

Lee, Mimi

From: Marlaud, Angela
Sent: Tuesday, November 24, 2009 11:22 AM
To: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwvapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: FW: Final RRC Agenda Submission for Agenda Item III.C., Rule 1.15
Attachments: RRC - 4-100 [1-15] - Dashboard - ADOPT - DFT2.1 (11-23-09)ERP-KEM.doc; RRC - 4-100 [1-15] - Public Comment Chart - By Commenter - DFT2.1 (11-23-09)RD-ERP.doc; RRC - 4-100 [1-15] - Rule - DFT 16.1 (11-23-09) - Cf. to PCD [15.3].doc; Rule 1.15 Comments Combined (11-09-09).pdf; 1.15 State Variations.doc; RRC - 4-100 1-15 - Compare - Introduction - DFT5 - RD (06-11-09).doc

-----Original Message-----

From: Ellen R. Peck [mailto:pecklaw@prodigy.net]
Sent: Tuesday, November 24, 2009 11:19 AM
To: Marlaud, Angela
Cc: Robert Kehr (E-mail); Jerome Sapiro Jr. (E-mail); 'Kevin Mohr'; 'Harry Sondheim'; Mark L. Tuft (E-mail); Mark Tuft; Paul W. Vapnek (E-mail); Difuntorum, Randall; McCurdy, Lauren
Subject: Final RRC Agenda Submission for Agenda Item III.C., Rule 1.15

Angela:

Please use this e-mail as the cover memo for this Agenda Item.

I've attached the following documents for the consideration of the Commission:

1. Dashboard, Draft 16.1 (11/23/09);
2. RRC - 4-100 1-15 - Compare - Introduction - DFT5 - RD (06-11-09);
3. RRC - 4-100 [1-15] - Public Comment Chart - By Commenter - DFT2.1 (11-23-09)RD-ERP;
4. RRC - 4-100 [1-15] - Rule - DFT 16.1 (11-23-09) - Cf. to PCD [15.3]
5. Rule 1.15 Comments Combined
6. 1.15 State Variations

*I have not attached the comparison charts comparing the proposed rule and comments to the ABA. I have not made changes to those charts since the Commission has not reviewed the post comment proposed changes.

Moreover, the charts would be useless for the Commission's work because we have deviated so far from the Model Rule. *

A few notes (we've highlighted any changes that are being suggested):

1. The public comment chart has been revised to add three commenters.

The right hand column contains the drafting team's recommendations for comment, couched as if they were the Commission. The Commission may determine to change any and all of this language it has been proposed to save time after the meeting.

2. Draft 16 (11/16/09), redline. This draft contains the drafting team's proposed recommendations for changes to the rule, following public comment. Footnotes identify majority and minority positions.

3. Dashboard: This has been listed as moderately controversial because LACBA and OCTC both prefer to go with the Model Rule with some revisions.

4. Introduction: The introduction has not been changed except to make a date change and non-substantive editing. The introduction is accurate even assuming the Commission's adoption of the proposed post-public comment changes.

5. The Rule Chart and Comment Charts have not been changed, pursuant to instructions. Changes will be made after the meeting. I have not included these as indicated above.

6. I HAVE NOT INCLUDED A CLEAN DRAFT OF DRAFT 16 BECAUSE I DO NOT THINK IT WOULD BE USEFUL TO THE COMMISSION'S DELIBERATIONS. THE COMMISSION NEEDS TO SEE THE PROPOSED CHANGES FROM THE PUBLIC COMMENT DRAFT. A CLEAN VERSION WILL BE PREPARED ONCE THE COMMISSION HAS DETERMINED WHAT IT WANTS TO DO.

Please let me know if you have any questions. Thanks, Ellen

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Proposed Rule 1.15 [4-100]

“Handling Funds and Property of Clients and Other Persons”

(Draft #16.1, 11/23/09)

Summary: Proposed Rule 1.15 is a complete rewrite of the general language of ABA Model Rule 1.15 to provide detailed standards for client protection and guidance of lawyers. Parts of the proposal also reject some ABA policies because they are inconsistent with statutes (Business & Professions Code §§ 6091.1 and 6210-6228), violate access to justice concepts, and would impair disciplinary enforcement.

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input checked="" type="checkbox"/> ABA Model Rule substantially rejected	<input checked="" type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

RPC 4-100

Statute

Case law

State Rule(s) Variations (See provided excerpt of selected state variations.)

Fifteen states have created their own rule or substantially amended ABA Model Rule 1.15; twelve states have made substantive amendments to the Model Rule. (See Introduction, at par. 6.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.15* Safekeeping Property: Handling Funds and Property of Clients and Other Persons

November 2009

(Draft rule to be considered after public comment.)

INTRODUCTION:

Proposed Rule 1.15 is a complete rewrite of the general language of the ABA Model Rule to provide detailed standards for client protection and guidance of lawyers. Parts of the proposal also reject some ABA policies because they are inconsistent with statutes (Business & Professions Code §§ 6091.1 and 6210-6228), violate access to justice concepts, and would impair disciplinary enforcement.

1. **The proposal satisfies the need for greater and specific regulation of lawyer conduct in handling entrusted funds and property:** ABA Model Rule 1.15 states general principles regarding lawyer handling of other people's funds and property, often with reference to principles of other fiduciaries or accountants that do not apply in this context. California experimented with such general language from 1927-1974 with former Rule 9, California Rules of Professional Conduct. Because lawyer mismanagement of trust funds and property continued to be a substantial percentage of disciplinary investigations and prosecution, Rule 4-100, adopted in 1975 and 1989, rejected continuation of a general approach and added other more specific regulations and standards for record keeping.

2. Although the Mandatory Continuing Legal Education requirement, the State Bar's publication of the *Handbook on Client Trust Accounting for California Attorneys* and the State Bar Ethics Hotline program have assisted in preventing mismanagement of trust funds and property, handling of trust funds and property continues to be a significant disciplinary issue.

* Proposed Rule, Draft 16 (11/23/09).

3. According to the State Bar of California Annual Discipline Report for 2007, 12% of all disciplinary complaints arose from allegations of mishandling of funds, and banks made 2617 reports pursuant to Business and Professions Code section 6091.1 of instances of insufficient funds presented against an attorney's client trust account, regardless of whether the instrument was honored.

4. Moreover, when the State Bar Office of Chief Trial Counsel processing of disciplinary complaints was reduced to almost nothing from June 1998 until the system commenced significant operations in early 1999, due to absence of funding and during its 1999 resumption of disciplinary enforcement, the trust account mismanagement spiked dramatically:

(a) The highest number of insufficient funded trust account checks was reported: 4260 in 1998 and 4417 in 1999 (more than 500 reports in the prior and succeeding years. (2000 State Bar of California Annual Discipline Report, at p. 9.)

(b) Moreover, complaints about handling entrusted funds rose to 15% of all disciplinary complaints in 1999 from an average of 10-12% of all disciplinary complaints in prior and succeeding years. (2000 State Bar of California Annual Discipline Report, at p. 11.)

5. These statistics suggest that disciplinary enforcement acts as a deterrent. Therefore, more detailed regulation than provided by the Model Rule is necessary to serve as guidance to lawyers, to protect the public from improper handling of trust funds and property and to increase public confidence in the legal profession's abilities in safekeeping property.

6. A number of other jurisdictions have reached the conclusion that more detailed regulation is needed than is provided by ABA Model Rule 1.15.

(a) The following jurisdictions have either created their own rule or have substantially revised the ABA Model Rule with amendments and additions: Delaware, District of Columbia, Florida, Massachusetts, Minnesota, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Virginia, Washington, Wisconsin, and Wyoming.

