

E-mails, e

June 9, 2010 McCurdy E-mail to Peck, cc Chair, Vice-Chairs & Staff:

Ellen,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synthesizing all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 3.4 (Agenda Item III.NN)
- 3.7 (Agenda Item III.QQ)
- 5.5 (Agenda Item III.EEE)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - PECK - DFT1 (06-09-10).pdf
- RRC - 1-300 [5-5] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - 5-210 [3-7] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 5-220 [3-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-300 [5-5] - Rule - PCD [8.1] (09-17-09) - CLEAN-LAND.pdf
- RRC - 1-300 [5-5] - Rule - PCD [8.1] (09-17-09) - CLEAN-LAND.doc
- RRC - 5-220 [3-4] - Rule - PCD [6] (09-19-09) - CLEAN-LAND.pdf
- RRC - 5-220 [3-4] - Rule - PCD [6] (09-19-09) - CLEAN-LAND.doc
- RRC - 5-210 [3-7] - Rule - PCD [7] (12-12-09) - CLEAN-LAND.pdf
- RRC - 5-210 [3-7] - Rule - PCD [7] (12-12-09) - CLEAN-LAND.doc

June 16, 2010 McCurdy E-mail to Peck, cc Chair, Vice-Chairs & Staff:

Ellen,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule>).

- 1.15 (Agenda Item III.CC) – 2 Comments: Zitrin/Law Professors; and OCTC (sent with Randy's 6/15/10 e-mail)
- 3.4 (Agenda Item III.NN) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.7 (Agenda Item III.QQ) 3 Comments: **COPRAC (attached)**; OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 5.5 (Agenda Item III.EEE)- OCTC (sent with Randy's 6/15/10 e-mail)
- 8.4 (Agenda Item III.WWW) – Co-Lead with/Vapnek - OCTC (sent with Randy's 6/15/10 e-mail)=
- 8.4.1 (Agenda Item III.XXX) - OCTC (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 5-210 [3-7] - 06-15-10 COPRAC Comment.pdf

June 16, 2010 Peck E-mail to Difuntorum:

There will be no changes to 1.15. I have checked with Jerry and Bob.

June 16, 2010 Difuntorum E-mail to Peck, cc McCurdy, Lee & KEM:

Thanks Ellen. This is exactly the helpful information that we need to prepare the agenda.

June 19, 2010 Kehr E-mail to Peck & Sapiro, cc KEM:

Ellen and Jerry: My apologies for my unavoidable tardiness on this. I now have looked at the comments that came in from Richard and from OCTC, and your email exchanges on 6/15 and 6/16.

I agree with both of you on Richard's criticism of the complexity of the proposed Rule and continue to support the effort to bring into the Rule disciplinary standards that previously were hidden in case law. We need to be certain to provide this explanation in the commenter chart if we haven't done so already.

As to OCTC's numbered paragraphs on this proposal:

1. I sympathize with OCTC's view that lawyers should be obligated to place in trust all advance fee payments but understand that there are situations in which it might not be in the client's interest to do so. We had testimony at the L.A. public hearing earlier this month that provided an example of one such situation. I would not change this.

2. I've looked at the four paragraphs that OCTC describes as confusing and inconsistent and do not find either criticism to be valid (and most of those four paragraphs track the current rule).
3. OCTC says that "inviolate" in paragraph (e) is confusing, and is unnecessary. I might agree with them on this one, as the word is hardly part of everyday speech, but "inviolate" is the word used in 6068(e). The comment then says the rule should specifically say that the misappropriation of funds violates the rule. I suppose 1.15(e) could say: A lawyer is subject to professional discipline for removing funds from a client trust account except as permitted by this Rule – but I'm not certain that simple declarative sentence would get to things like the consequences of taking funds out before the deposited check clears. If we have, say, 500 things to discuss at the next meeting, I would put this at about number 498.
4. I disagree with the criticism of paragraph (f) and would make no change.
5. I have two thoughts about paragraph (k)(6). First, I wonder why we need to say "pursuant to the rules of procedure, etc." Doesn't it go without saying that a lawyer does not need to comply with an invalid order? Also, Ellen's reply to Jerry says that only the State Bar Court has the authority to order an audit of a lawyer's trust account, but I would think that only describes current procedure. In order to have a rule that doesn't need to be modified if procedures change, why not say "... comply with a court order for an audit of such records"? The same paragraph recommends the addition of "authorized" to paragraph (k)(7). I would not do so as "other person" is the phrase used throughout the rule to refer to a person who is not a client but for whom a lawyer holds entrusted funds or property.
6. The reference to compliance with the requirements of the other jurisdiction seems necessary in (l)(1) but not in (l)(2) or (3), so I'm fine with what we have done on that. I'm not able to see any conflict with Rule 8.5. But I have a new question of my own – why does paragraph (l)(2) exclude matters in California. As I read that subparagraph, if the NYC office of a national law firm is retained to represent a NYC client to acquire a corporation headquartered in California, the law firm would have to comply with our Rule in handling any funds that are placed in its trust account, or that should have been under our rule (and even if the law firm doesn't have a CA office). Is that right?
7. No comment is needed.

