	Not Known	Not Known
Arizona	1.5, cmt 7	1.5, cmt 7	1.5, cmt 7	Yes, 1.15c unearned fees in trust	Yes, 1.15c unearned fees in trust	No, Opinion No. 99-02	No, provided client agrees, 1.5, cmt 7
Arkansas	Not Defined	Not Defined	Not Defined	Yes, 1.15b unearned fees in trust	Yes, 1.15b unearned fees in trust	Not Known	Not Known
California	3-700D	Not Defined	Not Defined	Yes, 4-100A lawyer's interest not fixed	Yes, 4-100A lawyer's interest not fixed	No, 4-100A lawyer's interest fixed	Yes, caselaw
Colorado	Cmt to 1.5f	Cmt to 1.5f	Not Defined	Yes, 1.5f unearned fees in trust	Yes, 1.5f unearned fees in trust	No, Cmt to 1.5f	Yes, 1.5f unearned fees in trust
Connecticut	Not Defined	Not Defined	Not Defined	Yes, unless client agrees otherwise, 1.15d	Yes, unless client agrees otherwise, 1.15d	Yes, unless client agrees otherwise, 1.15d	Yes, unless client agrees otherwise, 1.15d
Delaware	Not Defined	Not Defined	Not Defined	Yes, 1.5f unearned fees in trust	Yes, 1.5f unearned fees in trust	Not Known	No, if under \$2.5K or otherwise reasonable, 1.5 cmts 10-12
DC	Opinion 264	Pending	Pending	Yes, unless client agrees otherwise, 1.15d	Pending before the Court	No, Opinion 264	Yes, 1.15d, unless client agrees; issue pending with the Court
Florida	Opinion 93-2	Not Defined	Not Defined	Yes, 5-1.1a unearned in trust	Yes, 5-1.1a unearned in trust	No, Opinion 93-2	No, Opinion 93-2
Georgia	Opinion 91-2	Opinion 91-2 "Prepaid"	Opinion 91-2	No, 1.15lb, Opinion 91-2	No, 1.15lb, Opinion 91-2	No, 1.15lb, Opinion 91-2	No, 1.15lb, Opinion 91-2
Hawaii	Not Defined	Not Defined	Not Defined	Yes, 1.15d	Yes, 1.15d	No	Yes, 1.15d
Idaho	Not Defined	Not Defined	Not Defined	Yes, 1.15b unearned fees in trust	Yes, 1.15b, unless earned upon receipt by agreement	Not Known	Yes, 1.15b, unless earned upon receipt by agreement
Illinois	Case Law	Case Law	Not Defined	Yes, Opinion 90-10	Yes, Opinion 90-10	No, Opinion 90-10	No, provided client agrees, ARDC Policy
Indiana	Case Law	Case Law	Case Law	Yes, 1.15c fees paid in advance	No, Case Law	No, Case Law	Yes, except flat fees, Case Law
Iowa	Rule 45.8	Rule 45.7	Rule 45.10	Yes, 1.15c, 45.7, fees paid in advance	Yes, 1.15c, 45.10, fees paid in advance	No, 45.8	Not Known, 45.9
Kansas	Case Law	Not Defined	Not Defined	Not Known	Not Known	No, Case Law	Not Known
Kentucky	Opinion E-380	Opinion E-380	Not Defined	Not Known	Not Known	No, Opinion E-380	No, provided client agrees, Opinion E-380
Louisiana	1.5f1	Not Defined	Not Defined	Yes, 1.5f3	No, 1.5f2	No, 1.5f1	No, 1.5f2
Maine	Not Defined	Not Defined	Not Defined	Yes, 3.6e, Opinion #98, #173	Yes, 3.6e, Opinion #173	No, Opinion #173	Yes, Opinion #173
Maryland	Not Defined	Not Defined	Not Defined	No, provided client agrees, 1.15c	No, provided client agrees, 1.15c	No, 1.15c, Case Law	No, provided client agrees, 1.15c
Massachusetts	Not Defined	Not Defined	Not Defined	Yes, 1.15b	No, Agency Policy	No	Yes, if hourly; No, if flat
Michigan	Op. RI-69	Op. RI-69	Op. RI-50	Yes, 1.15g, Op. R-7	Yes, 1.15g, Op. R-7	No, Op. RI-69	Not Known: Cp. R-7; RI-10
