

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.15 [4-100]**

**Lead Drafter:** Tuft  
**Co-Drafters:** Ham, Martinez  
**Meeting Date:** March 31 & April 1, 2016

**I. CURRENT CALIFORNIA RULE**

**Rule 4-100 Preserving Identity of Funds and Property of a Client**

- (A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:
- (1) Funds reasonably sufficient to pay bank charges.
  - (2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (B) A member shall:
- (1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.
  - (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
  - (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.
  - (4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.
- (C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph(B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

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### Standards:

Pursuant to rule 4-100(C) the Board of Governors of the State Bar adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with subparagraph(B)(3).

- (1) A member shall, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain:
  - (a) a written ledger for each client on whose behalf funds are held that sets forth:
    - (i) the name of such client,
    - (ii) the date, amount and source of all funds received on behalf of such client,
    - (iii) the date, amount, payee and purpose of each disbursement made on behalf of such client, and
    - (iv) the current balance for such client;
  - (b) a written journal for each bank account that sets forth:
    - (i) the name of such account,
    - (ii) the date, amount and client affected by each debit and credit, and
    - (iii) the current balance in such account;
  - (c) all bank statements and cancelled checks for each bank account; and
  - (d) each monthly reconciliation(balancing) of(a),(b), and(c).
- (2) A member shall, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:
  - (a) each item of security and property held;
  - (b) the person on whose behalf the security or property is held;
  - (c) the date of receipt of the security or property;
  - (d) the date of distribution of the security or property; and
  - (e) person to whom the security or property was distributed.

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### II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed rule with several alternative provisions for the Commission's consideration as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

### III. PROPOSED RULE 1.15 (CLEAN)

#### Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons

- (a) **[ALT1]** All funds received or held by a lawyer or law firm for the benefit of a client, or other person to whom the lawyer owes a contractual or legal duty, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction.
- (a) **[ALT2]** All funds received or held for the benefit of a client or other person by a lawyer or law firm [in connection with a representation], including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction.
- (a) **[ALT3]** All funds received or held for the benefit of a client by a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction.
- (b) Funds belonging to the lawyer or the law firm shall not be deposited or otherwise commingled with funds held in a trust account except:
  - (1) funds reasonably sufficient to pay bank charges.
  - (2) in the case of funds belonging in part to a client or other person and in part to the lawyer or the law firm, the portion belonging to the lawyer or law firm must be withdrawn at the earliest reasonable time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

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- (c) A lawyer shall:
- (1) promptly notify a client or other person of the receipt of funds, securities, or other property in which the lawyer knows or reasonably should know the client or other person has an interest;
  - (2) identify and label securities and properties of a client or other person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
  - (3) maintain complete records of all funds, securities, and other property of a client or other person coming into the possession of the lawyer or law firm;
  - (4) promptly account to the client or other person for whom the lawyer holds funds or property;
  - (5) preserve records of all funds and property held by a lawyer or law firm under this Rule for a period of no less than five years after final appropriate distribution of such funds or property;
  - (6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.
  - (7) promptly distribute, as requested by the client or other person, any undisputed funds or property in the possession of the lawyer or law firm that the client or other person is entitled to receive.
- (d) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms in accordance with subparagraph(c)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

### Standards:

Pursuant to this Rule, the Board of Trustees of the State Bar adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by lawyers and law firms in accordance with subparagraph (c)(3).

- (1) A lawyer shall, from the date of receipt of funds of the client [or other person] through the period ending five years from the date of appropriate disbursement of such funds, maintain:
  - (a) a written ledger for each client [or other person] on whose behalf funds are held that sets forth:

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- (i) the name of such client [or other person],
    - (ii) the date, amount and source of all funds received on behalf of such client [or other person],
    - (iii) the date, amount, payee and purpose of each disbursement made on behalf of such client [or other person], and
    - (iv) the current balance for such client [or other person];
  - (b) a written journal for each bank account that sets forth:
    - (i) the name of such account,
    - (ii) the date, amount and client affected by each debit and credit, and
    - (iii) the current balance in such account;
  - (c) all bank statements and cancelled checks for each bank account; and
  - (d) each monthly reconciliation(balancing) of (a), (b), and(c).
- (2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client [or other person] through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:
- (a) each item of security and property held;
  - (b) the person on whose behalf the security or property is held;
  - (c) the date of receipt of the security or property;
  - (d) the date of distribution of the security or property; and
  - (e) person to whom the security or property was distributed.

### Comment<sup>1</sup>

[1] **[ALT3]** The duties set forth in Rule 4-100 [1.15] have been applied to funds or property that a lawyer receives or holds for the benefit of a non-client, including but not limited to a

<sup>1</sup> The drafting team has deferred drafting comments until after the Commission has made a decision on the black letter of the Rule. Proposed comment [1] is intended as a placeholder pending the Commission's decision on Open Issue #1 in Section VIII.1, below.

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statutory lien holder [this is *Riley*] or a person to whom the lawyer has agreed to assume a duty as a trustee [[this is Wassman](#)]. A lawyer must refer to case law in determining the parameters of the duty owed to a non-client. See, e.g., . . . .”

### IV. PROPOSED RULE 1.15 (REDLINE TO CURRENT RULE 4-100)

#### Rule ~~4-100 Preserving Identity of~~ 1.15 Safekeeping Funds and Property of ~~a Client~~ Clients and Other Persons

- (Aa) ALT1 All funds received or held by a lawyer or law firm for the benefit of ~~clients by a member or law firm~~ a client, or other person to whom the lawyer owes a contractual or legal duty, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled “Trust Account,” ~~“Client’s Funds Account”~~ or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client’s business and the other jurisdiction.
- (Aa) ALT2 All funds received or held for the benefit of ~~clients~~ a client or other person by a ~~member lawyer~~ or law firm in connection with a representation, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled “Trust Account,” ~~“Client’s Funds Account”~~ or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client’s business and the other jurisdiction.
- (Aa) ALT3 All funds received or held for the benefit of ~~clients~~ a client by a ~~member~~ lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled “Trust Account,” ~~“Client’s Funds Account”~~ or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client’s business and the other jurisdiction.
- (b) ~~No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except~~ Funds belonging to the lawyer or the law firm shall not be deposited or otherwise commingled with funds held in a trust account except as follows:
- (1) ~~Funds~~ funds reasonably sufficient to pay bank charges.
  - (2) ~~In in~~ the case of funds belonging in part to a client or other person and in part ~~presently or potentially~~ to the ~~member lawyer~~ or the law firm, the portion belonging to the ~~member lawyer~~ or law firm must be withdrawn at the earliest reasonable time after the ~~member’s~~ lawyer or law firm’s interest in that portion becomes fixed. However, ~~when the right of the member~~ if a client or other person

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~~disputes the lawyer~~ or law ~~firm-firm's right~~ to receive a portion of trust funds ~~-is disputed by the client~~, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(Bc) A ~~member~~lawyer shall:

- (1) ~~Promptly-promptly~~ notify a client or other person of the receipt of ~~the client's~~ funds, securities, or other ~~properties-property in which the lawyer knows or reasonably should know the client or other person has an interest~~;
- (2) ~~Identify-identify~~ and label securities and properties of a client or other person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
- (3) ~~Maintain-maintain~~ complete records of all funds, securities, and other ~~properties-property~~ of a client or other person coming into the possession of the ~~member lawyer~~ or law firm;
- (4) ~~and render appropriate accounts to the client regarding them~~ promptly account to the client or other person for whom the lawyer holds funds or property;
- (5) preserve ~~such~~-records of all funds and property held by a lawyer or law firm under this Rule for a period of no less than five years after final appropriate distribution of such funds or ~~properties-property~~; ~~and~~
- (6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.
- (4)(7) ~~Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive~~ promptly distribute, as requested by the client or other person, any undisputed funds or property in the possession of the lawyer or law firm that the client or other person is entitled to receive.