(b) Many other states have made some substantive amendments to ABA Model Rule 1.15 (Alabama, Connecticut, Indiana, Iowa, Louisiana, Maryland, Mississippi, Montana, Nevada, North Dakota, Oregon, and South Carolina.) Gillers, Simon & Perlman (2009) *Regulation of Lawyers: Statutes and Standards*, ABA Model Rules of Professional Conduct, Rule 1.15, Selected State Variations, pp. 189-192; ABA Center for Professional Responsibility, Charts Comparing Professional Conduct Rules at:

<http://www.abanet.org/cpr/jclr/charts.html>

Proposed Rule 1.15:

7. As is true with the corresponding Rules adopted by several other jurisdictions, proposed Rule 1.15 elaborates in some detail on, and gives more specific guidance than, the ABA statements of general principles about how to handle funds and property of others that have been entrusted to the lawyer. The proposed Rule does so by adding sufficient detail designed to instruct the lawyer as to the minimum standards at every phase of handling the funds and property.
8. Proposed Rule 1.15 also expands the scope of ABA Model Rule 1.15 by including:
 - (a) standards concerning the handling of electronic financial transactions;
 - (b) requirements with respect disciplinary audits; and
 - (c) identification of alternatives to keeping disputed property in trust (when a third party and a client dispute distribution of funds or property and do not want the lawyer to maintain the funds) that are available to the lawyer, such as by the use of interpleader.

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

TOTAL =9 Agree = 2
Disagree = _2
Modify = 5
NI = ___

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Bach, James A.	A			Whole-heartedly endorse and recommend the proposed rule that would permit accepting advance fees outside of the trust account, and requiring deposit into the trust account only if those fees are disputed.	No comment necessary.
2	COPRAC	M			<p>Among the unanswered questions before this proposed rule was the propriety of transferring disputed trust funds to court by way of interpleader. We support the Commission's recommendation in favor of this dispute resolution device. We urge only that this provision, now in Comment [14], be included as part of the Rule itself.</p> <p>In addition, we subscribe to the importance of establishing definitions of key terms, and we in accord with the definitions developed by the Commission. We urge only that these definitions be incorporated into the Rule itself.</p> <p>Finally, we ask the Commission to clarify the status of the "standards" heretofore promulgated by the Board of Governors for purpose of the existing Rule 4-100. We recommend that the proposed Rule 1.15 call</p>	<p>Consistent with this recommendation, a majority of the Drafting Team recommends moving the concept of interpleader into the black letter rule. Paragraph (g)(2) has been changed accordingly.²</p> <p>Because of the length of this proposed Rule, the Commission recommends that definitions which apply to this particular rule only, should remain in the comments.</p> <p>The Commission agrees. For this reason, it has proposed the continued authority of the Board of Governors to adopt the standards. (See proposed Rule 1.15(m).)</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

² Ms. Peck and Mr. Sapiro recommend that the concept of interpleader be in the black letter rule; Mr. Kehr recommends that it remain in the comment and that the comment be clarified. See fn.

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					for the continued efficacy of those standards pending Board of Governors review to determine whether changes are in order once proposed Rule 1.15 is adopted.	<p>The Commission recommends that:</p> <p>(1) upon completion of a proposed Rule 1.15, that the Board of Governors authorize the appropriate committee or other entity to review and update the standards for review and adoption by the Board of Governors;</p> <p>(2) that the current standards remain fully applicable to proposed rule 1.15 as they are to current rule 4-100;</p> <p>(3) the current Standards be republished with any new effective rule as of the effective date of the new rules, unless the Supreme Court otherwise orders; and</p> <p>(4) the current Standards remain in effect unless and until the Board of Governors adopts new or revised standards.</p>
5	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M			<p>ABA Model Rule 1.15 is superior in form and function to proposed Rule 1.15.</p> <p>Although no one argues with the Commission's observation that a strong rule may deter misconduct, proposed Rule 1.15 is not a strong disciplinary standard but, rather, an impossibly detailed trap for the unwary. This rule should be published as a guideline, as part of the State Bar's official publication on client trust accounts (which the state bar currently publishes, and which it could easily place online or email to each of its active</p>	<p>The Commission has adopted all of the concepts in Model Rule 1.15, except the requirement to place advance fees in a trust account, as LACBA PREC has suggested.</p> <p>The Commission has concluded that ABA Model Rule 1.15, which does not even provide for the establishment of a trust account, does not provide adequate public protection and does not provide adequate guidance to lawyers concerning their fiduciary duties to clients and other persons or the</p>

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					<p>members), rather than as a disciplinary rule.</p> <p>A majority of our members agrees with the Commission that, based on longstanding and well understood California law, costs must be deposited into the client trust account, but advanced fees may or may not be. We have no objection to including a recommendation in the State Bar's publication, to the effect that advanced fees should be safeguarded against the possibility that, if the services are not completed, the lawyer will be ethically required to refund the unearned portion of the fees. However, it ought not to be a disciplinary offense if a California lawyer follows the traditional rule and does not deposit the advanced fee in the trust account, particularly where the services were fully performed and the fee fully earned.</p> <p>We recommend that ABA Model Rule 1.15 be adopted, except that the word "fees" be deleted from Model Rule subpart (c); or alternatively, that current Rule 4-100 be</p>	<p>handling, management, recordkeeping and accounting for entrusted funds and properties. As other states have done before California, the Commission has concluded that a recitation of these duties as they now exist in California is the best means of protecting clients and other persons from a breach and to notify lawyers of the minimum standards required of them.</p> <p>The Commission agrees with LACBA's position that advance fees are not required to be deposited in a client trust account. It disagrees that the proposed rule 1.15(d) should be omitted from the rule, but rather should be in a State Bar publication. If as LACBA asserts, this has been the law in California, the Commission believes that the proposed rule should reflect the law for the guidance of lawyers, the Courts, clients and the public.</p> <p>The Commission disagrees. Public protection and lawyer guidance require greater specificity and greater direction than afforded in Model Rule 1.15.</p>

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TOTAL =9 Agree = 2
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					retained as is, and simply renumbered as Rule 1.15.	
7	Medina, Michael	D		1.15(j)	<p>My office does bankruptcy filings. Federal rules required all cases be filed electronically, including fee payments. State bar rules require that court costs and fees be deposited in Attorney-Client trust accounts. Financial institutions will not issue debit cards or credit cards on IOLTA accounts, i.e.: Attorney-Client Trust Accounts.</p> <p>Therefore, the only way to service our clients is to transfer funds from Trust accounts to General Accounts and electronically submit fee payments. I can have the clients give me a waiver, but, I think, as to a non-waivable provision.</p> <p>I believe in the future most business will be conducted electronically. State Bar rules need to recognize this legitimate way of doing business. Moreover, Federal Courts are not going to change their procedures to accommodate individual state rules for attorneys.</p>	<p>The Commission agrees that electronic payments are the way of the future and that the rule must be flexible enough to provide for electronic deposits and payments. The Commission disagrees that the rule prohibits electronic payments or receipts or that there are not commercial means of both protecting a client trust account from intrusion and control by third party financial institutions which may result in loss of client funds and receiving and making payments for the benefit of a client.</p> <p>Assuming arguendo that no financial institution will issue a credit card or debit card on an attorney-client trust account, which is not our experience, there are still other means of making electronic payments (e.g., by making an electronic payment from the general account first and then reimbursing the general account from the trust account).</p> <p>Improving commercial means of making electronic payments by lawyers is outside of the scope of the Commission. The Commission urges the Board of Governors to refer this issue to the appropriate standing committee or request the assistance of an appropriate section for study, report and</p>