Minnesota	Not Defined	Not Defined	Not Defined	Yes, unless client agrees, 1.15c	Yes, unless client agrees, 1.15c	No	Yes, unless client agrees, 1.15c
Mississippi	Op. 250	Not Defined	Not Defined	Yes, 1.15	No	No	Yes, if unearned, 1.15
Missouri	Not Defined	Not Defined	Not Defined	Not Known	Not Known	Not Known	Not Known
Montana	Not Defined	Not Defined	Not Defined	Not Known	Not Known	Not Known	Not Known
Nebraska	Not Defined	Not Defined	Not Defined	Yes, 1.15c	Yes, 1.15c	Not Known	Not Known
Nevada	Not Defined	Not Defined	Not Defined	Yes, 1.15c	Yes, 1.15c	Not Known	Not Known
New Hampshire	Not Defined	Not Defined	Not Defined	Yes, 1.15a; Opinion 1990-91/10	Yes, 1.15a; Opinion 1990-91/10	No, Opinion #1990-91/10	Yes, Case Law
New Jersey	Case Law; Op. 644	Not Defined	Not Defined	Not Known	Not Known	No, Case Law; Op. 644	No, Opinion 644
New Mexico	Not Defined	Not Defined	Not Defined	Yes, Case Law	Yes, Case Law	No, Case Law	Yes, Case Law
New York	Opinion 570 & 599	Opinion 599	Opinion 599	No, Opinion 570	No, Opinion 570	No, Opinion 570	No, Opinion 570
North Carolina	Cmt to 1.15	Cmt to 1.15	97 FEO 4	Yes, 1.15	No, Opinion 2000 FEO 5	No, 1.15	No, 1997 FEO 4 (Revised), 2000 FEO 5
North Dakota	Not Defined	Not Defined	Not Defined	Yes, 1.15c	Yes, 1.15c	Not Known	Not Known
Ohio	Cmt to 1.5	Cmt to 1.5	Cmt to 1.5	Yes, 1.15c, unearned fees in trust	Yes, unless deemed earned, Cmt to 1.5	No, Cmt to 1.5	No, provided the fee is deemed earned upon receipt, Cmt to 1.5
Oklahoma	EO 317	EO 317	EO 317	Yes, EO 317	No, EO 317	No, EO 317	No, EO 317
Oregon	Not Defined	Not Defined	Op. 2005-151	Yes, 1.15c	Yes, unless client agrees in writing, 1.15c, Op. 2005-151	No	Yes, unless client agrees in writing, 1.15c, Op. 2005-151
Pennsylvania	Op. 95-100	Not Defined	Not Defined	Yes, 1.15a, Op. 96-7	Yes, 1.15a, Op. 96-7	No	Yes, 1.15a, Op. 96-7
Rhode Island	Not Defined	Not Defined	Not Defined	Yes, 1.15a, 1.16a	Yes, 1.15a, 1.16a	Not Known	Not Known
South Carolina	Op. 81-15	Not Defined	Not Defined	Yes, 1.15c	Yes, 1.15c	No, Cmt to 1.5	No, Cmt to 1.5
South Dakota							
Tennessee	Op. 92-F-128	Not Defined	Not Defined	Not Known, Op. 92-F-128(a)	Not Known, Op. 92-F-128(a)	No, Op. 92-F-128(a)	Not Known, Op. 92-F-128(a)
Texas	Op. 431	Not Defined	Not Defined	Yes, Op. 391, 431	Yes, Op. 391, 431	No, Op. 391, 431	Yes, Op. 391, 431
Utah	Not Defined	Not Defined	Not Defined	Yes, 1.15c	Yes, 1.15c	No, Op. 136	Yes, 1.15c
Vermont	Not Defined	Not Defined	Not Defined	Yes, Op. 97-07	Yes, Op. 97-07	No, Op. 97-07	Yes, Op. 97-07
Virginia	LEO #1606	LEO #1606	LEO #1606	Yes, unless portion deemed earned, LEO #1606	Yes, unless portion deemed earned, LEO #1606	No, LEO #1606	No, LEO #1606
Washington	Not Defined	Not Defined	Not Defined	Yes, 1.15c	Yes, 1.15c	Not Known	Not Known
West Virginia	LEI 99-03	Not Defined	Not Defined	Yes, 1.15a	Yes, 1.15a	No, LEI 99-03	No, LEI 99-03
Wisconsin	Cmt to 1.5	Cmt to 1.5	Not Defined	Yes, 1.5, Cmt; 1.15b4	No, by agency policy	No, 1.5, Cmt	Yes, if hourly; No if flat.
Wyoming	Not Defined	Not Defined	Not Defined	Yes, 1.15d	Yes, 1.15d	Not Known	Not Known