June 21, 2010 McCurdy E-mail to Peck, cc Chair, Vice-Chairs & Staff:

Ellen,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

**RRC – Rule 1.15 [4-100]
E-mails, etc. – Revised (6/21/2010)**

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 2-400 [8-4-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 4-100 [1-15] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 5-210 [3-7] - Public Comment Chart - By Commenter - XDFT1 (06-21-10)-LC.doc
RRC - 5-220 [3-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**Rule 1.15 Safekeeping Property: Handling Funds
and Property of Clients and Other Persons.
[Sorted by Commenter]**

TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.
2	Office of Chief Trial Counsel	M	Yes	1.15(d)	<p>While OCTC supports some of the Commission's additions or changes to the Model Rules and there is much merit to the Commission's explanation that costs are covered by the rule, OCTC disagrees with subparagraph (d) of this rule with allows, but does not require, attorneys to place advanced fees in the trust account. We believe this creates confusion and a lack of consistency. Either every lawyer should be placing advanced fees in the Client Trust Account ("CTA") or no lawyer should be placing advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will protect clients. At least one state appellate court has found that the Current Rule requires attorneys to place advanced fees into the CTA. (See <i>T & R Foods, Inc v. Rose.</i>) Further, the Model Rules and most other jurisdictions require attorneys to place advanced fees in the trust account.</p> <p>Comment [10] If the change requested above is adopted, the first sentence of Comment [10] should be</p>	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.15 Safekeeping Property: Handling Funds
and Property of Clients and Other Persons.
[Sorted by Commenter]**

TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>stricken.</p> <p>1.15(d), (g), (h) & (j) OCTC finds very confusing and inconsistent the proposed rules as to when disputed funds need to be placed in the client trust account. (See Proposed Rules 1.15(d), (g), (h), and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments [12] – [14].</p> <p>1.15(e) OCTC suggests that the term “inviolate” in Proposed Rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them. OCTC would also suggest that the rule specifically provide that the misappropriation of funds violates this rule.</p> <p>1.15(f) OCTC finds Proposed Rule 1.15(f) confusing and inconsistent. OCTC sees no compelling reason to deviate from the ABA Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the ABA Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule.</p>	

**Rule 1.15 Safekeeping Property: Handling Funds
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TOTAL = 3 Agree = 1
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Modify = 1
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.15(k)(6)	OCTC is concerned that subparagraph (k)(6) does not provide for the Supreme Court or other courts to issue an order for an audit. The rule should not determine jurisdiction or send a message that attorneys can violate a court order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See <i>Brotsky v. State Bar</i> (1962) 57 Cal.2d 287, 301; <i>In re Rose</i> (2000) 22 Cal.4th 430, 439; <i>Obrien v. Jones</i> (2000) 23 Cal.4th 40, 48. See also <i>In re Accusation of Walker</i> (1948) 32 Cal.2d 488, 490.)	
				1.15(k)(7)	OCTC also believes that subparagraph (k)(7) should add the word "authorized" to other person to clarify that only authorized persons can request undisputed funds	
				1.15(l)	OCTC is concerned that the language of subparagraph (l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is concerned that rule 1.15(l)(2) and (3) do not state, as rule 1.15(l)(1) does, that if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law	