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						recommendations.
9	Office of Chief Trial Counsel ("OCTC"), State Bar	M			<p>1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent.</p> <p>For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.</p> <p>2. OCTC finds very confusing and inconsistent the proposed rule as to when</p>	<p>No comment.</p> <p>The Commission disagrees. The Commission has concluded that the 1.15 should not require advances for fees to be placed in a client trust account, as previously reported and as is the state of the law at the present time. The Commission has not received reports of confusion or complaints about lack of consistency concerning the current rule . Accordingly, the risk of confusion or perceived inconsistency is unlikely.</p> <p>The Commission disagrees with the alternative suggestion that no fees should be placed in a trust account. In appropriate circumstances, placing advances for fees in a client trust account provides greater client protection. The OCTC proposal contravenes current required deposits of advances for fees in a trust account even where the advances may have been initially held in a general account. (See <i>In the Matter of Fonte</i> (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757.)</p> <p>The Commission has clarified subparagraph (g), in</p>

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					<p>disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).)</p> <p>OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 - 14.</p> <p>3. 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.</p> <p>4. OCTC finds confusing and inconsistent proposed rule 1.15(f).</p> <p>OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.1 5(a) of the Model Rules be reinstated.</p>	<p>order to prevent confusion.</p> <p>The Commission disagrees that it should not deviate from ABA Model Rule 1.15 for the reasons stated in its initial report.</p> <p>The Commission disagrees that the word "inviolate" should be removed. The duty to maintain inviolate client and third party funds and property has been a part of the California trust account rule since 1927. "Maintaining" funds and property in trust without the word "inviolate" may be ambiguous (implying a duty as to the depository only). The word "inviolate" clarifies the ambiguity, and has been interpreted to mean that the amount in the account is not permitted to dip below the amount to be held. The danger in removing "inviolate" is that some may interpret a change in policy.</p> <p>The Commission disagrees.</p> <p>The Commission reordered ABA Model Rule 1.15 and placed duties with respect to property primarily in proposed subparagraph (k)(2). The Commission agrees that subparagraph (k)(2) should be clarified to include the concept of the first sentence of Model Rule 1.15(a).</p>

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					<p>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 prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.</p> <p>5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that</p>	<p>The Commission shares the concern that there should be no diminution of the fundamental prohibition against commingling. The Commission disagrees that listing the five recognized exceptions to the prohibition in the rule undermines the commingling prohibition. The exceptions set forth in (f)(1) and (4) and (5) have been part of California's rule since 1975, although (f)(4) and (5) have been amplified with the addition of "other person" to the rule. Omitting these traditional exceptions would suggest that there is a change in policy and that they are no longer exceptions .</p> <p>The exceptions set forth in (f)(1)and (2) are important public protection issues which prioritize prompt restitution to consumers when loss occurs. This policy was set by the California Supreme Court in <i>Guzzetta v. State Bar</i> (1987) 43 Cal.3d 962 and which the Commission has concluded is good policy for consumer protection..</p> <p>The Commission disagrees that subparagraph (k)(6) was intended to or does limit the authority or jurisdiction of Supreme Court or other court to issue an order for an audit. Proposed subparagraph (k)(6) is limited to lawyer discipline for failing to comply with an audit ordered by the State Bar Court pursuant to the Rules of Procedure, since the State Bar Court is not otherwise empowered through sanction, contempt or other authority to enforce its</p>

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					<p>attorneys can violate a court's 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.4'h 430, 439; <i>Obrien v. Jones</i> (2000) 23 Cal.4'h 40, 48. See also <i>In re Accusation a/Walker</i> (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.</p> <p>6. OCTC is concerned that the language of rule 1.15(1) 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 also concerned that subparagraphs (2) and (3) do not state, as subparagraph (l) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able to obtain copies of those out of state</p>	<p>orders for audit.</p> <p>The Commission did not believe that it should provide a separate rule requiring a lawyer to comply with a court order, since Business and Professions Code section 6103 already covers the duty and provides for suspension or disbarment for failure to comply with that duty. Because of the case law that OCTC cites, because (k)(6) has been part of the rules since at least 1983, and because Business and Professions Code section 6087 provides that the State Bar's promulgation of Rules of Professional Conduct does not limit or alter the powers of the Supreme Court, the Commission did not believe that any explanatory comment was needed.</p> <p>The Commission has clarified this in new comment [16a]</p> <p>OCTC's desire to obtain jurisdiction to subpoena financial records from California lawyers who are outside of the State Bar's subpoena power outside of California cannot be cured by adoption or rejection of proposed Rule 1.15. Perhaps it may be approached in a different forum (e.g., the Legislature or the California Supreme Court, through a California Rule of Court).</p>

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[Sorted by Commenter]**

TOTAL =9 Agree = 2
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					records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)	The Commission continues to monitor conformance between this rule and proposed rule 8.5.
4	Orange County Bar Association	M			The OCBA recommends for consistency purposes that the definition appear in the body of the Proposed Rule, rather than in the Comments. The OCBA also recommends that a definition of the term "fixed," as used in subsection (g), be included in order to provide useful guidance to the membership with regard to their duties under the Proposed Rule.	Because of the length of this proposed Rule, the Commission recommends that definitions which apply to this particular rule only, should remain in the comments. The Commission agrees that a definition of "fixed" would be useful. The Commission has nevertheless concluded that there are too many facts and circumstances in individual cases which may affect ³ when a fee is fixed to provide any useful definition.
3	San Diego County Bar Association Legal Ethics Committee	A			Approve the rule in its entirety.	No further comment.
6	Santa Clara County Bar Association	M			The SCCBA believes that the proposed rule does not adequately account for the differences and distinctions between advance payment of fees; true retainers and flat fees. The proposed rule speaks to advanced	Consistent with this recommendation, comments [5] has been clarified. The Commission disagrees that comments [8], [9] and [10] should be clarified further. The definitions

³ Ms. Peck and Mr. Kehr recommend that no further attempts at defining "fixed" be pursued. Mr. Sapiro believes we should discuss whether we should attempt to define it.

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

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Modify = 5
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>payment of fees and true retainers but does not explain the treatment of flat fees. In fact, the definition and discussion of advanced fees and true retainers in Comments [5], [8], [9] and [10] should be clearer in defining these three categories of fees.</p> <p>For example, in Comment [5], it uses the word “retainer” in defining an “advance for fees.” We recommend that the word “retainer” be deleted so that the practitioner does not confuse it with a “true retainer.”</p> <p>In addition, a flat fee needs to be defined and distinguished from a true retainer. The definition and discussion of a “true retainer” does not make clear that it is not the same as a flat fee, a common mistake made by many practitioners.</p>	<p>of a true retainer is set forth in 1.5(f) as cross-referenced here. The comments distinguish between a true retainer and an advance fee. Further clarification can be developed in the State Bar Trust Account Manual.⁴</p> <p>The Commission agrees and has amended comment [5].</p> <p>The Commission disagrees. A discussion of the distinction between a flat fee and a true retainer, if one is needed, should be in rule 1.5 rather than this rule. Alternatively, rather than lengthen the rule further, the distinction can be made in the State Bar Trust Account Manual.</p>
8	Smith, Paul W.	D		1.15(j)	I believe subparagraph (j) regarding the method of accepting credit card payments should be modified. As proposed it ignore the economic realities of accepting payments by credit card, at least as to small firms or sole practitioners.	The Commission agrees that commercial resources catering to the special needs of lawyers serving fiduciaries are limited. Accordingly, it has urged the Board of Governors to refer this issue to the appropriate standing committee or section for further study, report and recommendations.