Executive Summary of Proposed Trust Account Rule Changes

The following table summarizes the proposed amendments to the Trust Account Rules now pending before the Supreme Court. The proposed changes allow a lawyer to decide whether to deposit an unearned fee in the trust account or in the general business account. If the unearned fee is deposited to the trust account, the revisions would allow the lawyer to withdraw the amount of earned fees on the same day as rendering the bill, provided that the client is advised and consents to immediate withdrawal in advance. In addition, the current rule gives clients an unlimited time to object to fees and requires the return of fees to trust upon objection until the dispute is resolved. Under the proposed revisions, the client would have 30 days to object and must provide a specific statement of the reasons the fee is being disputed.

The revised rule also allows the practitioner to take unearned fees into the general business account, provided that clients are advised that they have a right to a refund of all unearned fees and provided that the lawyer advises the clients as set forth in box 2 below. The revisions also create special rules allowing the creation of a trust account specially designed for credit card advanced fee payments.

<i>The Problem Areas in the Existing Trust Account Rule (2004 Amendments)</i>	<i>The Proposed "Fixes" Currently Before the Court</i>
<p>1) Disparity in treatment of advanced flat fees and advanced hourly fees, i.e., hourly fees must be held in trust and flat fees need not be.</p>	<p>Definitions proposed as amendment to SCR 20:1.0. Please note if these "fixes" are adopted, all advanced 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 will be required to "account" for the fee per SCR 20:1.15(b)(4m). This includes a "flat fee."</p>
<p>2) The absolute requirement that all advanced fees be deposited in trust and be made subject to the billing, deferred transfer to general account and other bookkeeping requirements of SCR 20:1.15.</p>	<p>Proposal at SCR 20:1.15(b)(4m) <i>allows lawyers to deposit advanced fees to their general business account provided that:</i></p> <p>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;</p> <p><i>and of the following:</i></p> <p>the lawyer's obligation to refund any unearned advanced fee, and provide an accounting, at the termination of the representation; and</p>

	<p>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> <p>the ability of the client to file a claim with the Wisconsin Lawyers' Fund for Client Protection.</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> <p>a final accounting AND a refund of any unearned advanced fees;</p> <p>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</p> <p>notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client, the lawyer shall submit the dispute to binding arbitration within 30 days after receiving notice of the dispute from the client.</p>
<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) The absolute prohibition of advanced 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 charged back to the account by the credit card company within three days of notice of the chargeback, 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 <i>non-waiveable</i> 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 20:1.15(g)2:</p> <p>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 is resolved.</p>	<p>A time limit of 30 days is added to the section "Objection to Disbursement" which becomes SCR 20:1.15(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 20:1.15(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." In order to document the lawyer's position regarding the reasonableness of the fee, the rule requires the lawyer to promptly provide written notice of the lawyer's position to the client, and to make reasonable efforts to clarify and address the client's objections.</p> <p>Finally, 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 when there is no direction from the client, the 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 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.</p>

Sample #1: Fee Agreement under Current Rule

REPRESENTATION AND FEE AGREEMENT

1. **Anonymous Lawyer, S.C.**, Attorney at Law (hereinafter "Attorney"), is engaged to represent Anonymous Client (hereinafter "Client"), and to act as Attorney deems best in connection with _____. Attorney may retain associate counsel, experts, accountants, or investigators where helpful, and do any and all things appropriate or helpful to protect the Client's interests. Fees charged by associate counsel, experts or investigators retained by firm in this representation shall be treated as necessary disbursements or expenses to be paid by Client upon demand by Attorney.

2. The Client agrees to pay Attorney hourly fees at the rate of \$____.00 per hour, (Attorney's current hourly rate). If this matter continues over an extended period of time and it should be necessary for Attorney to increase the hourly rate, Client agrees to the increased rate upon 30 days written notice.

3. It is understood that time billing by Attorney will include, but is not limited to, office conferences, telephone conversations, court appearances, reading and writing correspondence, preparing and reviewing pleadings and documents, analyzing financial records and reports, and travel to and from court or other destinations associated with this representation.

4. Client agrees to pay upon demand any costs or disbursements incurred or advanced on Client's behalf, such as travel, mileage, parking, photocopies, telephone calls, process service fees, court reporter fees, postage, witness and subpoena fees, filing and court fees, etc. Mileage will be charged at the rate authorized by the Internal Revenue Service.