**Rule 1.15 Safekeeping Property: Handling Funds
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[Sorted by Commenter]**

TOTAL = 3 Agree = 1
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NI =

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					<p>of the controlling jurisdiction. OCTC also is concerned how this paragraph is impacted by the Choice of Law Rule (Proposed Rule 8.5).</p> <p>OCTC supports subparagraph (l)(4).</p> <p>There are too many Comments and some of them appear to belong in the Proposed Rule.</p>	
3	Richard Zitrin (for group of law professors)	D	Yes		<p>The Commission has developed an extraordinarily detailed and complicated trust account rule. We commend the Commission for the time and energy involved in fashioning such a detailed series of requirements.</p> <p>However, we remain quite concerned that details of this extraordinary nature read more like a handbook than a disciplinary rule. While we have stated that we believe the CRPC must provide guidance as well as simple rules of discipline, we are concerned as to whether the trust account rule may be so complicated as to pose traps for both unwary <i>and wary</i> practitioners.</p> <p>We note that the proposed CRPC rule runs 30 paragraphs, while the ABA rule is five paragraphs long. We believe more work needs to be done on this rule in order to provide practitioners with clear guidance and sufficient simplicity to enable California lawyers to comply with reasonable</p>	

**Rule 1.15 Safekeeping Property: Handling Funds
and Property of Clients and Other Persons.
[Sorted by Commenter]**

TOTAL = 3 Agree = 1
Disagree = 1
Modify = 1
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					requirements without getting lost in the interstices of complex linguistics. The Board should return this rule to the Commission with appropriate instructions.	

Rule 1.15: Handling Funds and Property of Clients and Other Persons
(Commission's Proposed Rule – Clean Version)

- (a) Duty to deposit entrusted funds in trust account. A lawyer shall deposit all funds that the lawyer receives or holds for the benefit of a client or other person in connection with the performance of a legal service or representation by the lawyer, including an advance for costs and expenses, in one or more trust accounts in accordance with this Rule.
- (b) Approved depositories for trust accounts. Except as provided in paragraph (l), or as expressly ordered by a tribunal, all trust accounts under this Rule shall be in depositories approved by the California Supreme Court in the State of California. All IOLTA trust accounts as defined in Business and Professions Code section 6211 shall be in depositories that are in compliance with the requirements of Business and Professions Code section 6212.
- (c) Trust account designation. A lawyer shall designate each trust account as "Client Trust Account" or other identifiable fiduciary title.
- (d) Advances for fees; deposit and accounting. A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account:
- (1) subject to Rule 1.6 and Business and Professions Code section 6068(e), the lawyer must account to the client or other person who advanced the fees; and
 - (2) if a client or other person disputes a lawyer's entitlement to a fee, any disputed portion of an advance for fees not yet fixed must be deposited in a trust account.
- (e) Duties concerning maintenance and use of trust funds. A lawyer shall maintain inviolate all funds on deposit in a trust account and all property entrusted to the lawyer for the benefit of a client or other person until distributed in accordance with this Rule.
- (f) Commingling of lawyer's funds and trust funds prohibited; exceptions. Funds belonging to a lawyer or law firm shall not be commingled with funds held in a trust account established under this Rule except:
- (1) funds reasonably sufficient to pay bank charges;
 - (2) deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;
 - (3) the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;
 - (4) funds in which the lawyer claims an interest but which are disputed by the client or other person; or
 - (5) funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.
- (g) Duties when lawyer's entitlement to funds or property becomes fixed or the lawyer's entitlement is disputed. In the case of property, or funds held in a trust account, that belong in part to a client or other person and in part to the lawyer, the lawyer shall withdraw or distribute the

portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that:

- (1) the client or other person may still dispute that the lawyer is entitled to the funds or property;
 - (2) when the right of a lawyer to receive a portion of entrusted funds or property is disputed by the client or other person, the lawyer shall distribute the undisputed portion in accordance with paragraph (k)(7), but shall not distribute the disputed portion until the dispute is finally resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order;
 - (3) a lawyer shall take reasonable steps promptly to resolve any dispute regarding entrusted funds or property in the circumstances of paragraph (g)(2); and
 - (4) if the client or other person disputes the lawyer's interest in entrusted funds or property after the lawyer's interest has become fixed and the lawyer has withdrawn the fixed portion, the lawyer shall have no duty to redeposit the disputed portion in a trust account.
- (h) Duties when a client or other person disputes the other's entitlement to funds or property. When the right of a client or other person to receive a portion of entrusted funds or property is disputed by a client or other person, the lawyer shall not distribute the disputed portion of entrusted funds or property until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court

order, except that the lawyer shall make any distribution required by paragraph (k)(7).