(Cd) The Board of ~~Governors-Trustees~~ of the State Bar shall have the authority to formulate and adopt standards as to what ~~"records"~~ shall be maintained by ~~members-lawyers~~ and law firms in accordance with subparagraph (Bc)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all ~~members-lawyers~~.

### Standards:

Pursuant to ~~rule 4-100(G)~~ this Rule, the Board of ~~Governors-Trustees~~ of the State Bar adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by ~~members-lawyers~~ and law firms in accordance with subparagraph (Bc)(3).

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- (1) A ~~member-lawyer~~ shall, from the date of receipt of ~~client~~-funds of the client for other person through the period ending five years from the date of appropriate disbursement of such funds, maintain:
- (a) a written ledger for each client for other person on whose behalf funds are held that sets forth:
    - (i) the name of such client for other person,
    - (ii) the date, amount and source of all funds received on behalf of such client for other person,
    - (iii) the date, amount, payee and purpose of each disbursement made on behalf of such client for other person, and
    - (iv) the current balance for such client for other person;
  - (b) a written journal for each bank account that sets forth:
    - (i) the name of such account,
    - (ii) the date, amount and client affected by each debit and credit, and
    - (iii) the current balance in such account;
  - (c) all bank statements and cancelled checks for each bank account; and
  - (d) each monthly reconciliation(balancing) of (a), (b), and(c).
- (2) A ~~member-lawyer~~ shall, from the date of receipt of all securities and other properties held for the benefit of client for other person through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:
- (a) each item of security and property held;
  - (b) the person on whose behalf the security or property is held;
  - (c) the date of receipt of the security or property;
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### Comment<sup>2</sup>

[1] **[ALT3]** The duties set forth in rule 4-100 [1.15] have been applied to funds or property that a lawyer receives or holds for the benefit of a non-client, including but not limited to a statutory lien holder [this is *Riley*] or a person to whom the lawyer has agreed to assume a duty as a trustee [this is *Wassman*]. A lawyer must refer to case law in determining the parameters of the duty owed to a non-client. See, e.g., . . . .”

## V. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, Date:**

A comment on current rule 1-400 is anticipated.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

1. While OCTC supports some of the Commission’s additions or changes to the Model Rules and there is much merit to the Commission’s explanation that costs are covered by the rule, OCTC disagrees with subparagraph (d) of this rule with allows, but does not require, attorneys to place advanced fees in the trust account. We believe this creates confusion and a lack of consistency. Either every lawyer should be placing advanced fees in the Client Trust Account (“CTA”) or no lawyer should be placing advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will protect clients. (While some have even argued that the funds are less safe in a CTA, OCTC disagrees and believes the safest place for the funds is in a CTA.) OCTC has many cases where the attorney does not return the unearned fees and claims not to have the funds to do so. Many who oppose mandating that advanced fees be in the CTA cite to *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164. However, that case simply stated that the Court did not need to decide the issue in that case. Since then, at least one state appellate court has found that the current rule requires attorneys to place advanced fees into the CTA. (See *T & R Foods, Inc v. Rose* (1996) 47 Cal.App.4th Supp 1, 7.) Further, the Model Rules and most other jurisdictions require attorneys to place advanced fees in the trust account. If this change to the rule is adopted, the first sentence of Comment 10 should be stricken.

2. OCTC finds very confusing and inconsistent the proposed rules as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h), and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments [12] – [14].

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. OCTC would also

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<sup>2</sup> See footnote 1, above.

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suggest that the rule specifically provide that the misappropriation of funds violates this rule.

4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason 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.

5. OCTC supports subparagraph (k), even though it is not in the Model Rules, because it is mostly current rule 4-100(B). However, OCTC is concerned that subparagraph (k)(6), which is new, does not provide for the Supreme Court or other courts to issue an order for an audit. The rule should not determine jurisdiction or send a message that attorneys can violate a court order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *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 (k)(7) should add the word “authorized” to other person to clarify that only authorized persons can request undisputed funds.

6. OCTC is concerned that the language of subparagraph (l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is concerned that rule 1.15 (l)(2) and (3) do not state, as rule 1.15(l)(1) does, that if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC also is concerned how this paragraph is impacted by the Choice of Law rule (proposed rule 8.5)

7. OCTC supports subparagraphs (l)(4). There are too many Comments and some of them appear to belong in the rule.

- **MIKE NISPEROS, OCTC, 9/27/2001:** OCTC provided the following comment on rule 1-400:

OCTC recommends clarifying and expanding this rule to include, among other things, a requirement that members maintain advanced fees in a trust account until earned. The suggested changes also define the term “misappropriation.” Revise the rule as follows:

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled “Trust Account,” “Client’s Funds Account” or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client’s business and the other jurisdiction. If the funds received or held by the member involve a substantial sum of money and there is a reasonable expectation that these funds will be maintained in the account controlled by the member for over six months, the funds will not be placed with the member’s other clients’ funds but kept in a separate interest bearing bank

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account labeled "Trust Account," "Client's Funds Account" or words of similar import. Any interest earned from this separate trust account will belong to the client. No funds belonging to the member or the law firm shall be deposited ~~therein~~ into a trust account maintained by the member or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to the client and, in part, presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client or subject to a lawful lien the disputed portion ~~shall~~ must be placed or maintained in the current attorney's trust account and not be withdrawn until the dispute is finally resolved. The member or firm must promptly distribute to the client all portions of any property to which the interests of the client are not in dispute. The member or former lawyer or firm must sign any checks or drafts necessary to have the funds placed in the current lawyer's trust account or to ensure that the client is promptly provided his or her funds. The member or law firm has the obligation to take steps to ensure that any dispute is promptly resolved.

(B) A member ~~shall~~ must:

(1) Deposit into a Trust Account, as described in paragraph A of this rule, all legal fees and expenses that have been paid in advance and will be withdrawn by the member only as fees are earned or expenses incurred.

~~(4)~~(2) Promptly notify a client of the receipt of the client's funds, securities, or other property.

~~(2)~~(3) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

~~(3)~~(4) Maintain complete records of all funds, fees, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds, fees, securities, or properties; and comply with any order for an

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audit of such records issued pursuant to the Rules of Procedure of the State Bar.

~~(4)~~(5) Promptly pay or deliver, ~~as requested by the client~~, any funds, securities, or other properties in the possession of the member which the client is entitled to receive, unless the client instructs otherwise and, in that case, the member will comply with any lawful instruction by the client.

(6) Not misappropriate client funds or other trust funds. Misappropriate means (1) any unauthorized use by the member of client funds or other trust funds or property or (2) any unauthorized and unreasonable withholding by the member of client funds or other trust funds or property.