5. Client agrees to pay \$____.00 upon execution of this Agreement as an advanced fee for legal services of Attorney, and \$____.00 as an initial advance against costs to be incurred in this matter. Upon receipt, the advanced fees and costs will be deposited in Attorney's trust account. Pursuant to this agreement and Supreme Court Rule 20:1.15(g), a disbursement for fees earned for services rendered will be withdrawn from Client's funds in Attorney's trust account 5 business days following the delivery to Client of an itemized bill containing notice of the amount owed, anticipated date of withdrawal and Client's balance in lawyer's trust account after withdrawal. If Client objects to the disbursement, the funds shall remain in the trust account until the dispute is resolved. If Client objects after the funds have been withdrawn, the disputed portion will be returned to the trust account. Attorney reserves the right to require additional fee and cost advances during the term of the representation.

6. STATEMENTS FOR SERVICES, COSTS AND DISBURSEMENTS ARE DUE AND PAYABLE WITHIN 10 DAYS OF RECEIPT OF STATEMENT FROM ATTORNEY. Client agrees to pay Attorney as the case progresses. Failure to make payments as agreed authorizes Attorney to withdraw from further representation of Client.

Sample #1: Fee Agreement under Current Rule

7. Upon conclusion of this legal matter and final billing of Client's account, payment must be made in full within 30 days of receipt of Attorney's Billing Statement.

8. This agreement does not cover or apply to the filing of, prosecution of, or defense of an appeal, in which case a new representation and fee agreement must be executed. This agreement is binding upon the parties hereto, their personal representatives, successors, agents and assigns; and both parties hereto waive any objection to the jurisdiction, personal or subject matter, of any Wisconsin agency or court over any matter arising out of this agreement.

Dated this ____ day of _____, 2007, at Hometown, Wisconsin.

ANONYMOUS LAWYER, S.C.

Anonymous Client

By: _____
Anonymous Lawyer, Attorney-at-Law

Sample #2: Fee Agreement under Proposed Rule
Fees Not Held in Trust Account

REPRESENTATION AND FEE AGREEMENT

1. **Anonymous Lawyer, S.C.**, Attorney at Law (hereinafter "Attorney"), is engaged to represent Anonymous Client (hereinafter "Client"), and to act as attorney deems best in connection with _____. Attorney may retain associate counsel, experts, accountants, or investigators where helpful, and do any and all things appropriate or helpful to protect the Client's interests. Fees charged by associate counsel, experts or investigators retained by firm in this representation shall be treated as necessary disbursements or expenses to be paid by Client upon demand by Attorney.

2. The Client agrees to pay Attorney hourly fees at the rate of \$____.00 per hour, (Attorney's current hourly rate). If this matter continues over an extended period of time and it should be necessary for Attorney to increase the hourly rate, Client agrees to the increased rate upon 30 days written notice.

3. It is understood that time billing by Attorney will include, but is not limited to, office conferences, telephone conversations, court appearances, reading and writing correspondence, preparing and reviewing pleadings and documents, analyzing financial records and reports, and travel to and from court or other destinations associated with this representation.

4. Client agrees to pay upon demand any costs or disbursements incurred or advanced on Client's behalf, such as travel, mileage, parking, photocopies, telephone calls, process service fees, court reporter fees, postage, witness and subpoena fees, filing and court fees, etc. Mileage will be charged at the rate authorized by the Internal Revenue Service.

5. Client agrees to pay \$____.00 upon execution of this Agreement as an advanced fee for legal services of Attorney, and \$____.00 as an initial advance against costs to be incurred in this matter. In the event that the amount of the advanced fee is not earned during the representation, the unearned portion will be refunded to Client with a complete accounting of the time and expense charges. If Client and Attorney disagree about the amount of refund and do not resolve the dispute, Client has the absolute right to demand fee arbitration to resolve such dispute, and Attorney must submit the dispute to binding arbitration within 30 days of receiving written notice of dispute. Further, if Attorney does not refund an unearned fee, Client may file a claim with the Wisconsin Lawyers' Fund for Client Protection to recover such amount. Client is hereby notified that Attorney reserves the right to require additional retainer fees and cost advances during the representation.

6. STATEMENTS FOR SERVICES, COSTS AND DISBURSEMENTS ARE DUE AND PAYABLE WITHIN 10 DAYS OF RECEIPT OF STATEMENT FROM ATTORNEY. Client agrees to pay Attorney its compensation as the case progresses. Failure to make payments as agreed authorizes Attorney to withdraw from further representation of Client.