⁴ Mr. Kehr and Ms. Peck do not recommend further clarification of comments [8] – [10]. Mr. Sapiro recommends that we discuss whether the comments should be clarified. He has observed that if the comments are not clear to the Santa Clara County Bar Association commenters, it is likely that they are not likely to be clear to the membership.

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

TOTAL =9 **Agree = 2**
Disagree = _2
Modify = 5
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>The service providers I have used have two charges. A monthly service fee and a percentage of the transaction. For a large majority of us that only have a few trust account transactions a month it is not justifiable to be paying \$30-\$45 per month just for the privilege of accepting cards which is duplicated if we accept them in the general account. Also, I understand that very few providers will deposit the funds in one account and take the charges out of another one. This rule ignores that reality. It would be just as safe and much more practical to allow the initial funds to be credited to the general account and when cleared, moved to the trust account. What is the "safety" difference from having a physical check in my hand which I manually deposit in the trust account verses moving funds electronically or writing a check from the general to the trust account? Many of us will continue to refuse to accept trust fund deposits because of this. It is form over substance and ignores the realities of business. Please reconsider.</p>	<p>The Commission disagrees with the solution recommended by the commenter. After careful and serious study, the Commission concluded that providing a short window of time within which a lawyer may permit an advance credit card cost payment to be deposited into a non-client trust account for immediate transfer to a client trust account was not good public protection policy. Any period of commingling of a lawyer's funds with those of the client creates a risk of loss of client funds to a lawyer's third party creditors, asset freezing or institutional closure without federal insurance (since a general account need not be in a FDIC insured bank). These dangers plus the availability of other commercial means of handling advance costs payments outweigh creating a special exception to the commingling policy in the rule.</p>

- 1
2 (3) the lawyer’s or law firm’s funds deposited to restore entrusted funds that
3 have been improperly withdrawn;
4
5 (4) funds in which the lawyer claims an interest but which are disputed by the
6 client or other person; or
7
8 (5) funds belonging in part to a client or other person and in part, presently or
9 potentially, to the lawyer, but which are claimed by a third party.
10
11 (g) Duties when lawyer’s entitlement to funds or property¹ becomes fixed or the
12 lawyer’s entitlement is disputed. In the case of funds held in a trust account or
13 property that belong in part to a client or other person and in part to ~~a~~ the²
14 lawyer, the lawyer shall withdraw or distribute the portion belonging to the lawyer
15 at the earliest reasonable time after the lawyer’s interest in that portion becomes
16 fixed, provided that:
17
18 (1) the client or other person may still dispute that the lawyer has earned the
19 ~~funds~~ compensation;
20
21 (2) when the right of a lawyer to receive a portion of entrusted funds or
22 property is disputed by the client or other person, the lawyer shall
23 distribute the undisputed portion in accordance with paragraph (k)(7), but
24 shall not distribute ~~withdraw~~ the disputed portion until ~~either~~ the dispute is
25 finally resolved, the lawyer interpleads the funds³ or property or the
26 ~~withdrawal~~ distribution is authorized by law or court order;
27
28 (3) a lawyer shall take reasonable steps promptly to resolve any dispute
29 regarding entrusted funds or property in the circumstances of paragraph
30 (g)(2); and
31
32 (4) if the client or other person disputes the lawyer’s interest in entrusted
33 funds or property after the lawyer’s interest has become fixed and the

¹ Upon review after public comment, the drafting team concluded that “property” had been left out of paragraphs (g)(1)-(3). These subparagraphs have been redrafted to discuss duties regarding property as well as funds.

² This is a clarifying change.

³ COPRAC approved of the Commission’s comment 14 which discusses the propriety of transferring disputed trust funds to court through interpleader. COPRAC urged the Commission to put this in the rule rather than the comments. Ms. Peck and Mr. Sapiro favor this recommendation. Mr. Kehr believes that the interpleader reference should remain in the comments, but would move comment [14] before comment [12] and would amend it to read:

Paragraph (g) does not permit a A lawyer to ~~may not unilaterally~~ withdraw disputed fees from a trust account unilaterally, except to ~~However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead the disputed funds or property in circumstances coming within paragraphs (h) or (i).~~

1 lawyer has withdrawn the fixed portion, the lawyer shall have no duty to
2 redeposit the disputed portion in a trust account.

3
4 (h) Duties when a client or other person disputes the other's entitlement to funds or
5 property. When the right of a client or other person to receive a portion of
6 entrusted funds or property is disputed by a client or other person, the lawyer
7 shall not distribute the disputed portion of entrusted funds or property until the
8 dispute is resolved, the lawyer interpleads the funds or property, –or the
9 distribution is authorized by law or court order, except that the lawyer shall make
10 any distribution required by paragraph (k)(7).

11
12 (i) Duties when entitlement to funds or property is disputed by third party. When the
13 right of a client or other person to receive a portion of entrusted funds or property
14 (1) is disputed by a third party that has a security or ownership interest in the
15 entrusted funds or property or (2) is subject to a court order, the lawyer shall not
16 distribute the disputed portion until the dispute is resolved, the lawyer interpleads
17 the funds or property, or unless authorized by law or court order. Nevertheless
18 the lawyer shall distribute any undisputed entrusted funds or property, as
19 required by paragraph (k)(7).

20
21 (j) Credit card, debit, or other electronically transferred payments. A lawyer may
22 establish a relationship with a merchant bank or electronic payment service so
23 that a client or other person may use credit card, debit, or other electronically
24 transferred payments to pay an advance for fees or costs directly into a trust
25 account, provided that the contract with the merchant bank or electronic payment
26 service requires that the lawyer's obligations for any charges, chargebacks and
27 offsets be paid from a source that is not a trust account.

28
29 (k) Management, recordkeeping and accounting for funds and property held in trust.
30 A lawyer shall:

31
32 (1) promptly notify a client or other person of the receipt of funds, securities,
33 or other properties in which the client or other person claims or has an
34 interest and notify the client or other person of the amount of such funds
35 or the identity or quantity of such property;

36
37 (2) identify and label securities and properties of a client or other person
38 promptly upon receipt, place them in a safe deposit box or other place of
39 safekeeping as soon as practicable, hold any securities or properties
40 separate from the lawyer's own property⁴, and notify the client or other
41 person of the location of the property;

42

⁴ Consistent with the recommendation of the State Bar's Office of Chief Trial Counsel, par. 4, this paragraph concerning duties regarding properties has been clarified to prohibit commingling of client's or other person's property with a lawyer's property. The phrase is based upon the same concept set forth in ABA Model Rule 1.15(a), sentence one.

RRC – Rule 1.15 [4-100]
Rule – Draft 16.1 (11/23/09) – COMPARED TO PCD [#15.3] (5/29/09)
December 11-12, 2009 Meeting; Agenda Item III.C.

- 1 (3) maintain complete records of all funds and property of a client or other
2 person coming into the possession of the lawyer;
3
4 (4) account to the client or other person for whom the lawyer holds funds or
5 property. An accounting shall include, but is not limited to: (i) a statement
6 of all funds and property received by the lawyer as of the date of the
7 accounting, the source, amount of funds or description of property, and
8 date received; (ii) a statement of all distributions of such funds and
9 property, the date of distribution, the amount of funds or description of
10 property distributed, the payee or distributee, and any trust account check
11 number; and (iii) any balance remaining in the possession of the lawyer;
12
13 (5) preserve records of all entrusted funds or property for a period of no less
14 than five years after final appropriate distribution of such funds or property;
15
16 (6) comply with any order for an audit of such records issued by the State Bar
17 Court pursuant to the Rules of Procedure of the State Bar; and
18
19 (7) promptly distribute, as requested by a client or other person, any
20 undisputed funds or property in the possession of the lawyer that the client
21 or other person is entitled to receive.