### Discussion

**The accounting requirement of section (B)(4) also obligates the attorney to maintain adequate records of fees received in advance and earned and to provide the client with an appropriate accounting of those fees. In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct., Rptr. 752, 758.) Other than a true retainer, a fee is not earned upon receipt and, therefore, the fee must be kept in a trust account until earned.**

While not every failure to promptly return funds or property to a client will constitute a misappropriation by the attorney, if client funds or property are held by the attorney for an unreasonable period of time without the client's permission or consent, such withholding may constitutes a misappropriation as it deprives the client of his or her rightful property and the use of that property.

### OCTC COMMENTS:

Paragraph (A)(2) codifies existing law that even if there is a fee or accounting dispute the attorney must not only place the disputed funds in the trust account, but actually distribute the funds not in dispute to the client. Some attorneys have attempted to pressure their clients in resolving the dispute by placing all the client's funds in the trust account, even when the dispute involves only a portion of those funds. Only the disputed portion of the funds should be maintained in trust pending resolution of the dispute. This rule should also mandate that the attorney take reasonable action to resolve the dispute so that the funds do not stay in the account for an unreasonable amount of time.

There are also situations where an attorney or doctor has a lawful lien that the client disputes. Those funds should stay in the trust account until the dispute is resolved.

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Sometimes, because of a dispute with a former attorney the attorney refuses to sign or endorse a settlement check. This should be specifically prohibited as it causes harm to the client. OCTC recommends the rule require that all attorneys must promptly sign or endorse a settlement check and that the disputed funds be placed in the current attorney's trust account until the dispute can be resolved. Clarity with regard to these requirements will be helpful. A specific requirement will ensure that clients are not impacted by the inability of attorneys to come to a reasonable agreement or attempts to hold funds hostage. This is consistent with the absolute prohibition against an attorney refusing to provide a client's files (see *Academy of California Optometrists v. Superior Court* (1975) 51 Cal. App.3d 999, 1006) and the Supreme Court's long held prohibition on an attorney who does not have a contractual lien from withholding funds to pay his or her services. (See *Silver v. State Bar* (1974) 13 Cal.3d 134.)

In new paragraph (B)(1), we codify the requirement that advanced fees should be placed in a client trust account. Although the Supreme Court declined to address this requirement in *Baranoski v. State Bar* (1979) 24 Cal.3d 153, 164, civil courts have held that the rule does require advanced fees be placed into a trust account until earned, unless they are a true retainer. (See *T & R Foods Inc .v. Rose* (1996) 47 Cal. App.4th Supp. 1, 7. See also *S.E.C. v. Interlink Data Network of Los Angeles* (9th Cir. 1996) 77 Fed.3d 1201.) Many other states require that advances for fees be placed in trust until earned.

With regard to paragraph (B)(4), OCTC eliminates the requirement that there be a request by the client in order for there to be a violation of the rule regarding prompt delivery of funds..

OCTC also added a specific misappropriation section. Although most misappropriation cases are and should be found as a violation of the moral turpitude section there are some cases where the authorized use has not been found to involve moral turpitude. There have also been situations where attorneys simply hold on to a client's funds for a substantial and unreasonable period of time - sometimes for years. This situation should also constitute the misappropriation of client funds.

- **State Bar Court:** No comments received from State Bar Court.

## VI. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Model Rule 1.15 Variations. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.15: Safekeeping Property," revised January 5, 2016, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc)

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.15 [4-100]

**Lead Drafter:** Tuft  
**Co-Drafters:** Ham, Martinez  
**Meeting Date:** March 31 & April 1, 2016

[1 15.authcheckdam.pdf](#) [Last visited 3/15/16]

- Three jurisdictions have adopted Model Rule 1.15 verbatim.<sup>3</sup> Fourteen jurisdictions have adopted a slightly modified version of Model Rule 1.15.<sup>4</sup> Thirty-four jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.15.<sup>5</sup> Some jurisdictions have adopted more than one rule to regulate lawyer trust accounts. (See, e.g., Delaware rules 1.15 and 1.15A, available at: <http://courts.delaware.gov/rules/DLRPCwithCommentsFeb2010.pdf> [Last visited 3/15/16].

### VII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

#### A. Concepts Accepted (Pros and Cons):

1. Recommend retaining the basic structure of current rule 4-100 but breaking out some paragraphs for clarity and changing the rule title. The title is changed from “Preserving Identity of Funds and Property of a Client” to “Safekeeping Funds and Property of Clients and Other Persons”
  - Pros: There is no evidence that there is anything wrong with the basic structure of rule 4-100, which in paragraph (A) describes where funds and property subject to the rule must be placed and in paragraph (B) sets forth duties a lawyer has regarding notice, accounting, and distribution of the funds and property. However, the drafting team recommends that for clarity, (i) the two sentences of paragraph (A) be split into separate paragraphs and (ii) the several clauses of paragraph (B)(3) also be split into separate subparagraphs. The title is derived from RRC1’s version on Rule 1.15, except “Handling” is changed to “Safekeeping” (from the Model Rule) and better describes the rule.
  - Cons: By separating the duty to place client funds in a trust account (proposed (a)) from the duty to not commingle funds (proposed (b)), double charging for the same misconduct (such as deposit of client trust funds in a lawyer’s personal bank account) could result. Maintaining as a single paragraph current rule 4-100(A), which encompasses both duties, would avoid such a result.

<sup>3</sup> The three are jurisdictions are: Kansas, Nebraska, and Rhode Island.

<sup>4</sup> The fourteen jurisdictions are: Alaska, Arizona, District of Columbia, Georgia, Iowa, Kentucky, Maryland, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Vermont, and West Virginia.

<sup>5</sup> The thirty-four jurisdictions are: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.



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2. Recommend including in the rule the concept that under certain circumstances, a lawyer owes duties to protect funds and property of a third person.
  - Pros: This change tracks RRC1's proposed rule, Model Rule 1.15 and the rule in a number of jurisdictions. California law has held that a lawyer owes duties regarding the funds and property of third persons and the rule should expressly recognize current law. . The current rule is deficient because it hides the ball and fails to provide adequate public protection. At the very least, a new comment should reveal that case extends the duties in the rule to non-clients in certain circumstances.
  - Cons: The inclusion of "other person" in the rule may cause confusion as to precisely when a lawyer owes a duty to third persons to protect their funds and property and what that duty entails. A particular problematic consequence of this change is confusion as to a lawyer's duty to honor a lien on client funds (such as statutory liens, contractual liens, medical liens and prior attorney liens) because case law demonstrates that all liens are not treated the same. See Open Issue, Section VIII, below, for three alternatives offered by the drafting team for addressing this issue: ALT1, ALT2 and ALT3.
3. Recommend retaining term "law firm" in current rule 4-100(A) and throughout the rule. Neither Model Rule 1.15 nor RRC1 proposed Rule 1.15 included the concept.
  - Pros: Both "lawyer" and "law firm" should be retained in the rule to protect the public and to make it clear that the rule applies even if the lawyer is not personally in charge of the firm's trust account. See proposed Rules 5.1 – 5.3. The concerns stated in the Con section below should not materialize because the rule has not proven to have such a negative effect and California neither currently nor in the proposed rules embraces the concept of law firm discipline.
  - Cons: Contrary to the pro argument, retaining "law firm" might continue a negative effect of leading individual lawyers to erroneously believe and claim that their "law firm" is primarily responsible for a trust accounting violation. If current Rule 4-100(A) is changed to refer only to a lawyer, then it would no longer suggest that anyone other than an individual lawyer is responsible for compliance.
4. Recommend deleting "presently or potentially" as modifiers of lawyer's funds in paragraph (b)(2), which is derived from current rule 4-100(A)(2).
  - Pros: The language unnecessarily injects uncertainty into a disciplinary rule. Moreover, on balance it is confusing because it appears logically inconsistent. Paragraph (b) requires a lawyer to withdraw from the trust account funds that belong to the lawyer. A rule should not permit a lawyer to withdraw funds that "potentially" belong the lawyer.
  - Cons: The current language is helpful and promotes compliance because it alerts lawyers to the fact that the character of funds received are not static. Rather, funds belonging initially to a client (such as advances for costs) may become funds belonging to the client's lawyer once the lawyer's interest becomes fixed.