Sample #2: Fee Agreement under Proposed Rule
Fees Not Held in Trust Account

7. Upon conclusion of this legal matter and final billing of Client's account, payment must be made in full within 30 days of receipt of Attorney's Billing Statement.

8. This agreement does not cover or apply to the filing of, prosecution of, or defense of an appeal, in which case a new representation and fee agreement must be executed. This agreement is binding upon the parties hereto, their personal representatives, successors, agents and assigns; and both parties hereto waive any objection to the jurisdiction, personal or subject matter, of any Wisconsin agency or court over any matter arising out of this agreement.

Dated this ____ day of _____, 2007, at Hometown, Wisconsin.

ANONYMOUS LAWYER, S.C.

Anonymous Client

By: _____
Anonymous Lawyer, Attorney-at-Law

Sample #3: Fee Agreement under Proposed Rule
Fees Held in Trust Account
Withdrawal Authorized at Invoicing

REPRESENTATION AND FEE AGREEMENT

1. **Anonymous Lawyer, S.C.**, Attorney at Law (hereinafter "Attorney"), is engaged to represent Anonymous Smith (hereinafter "Client"), and to act as attorney deems best in connection with _____. Attorney may retain associate counsel, experts, accountants, or investigators where helpful, and do any and all things appropriate or helpful to protect the Client's interests. Fees charged by associate counsel, experts or investigators retained by firm in this representation shall be treated as necessary disbursements or expenses to be paid by Client upon demand by Attorney.

2. The Client agrees to pay Attorney hourly fees at the rate of \$____.00 per hour, (Attorney's current hourly rate). If this matter continues over an extended period of time and it should be necessary for Attorney to increase the hourly rate, Client agrees to the increased rate upon 30 days written notice.

3. It is understood that time billing by Attorney will include, but is not limited to, office conferences, telephone conversations, court appearances, reading and writing correspondence, preparing and reviewing pleadings and documents, analyzing financial records and reports, and travel to and from court or other destinations associated with this representation.

4. Client agrees to pay upon demand any costs or disbursements incurred or advanced on Client's behalf, such as travel, mileage, parking, photocopies, telephone calls, process service fees, court reporter fees, postage, witness and subpoena fees, filing and court fees, etc. Mileage will be charged at the rate authorized by the Internal Revenue Service.

5. Client agrees to pay \$____.00 upon execution of this agreement as an advanced fee for legal services of attorney, and \$____.00 as an initial advance against costs to be incurred in this matter. Upon receipt, the advanced fees and costs will be deposited in Attorney's trust account. Costs will be disbursed from Attorney's trust account on behalf of Client as such costs are incurred. **Pursuant to this agreement and Supreme Court Rule 20:1.15(g), a payment for fees that have been earned will be withdrawn from Client's funds in Attorney's trust account upon sending Client an itemized bill containing the amount owed, the anticipated date of withdrawal and the balance of Client's funds in Attorney's trust account after that withdrawal.** If Client makes a specific and reasonable objection to the disbursement within 30 days after receiving such itemized bill, the disputed funds must be returned to the trust account until the dispute is resolved unless Attorney believes that the objection is not reasonable and provides Client with a written explanation of Attorney's position. **Note:** Client may dispute a fee after the 30 days have passed; however, Attorney is not required to return the disputed portion of the fee to the trust account unless Client disputes the fee within 30 days. Attorney reserves the right to require additional retainer fees and cost advances during the term of its representation.

Sample #3: Fee Agreement under Proposed Rule
Fees Held in Trust Account
Withdrawal Authorized at Invoicing

6. STATEMENTS FOR SERVICES, COSTS AND DISBURSEMENTS ARE DUE AND PAYABLE WITHIN 10 DAYS OF RECEIPT OF STATEMENT FROM ATTORNEY. Client agrees to pay Attorney its compensation as the case progresses. Failure to make payments as agreed authorizes Attorney to withdraw from further representation of Client.

7. Upon conclusion of this legal matter and final billing of Client's account, payment must be made in full within 30 days of receipt of Attorney's Billing Statement.

8. This agreement does not cover or apply to the filing of, prosecution of, or defense of an appeal, in which case a new representation and fee agreement must be executed. This agreement is binding upon the parties hereto, their personal representatives, successors, agents and assigns; and both parties hereto waive any objection to the jurisdiction, personal or subject matter, of any Wisconsin agency or court over any matter arising out of this agreement.

Dated this ____ day of _____, 2007, at Hometown, Wisconsin.

ANONYMOUS LAWYER, S.C.

By: _____

Anonymous Smith

Anonymous Lawyer, Attorney-at-Law