

## *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.

<p style="text-align: center;"><i>The Problem Areas in the Existing Trust Account Rule (2004 Amendments)</i></p>	<p style="text-align: center;"><i>The Proposed "Fixes" Currently Before the Court</i></p>
<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>