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5. Recommend retaining current rule 4-100(B)(1) as paragraph (c)(1) and adding the "lawyer knows or reasonably should know" standard to the notice requirement. Paragraph (c)(1) provides a lawyer shall: (1) promptly notify a client or other person of the receipt of funds, securities, or other property in which the lawyer knows or reasonably should know the client or other person has an interest."
    - Pros: With the addition in the rule of an express duty owed to "other persons," drafting team consensus that the duty to give notice to such persons should be qualified by the "knows or reasonably should know" standard.
    - Cons: The current rule's unqualified duty to notify *a client* should not be qualified by the "knows or reasonably should know" language.
  6. Recommend retaining current rule 4-100(B)(2) as paragraph (c)(2). Paragraph (c)(2) provides a lawyer shall: "identify and label securities and properties of a client or other person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable."
    - Pros: The paragraph carries forward current paragraph (B)(2) nearly verbatim. There is no indication that this provision has created any problems as currently constituted.
    - Cons: None identified.
- NOTE:** As noted, (see paragraph 1, above), the drafting team determined that dividing the different clauses of current rule 4-100(B)(3) into separate subparagraphs would increase the clarity of the rule.
7. Recommend retaining the first clause of current rule 4-100(B)(3) as paragraph (b)(3), with the addition of "other person". Paragraph (b)(3) provides a lawyer shall: "(3) maintain complete records of all funds, securities, and other property of a client or other person coming into the possession of the lawyer or law firm."
    - Pros: There is no indication that this provision has created any problems as currently constituted. Further, the rule should expressly recognize that a lawyer owes duties to third persons under appropriate circumstances.
    - Cons: None identified.
  8. Recommend retaining the substance of the second clause of current rule 4-100(B)(3) as paragraph (b)(4). There are three changes: (i) the word "account" has been substituted for the phrase "render appropriate accounts," (ii) the term "other persons" has been added, and (iii) the requirement that the lawyer account "promptly" has been added.
    - Pros: Paragraph (b)(4) carries forward the substance of rule 4-100(B)(3), but specifies that it also applies to "other persons" to reflect those duties that a lawyer may owe. No substantive change is intended by the substitution of "to account" for the current phrase "render appropriate accounts," which is considered to be ambiguous. The addition of the requirement that the lawyer account "promptly" more accurately describes current law.
    - Cons: None identified.
  9. Recommend retaining the third clause of current rule 4-100(B)(3) as paragraph (b)(5). The clause "of all funds and property held by a lawyer or law firm under this Rule" has



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- been added to modify the term “records.”
- Pros: The clause has been added to clarify that the duty to preserve records is limited to funds and property covered by the rule. No change in substance is intended.
  - Cons: None identified. However, paragraphs (b)(3) and (b)(5) could be combined or reordered to follow one another. (see Standards (1) and (2)).
10. Recommend retaining the fourth clause of current rule 4-100(B)(3) verbatim as paragraph (b)(6). Paragraph (b)(6) provides a lawyer shall: “(6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.”
- Pros: There no indication that this provision has created any problems as currently constituted.
  - Cons: None identified.
11. Recommend retaining current rule 4-100(B)(4) as paragraph (c)(7), as modified, but to add term “undisputed” to modify the term “funds or property”.
- Pros: Although the word “undisputed” does not appear in current rule 1-400(B)(4), it is implied in that provision that the lawyer need only distribute “undisputed” funds given the lawyer’s duties to hold in trust “disputed funds” set forth in current rule 1-400(A)(2) [proposed paragraph (b)(2) of this Rule.] This is a clarifying change intended simply to expressly state what is already implied in the current rule. No change in substance to the rule is intended.
  - Cons: The current language relies on the concept of “entitled to receive.” This language is adequate to encompass the concept of undisputed funds. If the language is changed, a lawyer’s duty may be ambiguous in situations where a client is entitled to receive funds but an alleged dispute by a third party causes a lawyer to improperly delay or withhold disbursement to the client.
12. Recommend retaining current rule 4-100(C) nearly verbatim as paragraph (d). The only changes to the Trustees’ enabling clause is to substitute “lawyers” for “members” and change “Governors” to “Trustees”.
- Pros: This clause is the essential enabling provision that authorizes the Board to promulgate standards regarding what records must be kept pursuant to paragraph (c)(3). It should be retained.
  - Cons: None identified.
13. Recommend adding “other persons” to the recordkeeping requirements set forth in Standard (1) and (2).
- Pros: If the lawyer owes duties to safeguard funds and property of a third person, the lawyer should also have duties to keep records regarding those funds. The standards clarify what records must be maintained and for how long. *But see* Open Issues, at Section VIII.3, below, re whether the standards should apply to the funds and property of “other persons.”
  - Cons: None identified.

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### B. Concepts Rejected (Pros and Cons):

1. Require that advance fees be placed in the lawyer's trust account.

- Pros: Whether to require that advance fees be placed in the lawyer's trust account, as is required in Model Rule 1.15 and most jurisdictions that have adopted the Model Rules, is a policy issue that has generated substantial controversy among different practice groups (e.g., bankruptcy, criminal defense lawyers) whenever it has been raised. Retaining the language of the current rule would maintain the status quo. To make the revision would effect a significant change in the law. There has been no clear signal since the Supreme Court decided *Baranowski v. State Bar* (1979) 24 Cal.3d 153 that the law should be changed. Moreover, much of the alleged abuse derives from lawyers who purport to charge a nonrefundable or "earned on receipt" fee for fee arrangements other than a true retainer. That issue has been addressed by this Commission in its proposed Rule 1.5(d) and (e).<sup>6</sup> Finally, lawyers can be found liable in discipline for failing to refund unearned fees. (See, e.g., *In the Matter of Fonte* (Rev. Dept. 1994) 2 Cal. State Bar Ct., Rptr. 752, 758.)) This should be sufficient incentive for lawyers to place advance fees in the trust account without an express requirement to do so.
- Cons: Including this requirement in the rule would be client protective. It is hornbook law that a fee is not earned until the lawyer has completed the agreed services or has otherwise earned the fee. A lawyer should be required to place advance fees in the trust account from which fees may be withdrawn only when the lawyer has earned the fee and the lawyer's interest in the fee has been fixed (i.e., there is no dispute as to the lawyer's entitlement to the fee. This will prevent lawyers from placing the fee in the lawyer's operating account and exhausting the funds before the funds are earned. . In the event the lawyer is discharged, the unearned fees remaining in the trust account will be available for refund. This is the rule in the majority of the states and there is no valid justification for California to provide less public protection. Lawyers have a duty to account for advance fees in any event. To

<sup>6</sup> Proposed Rule 1.5(d) and (e) provide:

(d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.