22
23 [(l) Scope and Application of Rule. This Rule does not apply to the following:

- 24
25 (1) A member of the State Bar of California residing and practicing law in a
26 state other than California who (i) receives funds or property from a
27 person who is not a resident of California, arising from or related to a legal
28 representation not in California, and (ii) handles the funds or property in
29 accordance with the law of the controlling jurisdiction. See [Rule 8.5(b)].
30
31 (2) Funds or property entrusted to a multi-jurisdictional law firm in locations
32 outside of California by clients domiciled outside of California regarding
33 disputes or matters arising or being litigated outside of California, even
34 though the firm maintains an office in California.
35
36 (3) Lawyers practicing under California Rules of Court 9.47 or 9.48, regarding
37 all matters involving a client or other person domiciled outside of California
38 in which no other party to the matter, residing in California, claims an
39 interest.]
40

41 (m) Board of Governors' Standards. The Board of Governors of the State Bar shall
42 have the authority to formulate and adopt standards as to what "records" shall be
43 maintained by lawyers in accordance with paragraph (k)(3). The standards
44 formulated and adopted by the Board, as from time to time amended, shall be
45 effective and binding on all lawyers.
46

1 **Comment**

2
3 *Definitions*

4
5 [1] As used in this Rule, “property” means (a) a tangible or intangible asset, other
6 than funds, in which a client or other person claims any ownership interest or right of
7 possession or enjoyment. Property does not include a client’s file except for anything in
8 it that has pecuniary value (e.g., a negotiable instrument) or intrinsic value (e.g., a will or
9 trust). Regarding the client’s file, see Rule 1.16(e). All references in this Rule to “a
10 client or other person” mean a client or other person for whose benefit the lawyer holds
11 funds or property.

12
13 [2] As used in this Rule “in connection with the performance of a legal service or
14 representation” means that there is a relationship between the actions of a lawyer in his
15 or her capacity as a lawyer and the receipt or holding of funds from a client or other
16 person. The provisions of this Rule are also applicable when a lawyer serves a client
17 both as a lawyer and as one who renders nonlegal services. (Kelly v. State Bar (1991)
18 53 Cal.3d 509, 517 [280 Cal.Rptr. 298].) Although lawyers who provide fiduciary
19 services that are not related to the performance of a legal service or representation may
20 be required to handle funds in a fiduciary manner (e.g., when serving as an executor,
21 escrow agent for parties to an escrow who are not clients, or as a trustee for a non-
22 client), this Rule does not govern those activities. Because the latter fiduciary accounts
23 are governed by other law, funds should be maintained in separate fiduciary accounts
24 and not in a trust account established under this Rule. However, the failure to
25 discharge fiduciary duties in relation to the provision of such services may result in
26 discipline for other violations. (See, e.g., Business and Professions Code section
27 6106.)

28
29 [3] As used in this Rule “client” means a prospective, current, or former client for
30 whom not all legal services have been completed, or as to whom not all funds or
31 property have been distributed in accordance with this Rule.

32
33 [4] As used in this Rule “entrusted funds” means funds that have been put into the
34 care of a lawyer, by or on behalf of a client or other person in connection with the
35 performance of a legal service or representation, that are held for the benefit of the
36 client or other person, regardless of whether the funds are deposited or held in a trust
37 account. Entrusted funds do not include (i) an advance for fees unless there is an
38 agreement between the lawyer and the client or other person that the advance for fees
39 will be held in trust; (ii) funds belonging wholly to a lawyer or law firm; (iii) payments for
40 undisputed past-due fees; or (iv) undisputed reimbursement by a client or other person
41 for costs advanced by a lawyer or law firm.

1 [5] As used in this Rule, “advance for fees” means a payment ~~or retainer~~ intended by
2 the client ~~to be funds paid in as an~~ advance payment⁵ for some or all of the services
3 that the lawyer is expected to perform on the client’s behalf.
4

5 [6] As used in this Rule, “bank charges” include any administrative or service
6 charges charged to a trust account by an approved depository for trust accounts but
7 does not include merchant account charges, chargebacks, or offsets charged in
8 connection with a merchant account that is attached to a trust account.
9

10 *Application of Rule*
11

12 [7] Funds do not take on a fiduciary status merely because they are deposited into a
13 trust account. A lawyer’s misuse of a client trust account can result in discipline. *In the*
14 *Matter of McKiernan* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 (deposit of non-
15 client business operating funds in trust account was misconduct.)
16

17 *Paragraph (a) – Application to true retainer fees*
18

19 [8] Because a true retainer fee, as defined in Rule 1.5(f), is earned on receipt and so
20 is not held for the benefit of the client, a lawyer may not deposit it in a client trust
21 account. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752].)
22

23 [9] If any part of a true retainer fee is paid for or applied to fees for the performance
24 of legal services, the entire amount loses its character as a true retainer fee and is
25 converted to an advance for fees. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164,
26 fn. 4 [154 Cal.Rptr. 752]; *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct.
27 Rptr. 752, 757.) When this occurs, the lawyer must comply with paragraphs (d) and
28 (k)(4) with respect to the entire fee. See also Comment [10].
29

30 *Paragraph (d) – Advances for fees; accounting for advances for fees*
31

32 [10] Although a lawyer has no duty to deposit an advance for fees in a trust account,
33 the lawyer still has a duty under paragraph (d)(1) to account for all funds received as an
34 advance for fees. In preparing an accounting as required under paragraph (d), a lawyer
35 may follow the standards set forth in Business and Professions Code section 6148(b).
36 (*In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 756–758.)
37

38 *Paragraph (e) – Duty to hold funds inviolate*
39

40 [11] Compliance with paragraphs (e) and (k)(4) requires that all withdrawals and
41 disbursements from a trust account must be made in a manner that permits the
42 recipient or payee of the withdrawal to be identified. Paragraphs (e) and (k)(4) are not

⁵ [These changes are made consistent with the recommendations of the Santa Clara County Bar Association that there is confusion between advance fees and true retainer. \(See Public Comment Chart, no. 6.\)](#)

1 intended to prohibit electronic transfers or to preclude a means of withdrawal that might
2 be developed in the future, provided that the recipient of the payment is identified.
3 When payment is made by check, the check should be payable to a specific person or
4 entity.

5
6 *Paragraphs (g) – (i) – Disputed fees*

7
8 [12] Paragraph (g)(2) of this Rule applies even when the lawyer claims to have a valid
9 lien on trust funds for the payment for services, costs and expenses.

10
11 [13] A lawyer may not withhold the undisputed portion of a client's or other person's
12 funds because of a fee dispute. The undisputed amount must be paid promptly to the
13 owner upon demand. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 240–241 [266
14 Cal.Rptr. 632].)

15
16 [14] A lawyer may not unilaterally withdraw disputed fees from a trust account.
17 However, in circumstances coming within paragraphs (h) or (i), a lawyer may interplead
18 the disputed funds or property.

19
20 *Paragraph (k) – Duties to maintain records and account for receipt of trust funds or*
21 *property*

22
23 [15] A lawyer who receives client funds in which an other person is known to have an
24 interest (e.g., a medical provider lienholder), must also notify that person of the receipt.
25 (*In the Matter of Respondent P* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632)
26 Certain statutory liens may have statutory notice requirements applicable to lawyers.
27 (See, e.g., Welfare and Institutions Code section 14124.79.)