- (i) Duties when entitlement to funds or property is disputed by third party. When the right of a client or other person to receive a portion of entrusted funds or property (1) is disputed by a third party that has a security or ownership interest in the entrusted funds or property or (2) is subject to a court order, the lawyer shall not distribute the disputed portion until the dispute is resolved, the lawyer interpleads the funds or property, or the distribution is authorized by law or court order. Nevertheless the lawyer shall distribute any undisputed entrusted funds or property, as required by paragraph (k)(7).
- (j) Credit card, debit, or other electronically transferred payments. A lawyer may establish a relationship with a merchant bank or electronic payment service so that a client or other person may use credit card, debit, or other electronically transferred payments to pay an advance for fees or costs directly into a trust account, provided that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that is not a trust account.
- (k) Management, recordkeeping and accounting for funds and property held in trust. A lawyer shall:
 - (1) promptly notify a client or other person of the receipt of funds, securities, or other property in which the client or other person claims or has an interest and notify the client or other person of the amount of such funds or the identity or quantity of such property;

- (2) identify and label securities and property of a client or other person promptly upon receipt, place them in a safe deposit box or other place of safekeeping as soon as practicable, segregate any securities or property from the lawyer's own securities or property of the same character, and notify the client or other person of the location of the property;
- (3) maintain complete records of all funds and property of a client or other person coming into the possession of the lawyer;
- (4) account to the client or other person for whom the lawyer holds funds or property. An accounting shall include, but is not limited to: (i) a statement of all funds and property received by the lawyer as of the date of the accounting, the source, amount of funds or description of property, and date received; (ii) a statement of all distributions of such funds and property, the date of distribution, the amount of funds or description of property distributed, the payee or distributee, and any trust account check number; and (iii) any balance remaining in the possession of the lawyer;
- (5) preserve records of all entrusted funds or property for a period of no less than five years after final appropriate distribution of such funds or property;
- (6) comply with any order for an audit of such records issued by the State Bar Court pursuant to the Rules of Procedure of the State Bar; and

- (7) promptly distribute, as requested by a client or other person, any undisputed funds or property in the possession of the lawyer that the client or other person is entitled to receive.

(l) Scope and Application of Rule. This Rule does not apply to the following:

- (1) A member of the State Bar of California residing and practicing law in a state other than California who (i) receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California, and (ii) handles the funds or property in accordance with the law of the controlling jurisdiction. See Rule 8.5(b).
- (2) Funds or property entrusted to a multi-jurisdictional law firm in locations outside of California by clients domiciled outside of California regarding disputes or matters arising or being litigated outside of California, even though the firm maintains an office in California.
- (3) Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding all matters involving a client or other person domiciled outside of California in which no other party to the matter, residing in California, claims an interest.
- (4) At the request of the State Bar of California disciplinary agency, a member of the State Bar of California who is subject to subparagraphs (l)(1) and (2) shall provide information respecting the lawyer's or law firm's non-California bank or financial institution account holding client or third party funds,

including, but not limited to, requested bank or financial institution records.

- (m) Board of Governors' Standards. The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers in accordance with paragraph (k)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

Definitions

- [1] As used in this Rule, "property" means (a) a tangible or intangible asset, other than funds, in which a client or other person claims any ownership interest or right of possession or enjoyment. Property does not include a client's file except for anything in it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or trust). Regarding the client's file, see Rule 1.16(e). All references in this Rule to "a client or other person" mean a client or other person for whose benefit the lawyer holds funds or property.
- [2] As used in this Rule "in connection with the performance of a legal service or representation" means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298].) Although lawyers who provide fiduciary services that are not related to

the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the latter fiduciary accounts are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. See, e.g., Business and Professions Code section 6106.