(e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services as long as the lawyer performs the agreed upon services. A flat fee is a fee which constitutes complete payment for legal fees to be performed in the future for a fixed sum regardless of the amount of work ultimately involved and which may be paid in whole or in part in advance of the lawyer providing those services.

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the extent that some lawyers rely upon flat fees paid in advance, a benchmark approach in fee agreements can be used that would accommodate the competing interests of protecting clients and allowing for the freedom to contract

2. Include more examples in paragraph (b) of exceptions to the rule against commingling as was done by RRC1.<sup>7</sup>
  - Pros: The added paragraphs would provide important guidance to lawyers in an area that frequently is the subject of discipline.
  - Cons: It is unnecessary to bring the foregoing exceptions into the rule because they are addressed in case law. These exceptions are nothing more than practice pointers. To include them in a rule would constitute micromanagement and conflict with the Commission's Charter. Further, funds deposited to restore entrusted funds are not and never were the lawyer's funds; it is the client's funds that are being restored.
3. Include in paragraph (c)(1) the phrase "claims to have" to modify the "interest" of an "other person".
  - Pros: Including this language will appropriately broaden the rule to require the lawyer to maintain sufficient funds to satisfy claims that have not yet matured.
  - Cons: The concept is ambiguous and would unnecessarily and confusingly broaden the lawyer's duties. It is not clear how a lawyer would know when a client "claims to have" an interest in funds. It is more definite and clear to impose notice duties on a lawyer only when the lawyer knows or reasonably should know the other person *has* an interest.

### **C. Changes in Duties/Substantive Changes to the Current Rule:**

1. Adding the concept of duties owed third persons throughout the rule is a substantive change. (See section VII.A.2, above.)
2. Qualifying the notice requirement in current rule 4-100(B)(1) by a "knows or reasonably should know" standard is a substantive change. See discussion of proposed paragraph (c)(1) in section VII.A.5, above.)

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<sup>7</sup> RRC1 added the following exceptions to its proposed paragraph re commingling:

(2) deposits for overdraft protection that compensate exactly for the amount that the overdraft exceeds the funds on deposit plus any bank charges;

(3) the lawyer's or law firm's funds deposited to restore entrusted funds that have been improperly withdrawn;

(4) funds in which the lawyer claims an interest but which are disputed by the client or other person; or

(5) funds belonging in part to a client or other person and in part, presently or potentially, to the lawyer, but which are claimed by a third party.

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3. The addition of the requirement in paragraph (c)(4) that the lawyer account “promptly” to clients and other persons is a substantive change. (See section VII.A.8, above.)
4. If the Commission were to agree that the standards be applied to “other persons” in addition to clients, it would be a substantive change. (See section VII.A.13, above.)

### D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
  - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. All recommended changes not identified in paragraph VII.C as substantive changes are non-substantive changes. (See paragraphs VII.A.1, 3, 4, 6, 7, and 9-12.)

### E. Alternatives Considered:

None.

## VIII. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. The drafting team proposes that the Commission as a whole consider and make a decision on which of the three alternative versions of paragraph (a) should be included in the proposed Rule. Each of these versions is an attempt to address the issue of how a lawyer should respond to a lien claim against the funds or property of a client. The drafting team recognized that including “other person” in paragraph (a) would likely cause concerns on how lawyers should treat funds that are subject to a lien. This is a

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particular problem because of a perceived conflict in the case law between several appellate decisions in civil cases and opinions issued by the Review Department in disciplinary matters. A brief summary of the approach that would be taken under each of those versions follows:

- (1) ALT1 is preferred by a majority of the drafting team and would make a change in the black letter itself to address the lien issue but would not include any clarifying comment. In addition to the language specifically addressed to the lien issue, ALT1 would include the reference to “other person” but not include the clause “in connection with a representation.”
  - (2) ALT2 is preferred by a minority of the drafting team. Like ALT1, it would include the reference to “other person” and would also include the clause “in connection with a representation.”<sup>8</sup> (See Open Issue #2, below.) It would not address the lien issue in the black letter of the current rule but would include a comment that clarifies when a lawyer owes a contractual or legal duty to hold funds for a person other than a client with appropriate case citations; i.e., the comment would clarify the lien issue in by referring to case law. As noted in footnote 1, above, the drafting of such a comment has been deferred pending the Commission’s decision on the blackletter.
  - (3) ALT3 is proposed by Staff and is not preferred by the drafting team. It would retain the current rule’s black letter, i.e., it would not include either (i) “other person” or (ii) “in connection with the representation,” but would (i) include any non-substantive changes the drafting team has agreed to and (ii) include a comment that explains that a lawyer may be held responsible to other persons. (See proposed Comment [1], which is intended as a placeholder only.)
2. Whether to include in paragraph (a) the limitation “in connection with a representation” as to funds and property to be held in safekeeping under the rule.<sup>9</sup>

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<sup>8</sup> ALT 2 does not depend on whether the phrase “in connection with the representation” is included. The phrase is in brackets for separate consideration by the Commission.

<sup>9</sup> RRC1 took a somewhat different tack in addressing this concept, using the phrase “in connection with the performance of a legal service or representation.” That term was defined in RRC1 Rule 1.15, cmt. [2], which provided:

[2] As used in this Rule “in connection with the performance of a legal service or representation” means that there is a relationship between the actions of a lawyer in his or her capacity as a lawyer and the receipt or holding of funds from a client or other person. The provisions of this Rule are also applicable when a lawyer serves a client both as a lawyer and as one who renders nonlegal services. *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298]. Although lawyers who provide fiduciary services that are not related to the performance of a legal service or representation may be required to handle funds in a fiduciary manner (e.g., when serving as an executor, escrow agent for parties to an escrow who are not clients, or as a trustee for a non-client), this Rule does not govern those activities. Because the latter fiduciary accounts

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- Pros: The limitation is found in Model Rule 1.15. It would distinguish lawyer's receipt of funds when providing legal services as opposed to a lawyer receiving funds that do not relate to the provision of legal services, such as when a lawyer acts as an independent escrow agent.<sup>10</sup>
  - Cons: The limitation is not necessary. If a lawyer is holding funds for the benefit of a client or a third person, the funds should go into the trust account.
3. Whether the standards in current rule 4-100 should be applied not only to funds or property held on behalf of a client but also to funds or property held on behalf of third persons. (See section VII.A.13, above.)

### IX. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

**Tuft**

- [Date]: Email Comment

**Ham**

- [Date]: Email Comment

**Martinez**

- [Date]: Email Comment

### X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

**Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 1.15 [4-100] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1.15 [4-100] in the form attached to this Report and Recommendation.

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are governed by other law, funds should be maintained in separate fiduciary accounts and not in a trust account established under this Rule. However, the failure to discharge fiduciary duties in relation to the provision of such services may result in discipline for other violations. See, e.g., Business and Professions Code section 6106.