28
29 [16] With respect to the timing and frequency of a lawyer's accounting under
30 paragraph (k)(4), see Business & Professions Code section 6091.

31
32 *Paragraph (l) – Scope and application of Rule.⁶*

33
34 *[16a]⁷ A lawyer who is not within the scope or application of subparagraph (l) should*
35 *comply with the appropriate rules of a controlling jurisdiction. (See Rule 8.5.)*

36
37 *Other Guidance*

38
39 [17] Trust account practice assistance. For guidance concerning the management
40 and administration of trust accounts under this Rule, see State Bar of California

⁶ This comment has been added consistent with OCTC's comment 6 that there is no statement compelling that a lawyer that is outside of the scope and application of this rule must comply with the appropriate rule in the controlling jurisdiction.

⁷ This comment number is a place holder until the Commission is finished with this rule, when all of the final comments will be renumbered.

RRC – Rule 1.15 [4-100]
Rule – Draft 16.1 (11/23/09) – COMPARED TO PCD [#15.3] (5/29/09)
December 11-12, 2009 Meeting; Agenda Item III.C.

- 1 publication “Handbook on Trust Accounting for California Attorneys” and the “California
- 2 Compendium on Professional Responsibility” Index.

File List - Public Comments – Batch 4 – Proposed Rule 1.15

D-2009-263 James Bach [1.15]

D-2009-266 COPRAC [1.15]

D-2009-272 Michael J. Medina [1.15]

D-2009-274 Paul Smith [1.15]

D-2009-275c State Bar OCTC [1.15]

D-2009-276c David Carr SDCBA Legal Ethics Comm [1.15]

D-2009-283b Orange County Bar [1.15]

D-2009-286b James Ham LACBA [1.15]

D-2009-287c Santa Clara County Bar [1.15]



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

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* State

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(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.8.6 \[3-310\(F\)\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I whole-heartedly endorse and recommend the proposed rule that would permit accepting advance fees outside of the trust account, and requiring deposit into the trust account only if those fees are disputed.

Most immigration attorneys depend on flat-fee (rather than hourly rate) billing arrangements with their clients, with a significant "retainer" collected in advance. The nature of this "retainer" creates a dilemma for attorneys, who must either characterize it as a "true retainer" or an advance fee that may have to be deposited in a trust account.

The dimensions of a "true retainer" are always unclear, but certainly an argument can be made in every case that the "retainer" is for the purpose of attaining the lawyer's availability and is earned at the moment it is paid. However, it is more in the consumer's interest, and probably closer to reality, to deem the "retainer" to be an advance fee that can and should be refundable.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the  next to **Attachment**.

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Most immigration attorneys depend on flat-fee (rather than hourly rate) billing arrangements with their clients, with a significant “retainer” collected in advance. The nature of this “retainer” creates a dilemma for attorneys, who must either characterize it as a “true retainer” or an advance fee that may have to be deposited in a trust account.

The dimensions of a “true retainer” are always unclear, but certainly an argument can be made in every case that the “retainer” is for the purpose of attaining the lawyer’s availability and is earned at the moment it is paid. However, it is more in the consumer’s interest, and probably closer to reality, to deem the “retainer” to be an advance fee that can and should be refundable.

In a flat fee case there is no guideline or metric to determine what part of the advance fee should be deposited into the trust account. Usually significant work on the case is commenced on the day the fee is received, so it would be improper to deposit all of it into the trust account (since the lawyer has already earned a portion of it). Also, a significant portion or all of the advance fee may be earned within a few days or weeks of payment, so an amount deposited into the trust account would have to be withdrawn right away, requiring the attorney’s administrative time that could be better used helping the client.

In sum, the proposed rule is sensible for all types of advance fees, but make particular sense in flat fee cases in which it is always unclear what portion is already earned and what portion has yet to be earned.

OFFICE USE ONLY.

*** Date**

08/26/2009



Period

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File :

D-2009-263 James Bach.pdf

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**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2107

September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.15 – Handling Funds and Property of Clients and Other Persons

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.15 and offers the following comments.

First, we wish to commend the Commission for its work on this rule. For reasons explained by the Commission, to which we wholly subscribe, it was necessary and appropriate to deviate from the generalized approach of the Model Rules, both to comply with the State Bar Act but also to provide much needed guidance on the many unanswered questions arising from the Model Rules and the current Rule 4-100, as well as to create an updated rule that reflects technological advancements.

Among the unanswered questions before this proposed rule was the propriety of transferring disputed trust funds to court by way of interpleader. We support the Commission's recommendation in favor of this dispute resolution device. *We urge only that this provision, now resident in Comment [14], be included as part of the Rule itself.*

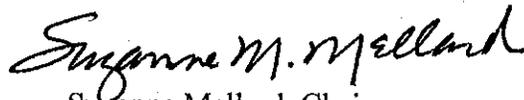
We also subscribe to the importance of establishing definitions of key terms, and we are in accord with the definitions developed by the Commission. *We urge only that these definitions be incorporated into the Rule itself.*

Finally, we ask the Commission to clarify the status of the "standards" heretofore promulgated by the Board of Governors for purpose of the existing Rule 4-100. More to the point, *we recommend that the proposed Rule 1.15 call for the continued efficacy of those standards pending Board of Governors review to determine whether changes are in order once proposed Rule 1.15 is adopted.*

Mr. Sondheim
September 10, 2009
Page 2

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in black ink that reads "Suzanne M. Mellard". The signature is written in a cursive style with a large, prominent initial "S".

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

McCurdy, Lauren

From: Mike [mjmedina@verizon.net]
Sent: Tuesday, September 29, 2009 5:06 PM
To: McCurdy, Lauren
Subject: "ethics" question

Attn Lauren McCurdy:

Per the suggestion of your employee Susan, I wish to refer, through you, a dilemma my office has, to the RULES REVISION COMMISSION.

My office does bankruptcy filings. Federal rules required all cases be filed electronically, including fee payments.

State bar rules require that court costs and fees be deposited in Attorney-Client trust accounts.

Financial institutions will not issue debit cards or credit cards on IOLTA accounts, i.e.: Attorney-Client Trust Accounts.

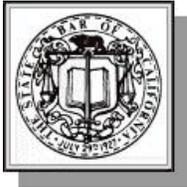
Therefore, the only way to service our clients is to transfer funds from Trust accounts to General Accounts and electronically submit fee payments. I can have the clients give me a waiver, but, I think, as to a non-waivable provision.

I believe our office is in technical violation of rule 4-100, which, of course, would not be just "technical".

I believe in the future most business will be conducted electronically.

State Bar rules need to recognize this legitimate way of doing business. Moreover, Federal Courts are not going to change their procedures to accommodate individual state rules for attorneys.

Michael J. Medina bar #42564



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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[Rule 1.8.6 \[3-310\(F\)\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I believe subparagraph (j) regarding the method of accepting credit card payments should be modified. As proposed it ignore the economic realities of accepting payments by credit card, at least as to small firms or sole practitioners.

The service providers I have used have two charges. A monthly service fee and a percentage of the transaction. For a large majority of us that only have a few trust account transactions a month it is not justifiable to be paying \$30-\$45 per month just for the privilege of accepting cards which is duplicated if we accept them in the general account.

Also, I understand that very few providers will deposit the funds in one account and take the charges out of another one. This rule ignores that reality. It would be just as safe and much more practical to allow the initial funds to be credited to the general account and when cleared, moved to the trust account. What is the "safety" difference from having a physical check [CONTINUED...SEE ATTACHED...]

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I believe subparagraph (j) regarding the method of accepting credit card payments should be modified. As proposed it ignore the economic realities of accepting payments by credit card, at least as to small firms or sole practitioners.