- [3] As used in this Rule "client" means a prospective, current, or former client for whom not all legal services have been completed, or as to whom not all funds or property have been distributed in accordance with this Rule.
- [4] As used in this Rule "entrusted funds" means funds that have been put into the care of a lawyer, by or on behalf of a client or other person in connection with the performance of a legal service or representation, that are held for the benefit of the client or other person, regardless of whether the funds are deposited or held in a trust account. Entrusted funds do not include (i) an advance for fees unless there is an agreement between the lawyer and the client or other person that the advance for fees will be held in trust; (ii) funds belonging wholly to a lawyer or law firm; (iii) payments for undisputed past-due fees; or (iv) undisputed reimbursement by a client or other person for costs advanced by a lawyer or law firm.
- [5] As used in this Rule, "advance for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf.

- [6] As used in this Rule, “bank charges” include any administrative or service charges charged to a trust account by an approved depository for trust accounts but does not include merchant account charges, chargebacks, or offsets charged in connection with a merchant account that is attached to a trust account.

Application of Rule

- [7] Funds do not take on a fiduciary status merely because they are deposited into a trust account. A lawyer’s misuse of a client trust account can result in discipline. *In the Matter of McKiernan* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 (deposit of non-client business operating funds in trust account was misconduct.)

Paragraph (a) – Application to true retainer fees

- [8] Because a true retainer fee, as defined in Rule 1.5(f), is earned on receipt and so is not held for the benefit of the client, a lawyer may not deposit it in a client trust account. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].)
- [9] If any part of a true retainer fee is paid for or applied to fees for the performance of legal services, the entire amount loses its character as a true retainer fee and is converted to an advance for fees. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4 [154 Cal.Rptr. 752]; *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.) When this occurs, the lawyer must comply with paragraphs (d) and (k)(4) with respect to the entire fee. See also Comment [10].

Paragraph (d) – Advances for fees; accounting for advances for fees

- [10] Although a lawyer has no duty to deposit an advance for fees in a trust account, the lawyer still has a duty under paragraph (d)(1) to account for all funds received as an advance for fees. In preparing an accounting as required under paragraph (d), a lawyer may follow the standards set forth in Business and Professions Code section 6148(b). (*In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 756–758.)

Paragraph (e) – Duty to hold funds inviolate

- [11] Compliance with paragraphs (e) and (k)(4) requires that all withdrawals and disbursements from a trust account must be made in a manner that permits the recipient or payee of the withdrawal to be identified. Paragraphs (e) and (k)(4) are not intended to prohibit electronic transfers or to preclude a means of withdrawal that might be developed in the future, provided that the recipient of the payment is identified. When payment is made by check, the check should be payable to a specific person or entity.

Paragraphs (g) – (i) – Disputed fees

- [12] Paragraph (g)(2) of this Rule applies even when the lawyer claims to have a valid lien on trust funds for the payment for services, costs and expenses.
- [13] A lawyer may not withhold the undisputed portion of a client’s or other person’s funds because of a fee dispute. The undisputed amount must be paid promptly to the owner upon demand. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 240–241 [266 Cal.Rptr. 632].)

- [14] A lawyer may not unilaterally withdraw disputed fees from a trust account. However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead the disputed funds or property.

Paragraph (k) – Duties to maintain records and account for receipt of trust funds or property

- [15] A lawyer who receives client funds in which another person is known to have an interest (e.g., a medical provider lienholder), must also notify that person of the receipt. (*In the Matter of Respondent P* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632) Certain statutory liens may have statutory notice requirements applicable to lawyers. See, e.g., Welfare and Institutions Code section 14124.79.
- [16] With respect to the timing and frequency of a lawyer's accounting under paragraph (k)(4), see Business and Professions Code section 6091.

Other Guidance

- [17] Trust account practice assistance. For guidance concerning the management and administration of trust accounts under this Rule, see State Bar of California publication "Handbook on Trust Accounting for California Attorneys" and the "California Compendium on Professional Responsibility" Index.