<sup>10</sup> If the Commission decides to include the phrase "in connection with a representation" in paragraph (a), the drafting team will consider including a brief comment along the lines of RRC1's Comment [2].

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<b>Co-Drafters:</b>	Ham, Martinez
<b>Meeting Date:</b>	March 31 & April 1, 2016
<b>XI. DISSENTING POSITION(S)</b>	
None.	
<b>XII. FINAL COMMISSION VOTE/ACTION</b>	
Date of Vote:  Action:  Vote: X (yes) – X (no) – X (abstain)	





**CURRENT CALIFORNIA RULE 4-100**  
**"Preserving Identity of Funds and Property of a Client"**

***I. Text of Current Rule:***

**Rule 4-100 Preserving Identity of Funds and Property of a Client**

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

- (1) Funds reasonably sufficient to pay bank charges.
- (2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member shall:

- (1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.
- (4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by

the Board, as from time to time amended, shall be effective and binding on all members.

*Standards:*

Pursuant to rule 4-100(C) the Board of Governors of the State Bar adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3).

(1) A member shall, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain:

- (a) a written ledger for each client on whose behalf funds are held that sets forth:
  - (i) the name of such client,
  - (ii) the date, amount and source of all funds received on behalf of such client,
  - (iii) the date, amount, payee and purpose of each disbursement made on behalf of such client, and
  - (iv) the current balance for such client;
- (b) a written journal for each bank account that sets forth:
  - (i) the name of such account,
  - (ii) the date, amount and client affected by each debit and credit, and
  - (iii) the current balance in such account;
- (c) all bank statements and cancelled checks for each bank account; and
- (d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A member shall, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:

- (a) each item of security and property held;
- (b) the person on whose behalf the security or property is held;
- (c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person to whom the security or property was distributed.

(Publisher's Note: Trust Account Record Keeping Standards as adopted by the Board of Governors on July 11, 1992, effective January 1, 1993.)

## **II. Background/Purpose:**

Rule 4-100 has its origin in the first rules promulgated in 1928. (The 1928 rules are found at 204 Cal. at p. xci.) Former Rule 9 provided:

A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company, authorized to do business in the State of California, in a bank account separate from his own account and clearly designated as "Clients' Funds Account" or "Trust Funds Account," or words of similar import. Unless the client otherwise directs in writing, securities of a client in bearer form shall be kept by the attorney in a safe deposit box at a bank or trust company authorized to do business in the State of California, which safe deposit box shall be clearly designated as "Clients' Account" or "Trust Account" or words of similar import, and be separate from the attorney's own safe deposit box.

In 1975, Rule 9 was revised and renumbered as 8-101. The rule that ultimately was ~~adopted~~ approved by the Supreme Court differed from the version that appeared in the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. ~~In that~~ As part of the comprehensive revisions to the Rules in the 1972 report, the special committee proposed rule 9-101, which ~~read~~ provided:

### **Rule 9-101. Preserving Identity of Funds and Property of a Client.**

(A) All funds of clients paid to a member of the State Bar or Firm of which he is a member, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the State of California and no funds belonging to the member of the State Bar or firm of which he is a member shall be deposited therein except as follows:

- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
- (2) Funds belonging in part to a client and in part presently or potentially to the member of the State Bar or firm of which he is a member must be deposited therein, but the portion belonging to the member of the State Bar or firm of which he is a member may be withdrawn when due unless the right of the member of the State Bar or firm of which he is a member to

receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member of the State Bar shall:

- (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them.
- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive.

*Comment*

Rule 9-101 originated from ABA Code DR 9-102. The committee amended ABA Code DR 9-102 to include advances by the client to the attorney for costs and expenses as subject to the trust account requirements.

~~However, the~~ The rule change that was ultimately ~~adopted~~ approved in 1975 was rule 8-101, ~~that~~ which provided:

**Rule 8-101. Preserving Identity of Funds and Property of a Client**

(A) All funds received or held for the benefit of clients by a member of the State Bar or firm of which he is a member, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account", "Client's funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in such other jurisdiction where there is a substantial relationship between his client or his client's business and the other jurisdiction and no funds belonging to the member of the State Bar or firm of which he is a member shall be deposited therein or otherwise commingled therewith except as follows:

- (1) Funds reasonable sufficient to pay bank charges may be deposited therein.
- (2) Funds belonging in part to a client and in part presently or potentially to the member of the State Bar or firm of which he is a member must be deposited therein and the portion belonging to the member of the State

Bar or firm of which he is a member must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member of the State Bar or firm of which he is a member to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member of the State Bar shall:

- (1) Promptly notify a client of the receipt of his funds, securities or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them.
- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the member of the State Bar which the client is entitled to receive. (Amended by order of the Supreme Court, effective January 1, 1975.)

In 1983, Rule 8-101 was further ~~developed~~amended to complement the then new statutory authority of the State Bar to conduct audits of trust accounts upon a State Bar Court determination of reasonable cause to believe that a member has violated rule 8-101. (See Bus. & Prof. Code sections 6055 and 6086 as amended effective January 1, 1982.) The following underlined language was added to 8-101(B)(3):

Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar and render appropriate accounts to his client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

In 1989, rule 8-101 was revised and renumbered as 4-100 as part of a comprehensive revision and renumbering of the entire California Rules of Professional Conduct. Rule 4-100(A) and (B) continued the requirements of rule 8-101, regarding the setting up and maintaining of client trust accounts and the handling of client funds and property that come into the possession of the attorney.

Paragraph (C) was added to permit the Board of Governors to adopt specific recordkeeping requirements ("standards") to assist attorneys in setting up trust accounts and to serve as a basis for discipline if those records were not kept.

The rule amendments of 1989 reflected in current rule 4-100:

Rule ~~4-100~~ 8-101. Preserving Identity of Funds and Property of a Client

(A) All funds received or held for the benefit of clients by a member of the State Bar or law firm, ~~of which he is a member~~, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in such any other jurisdiction where there is a substantial relationship between his the client or his the client's business and the other jurisdiction, ~~and a No~~ funds belonging to the member of the State Bar or the law firm of ~~which he is a member~~ shall be deposited therein or otherwise commingled therewith except as follows:

- (1) Funds reasonably sufficient to pay bank charges, ~~may be deposited therein.~~
- (2) ~~In the case of F~~ funds belonging in part to a client and in part presently or potentially to the member of the State Bar or the law firm, ~~of which he is a member must be deposited therein and the portion belonging to the member of the State Bar or law firm of which he is a member must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member of the State Bar or law firm of which he is a member to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.~~

(B) A member of the State Bar shall:

- (1) Promptly notify a client of the receipt of his the client's funds, securities, or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member of the State Bar or law firm and render appropriate accounts to his the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.
- (4) Promptly pay or deliver, ~~to the client~~ as requested by a the client, ~~the any~~ funds, securities, or other properties in the possession of the member of

~~the State Bar~~ which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

In 1992, proposed amendments to rule 4-100 were submitted to the California Supreme Court together with amendments to rule 3-700 (re termination of employment, including the duty to refunding ~~of~~ unearned fees paid in advance). The amendments to these rules would have required that all advance fees for legal services received by an attorney be deposited in the attorney's client trust account unless the attorney's written fee agreement with the client expressly provided that the fee paid in advance was earned when paid or was a "true retainer." Although the proposed amendments avoided use of the terms "fixed fee," "flat fee" or "non-refundable fee," such types of retainer fee agreements would have been permissible under the proposed amendments ~~and~~ but the fees paid under such agreements would have been required to be placed in the attorney's client trust account unless the attorney's written attorney-client fee agreement expressly provided that such fees, paid in advance of the provision of legal services, were "earned when paid or is a true retainer . . ." (See "Request that the Supreme Court of California Approve Amendments to the Rules 3-700 and 4-100 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation," October 1992, Supreme Court file number SO29270.)