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Also, I understand that very few providers will deposit the funds in one account and take the charges out of another one. This rule ignores that reality. It would be just as safe and much more practical to allow the initial funds to be credited to the general account and when cleared, moved to the trust account. What is the "safety" difference from having a physical check in my hand which I manually deposit in the trust account verses moving funds electronically or writing a check from the general to the trust account? Many of us will continue to refuse to accept trust fund deposits because of this. It is form over substance and ignores the realities of business.

Please reconsider. Thank you.

OFFICE USE ONLY.

* Date

10/20/2009 

Period

PC

File :

D-2009-274 Paul Smith [1.15]

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**THE STATE BAR OF
CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

OFFICE OF THE CHIEF TRIAL COUNSEL
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October 20, 2009

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in July 2009. Here are our comments:

~~Rule 1.8.6 Payments Not from Client.~~

- ~~1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.~~

~~Rule 1.8.7 Aggregate Settlements.~~

- ~~1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.~~

Rule 1.15 Handling Funds and Property of Clients and Other Persons.

1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.
2. OCTC finds very confusing and inconsistent the proposed rule 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.
3. OCTC suggests that the term "inviolable" 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.
4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the 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 prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.
5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's 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 *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4th 430, 439; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.
6. OCTC is concerned that the language of rule 1.15(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 also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able

to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)

~~**Rule 3.3 Candor Toward the Tribunal.**~~

- ~~1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an "attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth." Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California's current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.~~
- ~~2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for "knew or reasonably should have known." (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation~~
- ~~3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney's belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model~~

~~Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5 200.~~

4. ~~OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." (Butler v. State Bar (1986) 42 Cal.3d 323, 329.)~~

~~**Rule 6.4 Law Reform Activities Affecting Client Interests.**~~

1. ~~OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.~~

Again, thank you for the opportunity to comment on these rules.

Very truly yours,



Russell G. Weiner
Interim Chief Trial Counsel

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): David Cameron Carr

Old Rule No./Title: 4-100

Proposed New Rule No./ Title: 1.15

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.

Yes [x] No []

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [x] No []

(3) Is the new rule **worded correctly and clearly**? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [x] No []

A uncertain "yes" here. The new rule is much longer than the old rule, to accomodate all of the changes and nuances in the law governing client trust accounts that have happened in the last 20 years. If there was any doubt that the rules of professional conduct have become rules of substantive law, it is answered here. Are lawyers going to actually read and understand this rule? Based on the admittedly skewed sample of lawyers that I represent, the answer is that many will not. But that sample also tells me that many lawyers have not read the existing, shorter rule. This is probably as good as it gets.

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [x] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

The new rule clarifies that advanced fees may be placed in the client trust account and that this does not constitute impermissible co-mingling, even though the fees are not yet earned but it does not require them to be placed in the client trust account, consistent with the *Baranowski v. State Bar* ((1979) 24 Cal.3d 153).

The new rule also clarifies that the lawyer must account for advanced fees even if the fees are not placed in the client trust account, incorporating the gloss on rule 4-100(b)(3) from In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757. The failure to account of advanced unearned fees is one of most insidious discipline traps for the unwary,

The new rule expands the duty to account for advanced fees from the client (current rule 4-100(b)(3)) to include the client and the person who advanced the fee. This duty is made subject to the statutory duty to maintain client confidences (Bus. & Prof. Code section 6068(e)), consistent with current rule 3-310(f) which provides for payment of legal fees by another if the client consents in writing and information related to the representation is protected from the disclosure to the payor. One of the strange things about current rule 3-310(f) is that it does not require the attorney to advise the payor in that scenario that information related to the disclosure but the new rule specifically describes (in 1.15(k)(4)) the information that accounted for to the client or to the third party payor.

New section 1.15(g)(3), clarifies that the attorney has an affirmative obligation to resolve the dispute over funds being held in trust. This is a good change and eliminates another discipline trap for the unwary (at least for those with the sense to be wary about the rules.).

Another positive change is new section 1.15(j) which addresses credit card payments for cost advances. It provides that credit card payments for costs can be made 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." My understanding is such merchant accounts are being offered to lawyers, some through local bar association. SDCBA should consider talking to some local bank about making this a member benefit.

CONCLUSIONS (pick one):

- We approve the new rule in its entirety.
- We approve the new rule with modifications.*
- We disapprove the new rule and support keeping the old rule.
- We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*
- We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7

Aggregate Settlements [3-310(D)]

Rule 1.15

Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

Rule 3.3

Candor Toward the Tribunal [5-200]

Rule 3.6

Trial Publicity [5-120]

Rule 3.7

Lawyer as Witness [5-210]

Rule 6.3

Membership in Legal Services Organization [n/a]

Rule 6.4

Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE

Executive Director

Orange County Bar Association

Orange County Bar Association Charitable Fund

(949)440-6700, ext. 213

MEMORANDUM

Date: September 4, 2009

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.15 – Safekeeping Property: Handling Funds and Property of Clients and Other Persons**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning proposed Rule 1.15:

The OCBA believes that the Commission has done an excellent job in creating a very well thought out and detailed procedural guide for the handling of funds and property that will serve the legal profession and clients well. The Proposed Rule incorporates most of the relevant California case law on the subject.

The OCBA does recommend for consistency purposes that the definitions appear in the body of the Proposed Rule, rather than in the Comments.

In addition, the OCBA recommends that a definition of the term "fixed," as used in subsection (g), be included in order to provide useful guidance to the membership with regard to their duties under the Proposed Rule.



LACBA

**LOS ANGELES COUNTY
BAR ASSOCIATION**

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ROBIN L. YEAGER

October 23, 2009

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, Calif 94105

RE: Comment Regarding Proposed Rule of Professional Conduct 1.15 –

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has the following comments regarding proposed Rule 1.15 of the Rules of Professional Conduct.

ABA Model Rule 1.15 is superior in form and function to the convoluted proposed Rule 1.15. The ABA Model rule on safekeeping property, in five subparts and six comments, comprehensively and succinctly sets forth the mandatory requirements for receiving, maintaining, and safeguarding client funds. The rule requires that client funds be segregated in a separate account, properly identified and protected, and all transactions documented for 5 years; commingling of the lawyer's funds with client funds is prohibited; advanced fees and costs are to be held in the trust account; the client must be promptly notified of the lawyer's receipt of trust funds; funds to which the client is entitled must be promptly delivered and accounted for; and where there is a dispute as to the entitlement to the trust funds, the lawyer must hold the disputed funds in trust while the dispute is being resolved.

In contrast, the RRC's proposed California rule 1.15 contains 13 subparts, and 16 comments, plus an additional "guidance" comment. Proposed rule 1.15 is a commendable effort to provide guidance and suggestions to lawyers regarding client trust account management and transactions, which might be useful to practitioners. However, Rule 1.15 is a disciplinary rule, not a best practices commentary. Under the disciplinary rules, any "wilful" violation of Rule 1.15 results in severe discipline, even innocent and negligent mistakes in trust account management that are quickly caught and remedied resulting in no client harm. Pursuant to disciplinary Standard 2.2, any willful or grossly negligent violation of the rule governing client trust funds (e.g., including failures to complete proper bookkeeping; temporal or non-harmful commingling not accompanied by misappropriation or any other sort of impropriety; failure to promptly withdraw earned fees, failure to reconcile the trust account on a monthly basis, an isolated

Office of Professional Competence, Planning & Development
State Bar of California
October 23, 2009
Page 2

bounced check, etc.) results in a 90 day suspension from the practice of law, irrespective of mitigating circumstances.