In a May 11, 1995 Supreme Court letter from John C. Rossi, Assistant Clerk-Administrator, to Diane Yu, State Bar General Counsel, the court advised the State Bar of a possible ambiguity in the proposal. In relevant part, the letter stated:

If a fee agreement specifies that an advance fee is "earned" when paid, the fee does not fall within rule 3-700(D)(2)'s requirement that members return "unearned" advance fees. Similarly, the new discussion following that rule refers only to an "unearned" fee paid in advance and states that "such fee" may still have to be refunded even if not required to be in a trust account. . . . Thus, the proposed rules appear to exempt advance fees designated as earned when paid from the requirement of refunding fees paid for services that are not performed.

Following receipt of this letter, the State Bar withdrew the request that the Supreme Court approve the proposed amendments to rules 3-700 and 4-100.

While the foregoing submission to the Supreme Court was the last time that the Court considered proposed amendments to rule 4-100, in 1997 a Board Committee authorized COPRAC to seek public comment on a proposed new rule 4-110 (re advance payment of fees for legal services) that would have required a lawyer to obtain informed authorization from a client to deposit and hold advance fees in an account other than the lawyer's trust account. Following consideration of public

comment received on this proposal, COPRAC ceased its consideration of a proposed new rule 4-110.

### **III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):***

A. [2015 Comments](#). In a [2015 memorandum from OCTC](#), OCTC provided the following comment on rule 4-100:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. [2010 Comments](#). In a June 15, 2015 memorandum from OCTC, OCTC provided the following comment on ~~rule 4-100~~[the first Commission's proposed Rule 1.15](#):

1. While OCTC supports some of the Commission's additions or changes to the Model Rules and there is much merit to the Commission's explanation that costs are covered by the rule, OCTC disagrees with subparagraph (d) of this rule with allows, but does not require, attorneys to place advanced fees in the trust account. We believe this creates confusion and a lack of consistency. Either every lawyer should be placing advanced fees in the Client Trust Account ("CTA") or no lawyer should be placing advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will protect clients. (While some have even argued that the funds are less safe in a CTA, OCTC disagrees and believes the safest place for the funds is in a CTA.) OCTC has many cases where the attorney does not return the unearned fees and claims not to have the funds to do so. Many who oppose mandating that advanced fees be in the CTA cite to *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164. However, that case simply stated that the Court did not need to decide the issue in that case. Since then, at least one state appellate court has found that the current rule requires attorneys to place advanced fees into the CTA. (See *T & R Foods, Inc v. Rose* (1996) 47 Cal.App.4th Supp 1, 7.) Further, the Model Rules and most other jurisdictions require attorneys to place advanced fees in the trust account. If this change to the rule is adopted, the first sentence of Comment 10 should be stricken.

2. OCTC finds very confusing and inconsistent the proposed rules as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h), and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments [12] – [14].

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. OCTC would also suggest that the rule specifically provide that the misappropriation of funds violates this rule.

4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason 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.

5. OCTC supports subparagraph (k), even though it is not in the Model Rules, because it is mostly current rule 4-100(B). However, OCTC is concerned that subparagraph (k)(6), which is new, does not provide for the Supreme Court or other courts to issue an order for an audit. The rule should not determine jurisdiction or send a message that attorneys can violate a court order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *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 (k)(7) should add the word “authorized” to other person to clarify that only authorized persons can request undisputed funds.

6. OCTC is concerned that the language of subparagraph (l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is concerned that rule 1.15 (l)(2) and (3) do not state, as rule 1.15(l)(1) does, that if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC also is concerned how this paragraph is impacted by the Choice of Law rule (proposed rule 8.5)

7. OCTC supports subparagraphs (l)(4). There are too many Comments and some of them appear to belong in the rule.

C. [2001 Comments.](#) In a September 27, 2001 memorandum to the first Commission, OCTC provided the following comment regarding rule 4-100:

OCTC recommends clarifying and expanding this rule to include, among other things, a requirement that members maintain advanced fees in a trust account until earned. The suggested changes also define the term “misappropriation.” Revise the rule as follows:

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled “Trust Account,” “Client’s Funds Account” or words of similar import,

maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. If the funds received or held by the member involve a substantial sum of money and there is a reasonable expectation that these funds will be maintained in the account controlled by the member for over six months, the funds will not be placed with the member's other clients' funds but kept in a separate interest bearing bank account labeled "Trust Account," "Client's Funds Account" or words of similar import. Any interest earned from this separate trust account will belong to the client. No funds belonging to the member or the law firm shall be deposited therein into a trust account maintained by the member or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to the client and, in part, presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client or subject to a lawful lien the disputed portion shall must be placed or maintained in the current attorney's trust account and not be withdrawn until the dispute is finally resolved. The member or firm must promptly distribute to the client all portions of any property to which the interests of the client are not in dispute. The member or former lawyer or firm must sign any checks or drafts necessary to have the funds placed in the current lawyer's trust account or to ensure that the client is promptly provided his or her funds. The member or law firm has the obligation to take steps to ensure that any dispute is promptly resolved.

(B) A member shall must:

(1) Deposit into a Trust Account, as described in paragraph A of this rule, all legal fees and expenses that have been paid in advance and will be withdrawn by the member only as fees are earned or expenses incurred.

~~(1)~~(2) Promptly notify a client of the receipt of the client's funds, securities, or other property.

~~(2)~~(3) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

~~(3)~~(4) Maintain complete records of all funds, fees, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds, fees, securities, or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

~~(4)~~(5) Promptly pay or deliver, ~~as requested by the client~~, any funds, securities, or other properties in the possession of the member which the client is entitled to receive, unless the client instructs otherwise and, in that case, the member will comply with any lawful instruction by the client.

(6) Not misappropriate client funds or other trust funds. Misappropriate means (1) any unauthorized use by the member of client funds or other trust funds or property or (2) any unauthorized and unreasonable withholding by the member of client funds or other trust funds or property.

#### Discussion

**The accounting requirement of section (B)(4) also obligates the attorney to maintain adequate records of fees received in advance and earned and to provide the client with an appropriate accounting of those fees. In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct., Rptr. 752, 758.) Other than a true retainer, a fee is not earned upon receipt and, therefore, the fee must be kept in a trust account until earned.**

While not every failure to promptly return funds or property to a client will constitute a misappropriation by the attorney, if client funds or property are held by the attorney for an unreasonable period of time without the client's permission or consent, such withholding may constitutes a misappropriation as it deprives the client of his or her rightful property and the use of that property.