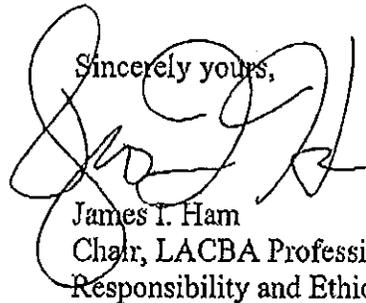
Although no one argues with the RRC's observation that a strong rule may deter misconduct, proposed Rule 1.15 is not a strong disciplinary standard but, rather, an impossibly detailed trap for the unwary. This rule should be published as a guideline, as part of the State Bar's official publication on client trust accounts (which the state bar currently publishes, and which it could easily place online or email to each of its active members), rather than as a disciplinary rule.

Furthermore, a majority of the members of our committee agrees with the RRC that, based on longstanding and well understood California law, costs must be deposited into the client trust account, but advanced fees may or may not be. PREC has no objection to including a recommendation in the State Bar's publication, to the effect that advanced fees should be safeguarded against the possibility that, if the services are not completed, the lawyer will be ethically required to refund the unearned portion of the fees. However, it ought not be a disciplinary offense if a California lawyer follows the traditional rule and does not deposit the advanced fee in the trust account, particularly where the services were fully performed and the fee fully earned.

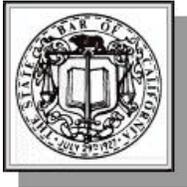
Based on the foregoing, PREC recommends that ABA Model Rule 1.15, be adopted, except that the word "fees" be deleted from Model Rule subpart (c); or alternatively, that current Rule 4-100 be retained as is, and simply renumbered as rule 1.15.

We appreciate the opportunity to comment on the proposed rules.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James I. Ham", is written over the typed name and title.

James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.8.6 \[3-310\(F\)\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The Santa Clara County Bar Association (SCCBA) commends the Commission for trying to clarify and add specifics to proposed Rule 1.15 to provide better guidance to the practitioner. The SCCBA believes that the proposed rule still does not adequately account for the differences and distinctions between advance payment of fees; true retainers and flat fees. The proposed rule speaks to advance payment of fees and true retainers but does not explain the treatment of flat fees. In fact, the definition and discussion of advanced fees and true retainers in Comments [5], [8], [9] and [10] should be clearer in defining these three categories of fees. For example, in Comment [5], it uses the word "retainer" in defining an "advance for fees." We recommend that the word "retainer" be deleted so that the practitioner does not confuse it with a "true retainer." In addition, a flat fee needs to be defined and distinguished from a true retainer. The definition and discussion of a "true retainer" does not make clear that it is not the same as a flat fee, a common mistake made by many practitioners.

OFFICE USE ONLY.

* Date

10/30/2009



Period

PC



File :

D-2009-287c Santa Clara County Bar [1.15].pdf

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Rule 1.15: Handling Funds and Property of Clients and Other Persons

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2008 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8 is highlighted)

District of Columbia. The language of D.C. Rule 1.15 differs significantly from the ABA Model Rule, though the basic requirements are the same. D.C.'s version of Rule 1.17 deals with notification of trust account overdrafts.

Florida: Chapter 5 of Florida's Supreme Court Rules regulates lawyer trust accounts.

Georgia: Rule 1.15(I) generally tracks the 1983 version of ABA Model Rule 1.15, but Georgia adds Rule 1.15(II) to govern trust accounts and IOLTA accounts, and Rule 1.15(III) to govern trust account recordkeeping, overdraft notification and auditing by disciplinary authorities. Rule 1.15(111) requires that lawyers deposit trust funds in a financial institution that agrees "to report to the State Disciplinary Board whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, and the instrument is not honored." The Comment to Rule 1.15(III) explains the overdraft agreement as follows:

[2] The overdraft agreement requires that all overdrafts be reported to the Office of General Counsel of the State Bar of Georgia whether or not the instrument is honored. It is improper for a lawyer to accept "overdraft privileges" or any other arrangement for a personal loan on a client trust

account particularly in exchange for the institution's promise to delay or not to report an overdraft....

[3] The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws a trust account. The lawyer or institution may explain occasional errors. The provision merely intends that the Office of General Counsel receive an early warning of improprieties so that corrective action, including audits for cause, may be taken.

Illinois: Rule 1.15(g), a highly unusual provision adopted in 1998 at the urging of the real estate bar, provides as follows: "In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds," and (among other requirements) the lawyer deposits only "good funds," which include only seven specified forms of deposits, including "(a) a certified check, (b) a check issued by the State of Illinois, the United States, or a political subdivision ... (c) a cashier's check, teller's check, bank money order, or official bank check ... (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the law of any state, ... [or] (f) a check

drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development" Rule 1.15(g) ends by stating: "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 such funds that are not collected."

Massachusetts: Rule 1.15 has extensive provisions for deposit of client funds in IOLTA accounts, and contains provisions to ensure that disciplinary authorities are notified in the event a lawyer's check is dishonored.

Michigan: provides for IOLTA accounts in Rule 1.15(d).

Minnesota: Rule 1.15 differs significantly in structure and substance from ABA Model Rule 1.15.

New Jersey: Under Rule 1.15(a), funds must be deposited in New Jersey institutions, without exception. Rule 1.15(a) also incorporates the substance of ABA Model Rule 1.15(b), and requires lawyers to keep trust account records for seven years. New Jersey deletes ABA Model Rule 1.15(c), and New Jersey Rule 1.15(b) deletes the requirement in ABA Model Rule 1.15(d) that a lawyer promptly render a full accounting of property upon request. New Jersey adds 1.15(d), which refers lawyers to section 1:21-6 of the Court Rules on recordkeeping.

New York: New York's DR 9-102 addresses the same issues in extensive detail. New York imposes a seven-year record-keeping requirement for eight specified categories of documents, such as "records of all deposits in and withdrawals from" trust accounts, and copies of "all retainer and compensation agreements with clients," "all bills rendered to clients," and "all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed."

Ohio: Rule 1.15 differs significantly from ABA Model Rule 1.15. Among other things, Rule 1.15(f) provides as follows: "Upon dissolution of any law firm, the former partners, managing partners, or supervisory lawyers shall promptly account for all client funds and shall make appropriate arrangements for one of them to maintain all records" Rule 1.15(h) imposes strict requirements on every lawyer or law firm that "owns an interest in a business that provides a law-related service"

Pennsylvania: Effective September 20, 2008, Pennsylvania adopted substantial changes to Rule 1.15, along with companion changes to Supreme Court Rule 221 (governing overdraft notification). The Pennsylvania rules now include requirements and definitions that are far more detailed and nuanced than the Model Rule.

Virginia: Rule 1:15, which substantially incorporates provisions from Virginia's former Code of Professional Responsibility, differs significantly from ABA Model Rule 1.15. Virginia Rule 1.15(d) prescribes the responsibility of lawyers who receive funds or other property in which a client or third person has an interest.

Washington: Rule 1.15(e) provides that a lawyer "must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding funds."

Wisconsin: Rule 1.15 is so highly detailed and so long (about 16 pages) that it has its own table of contents. Rule 1.15(a) defines 10 separate terms (such as "Demand account," "Fiduciary property," and "Financial institution"). Rule 1.15(b)(4) provides: "Unearned fees and advanced payments of fees shall be held in trust until earned by the lawyer.... Funds advanced by a client or 3rd party for payment

of costs shall be held in trust until the costs are incurred.” Particularly interesting is Rule 1.15(e)(4), which elaborates on a series of "Prohibited transactions," including:

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, and (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. ...