OCTC COMMENTS:

Paragraph (A)(2) codifies existing law that even if there is a fee or accounting dispute the attorney must not only place the disputed funds in the trust account, but actually distribute the funds not in dispute to the client. Some attorneys have attempted to pressure their clients in resolving the dispute by placing all the client's funds in the trust account, even when the dispute involves only a portion of those funds. Only the disputed portion of the funds should be maintained in trust pending resolution of the dispute. This rule should also mandate that the attorney take reasonable action to resolve the dispute so that the funds do not stay in the account for an unreasonable amount of time.

There are also situations where an attorney or doctor has a lawful lien that the client disputes. Those funds should stay in the trust account until the dispute is resolved.

Sometimes, because of a dispute with a former attorney the attorney refuses to sign or endorse a settlement check. This should be specifically prohibited as it causes harm to the client. OCTC recommends the rule require that all attorneys must promptly sign or endorse a settlement check and that the disputed funds be placed in the current attorney's trust account until the dispute can be resolved. Clarity with regard to these requirements will be helpful. A specific requirement will ensure that clients are not impacted by the inability of attorneys to come to a reasonable agreement or attempts to hold funds hostage. This is consistent with the absolute prohibition against an attorney refusing to provide a client's files (see *Academy of California Optometrists v. Superior Court* (1975) 51 Cal. App.3d 999, 1006) and the Supreme Court's long held prohibition on an attorney who does not have a contractual lien from withholding funds to pay his or her services. (See *Silver v. State Bar* (1974) 13 Cal.3d 134.)

In new paragraph (B)(1), we codify the requirement that advanced fees should be placed in a client trust account. Although the Supreme Court declined to address this requirement in *Baranoswki v. State Bar* (1979) 24 Cal.3d 153, 164, civil courts have held that the rule does require advanced fees be placed into a trust account until earned, unless they are a true retainer. (See *T & R Foods Inc .v. Rose* (1996) 47 Cal. App.4th Supp. 1, 7. See also *S.E.C. v. Interlink Data Network of Los Angeles* (9th Cir. 1996) 77 Fed.3d 1201.) Many other states require that advances for fees be placed in trust until earned.

With regard to paragraph (B)(4), OCTC eliminates the requirement that there

be a request by the client in order for there to be a violation of the rule regarding prompt delivery of funds..

OCTC also added a specific misappropriation section. Although most misappropriation cases are and should be found as a violation of the moral turpitude section there are some cases where the authorized use has not been found to involve moral turpitude. There have also been situations where attorneys simply hold on to a client's funds for a substantial and unreasonable period of time - sometimes for years. This situation should also constitute the misappropriation of client funds.

#### **IV. *Potential Deficiencies in the Current Rule:***

A. See above input from OCTC.

B. Rule 4-100(A) restricts the location of a trust account to California or another jurisdiction where there is "a substantial relationship between the client or the client's business and the other jurisdiction," and the [client](#) gives written client consent to hold funds in that other jurisdiction. A client may have other reasons for authorizing their lawyer to hold funds in another jurisdiction [besides those referenced in the rule](#).

C. Rule 4-100 has been interpreted to give a lawyer discretion as to whether to hold advance payment for fees in a trust account. This is based on discipline common law that questions whether advance fees are funds "held for the benefit of clients" as only those funds must be held in a trust account. (See *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 163.) Public protection might be lacking in those circumstances where an advance payment for fees was not held in a trust account and a refund becomes due but the lawyer no longer has sufficient funds to promptly pay that refund. (There may be civil consequences even if there is no discipline under Rule 4-100. See *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1 [56 Cal.Rptr.2d 41]. [Compare \*S.E.C. v. Interlink Data Network of Los Angeles\* \(9th Cir. 1996\) 77 F.3d 1201 \(firm entitled to part of advance fee as earned upon receipt but remainder belongs to client\).](#))

D. Rule 4-100 does not explicitly state the duties in the rule are applicable to funds entrusted to a lawyer by a person who is not a client. Clarification might lead to enhanced compliance when a lawyer owes duties to a non-client.

E. Rule 4-100 does not clarify whether commingling occurs if a lawyer seeks to restore to the trust account funds that were initially withdrawn by mistake or due to an improper act.

F. Rule 4-100 does not explicitly provide for a lawyer's use of modern technological methods of payment, such as Paypal.

G. Rule 4-100 is silent on multi-jurisdictional practice situations, for example where a member of the State Bar of California residing and practicing law in a state other than California who receives funds or property from a person who is not a resident of California, arising from or related to a legal representation not in California.

**V. California Context:**

A. State Bar Act. Every member of the State Bar of California is deemed to authorize banks and financial institutions holding client trust fund accounts to disclose records of those accounts to the State Bar, pursuant to Business and Professions Code §§ 6069, 6091.1, and 6091.2, and requires banks to make reports to the State Bar of instances of insufficient funds presented against an attorney's client trust account. §§ 6210-6228 requires IOLTA accounts to be established with the interest to be paid to the State Bar for legal services for the indigent.

B. Related California law. Under 4-100(A), funds belonging in part to a client and in part presently or potentially to the member must be deposited in the attorney's trust account. The California Supreme Court has declined to resolve the question of whether advance fees must be deposited in the attorney's trust account (See *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 163). In *Baranowski*, the court did not impose discipline on the attorney for failing to deposit advance fees in a trust account.

The State Bar Court distinguishes a true retainer as a fee paid by a client which is paid solely for the purpose of ensuring the availability of the member for the matter over a given period of time (See *In the matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752).

Separately, California statutory law establishes two areas where advance payment of fees for legal services are strictly prohibited:

Senate Bill No. 94, enacted in 2009, was codified in Business and Professions Code section 6106.3 and California Civil Code section 2944.7(a), and makes it unlawful for any person who offers to negotiate, arrange or perform a mortgage loan modification or forbearance in exchange for a fee paid by the borrower, to claim, demand, charge, collect or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.

Assembly Bill No. 1159, enacted in 2013, was codified in Business and Professions Code sections 6240 – 6243 and in amendments at sections 22442, 22442.3 and 22443.1, and prohibits attorneys and immigration consultants from demanding or accepting payment for any immigration reform act services before enactment, by Congress, of an immigration reform act that authorizes undocumented immigrants to attain lawful status under federal law.

## **VI. Approach In Other Jurisdictions (National Backdrop):**

A. Model Rule 1.15 Variations. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.15: Safekeeping Property,” revised January 5, 2016, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_15.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_15.authcheckdam.pdf) [Last visited 2/22/16]

- Three states have adopted Model Rule 1.15 verbatim.<sup>1</sup> Fourteen jurisdictions have adopted a slightly modified version of Model Rule 1.15.<sup>2</sup> Thirty-four states have adopted a version of the rule that is substantially different to Model Rule 1.8.”<sup>3</sup> Some jurisdictions have adopted more than one rule to regulate lawyer trust accounts. (See, e.g., Delaware rules 1.15 and 1.15A, available at: <http://courts.delaware.gov/rules/DLRPCwithCommentsFeb2010.pdf>)

## **VII. Public Comment Received by the First Commission:**

A. The clean text of proposed new Rule 1.15 drafted by the first Commission and adopted by the Board to replace rule 4-100 is enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rules differ from current rule 4-100, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 4-100 is also enclosed with the public comments received. However, given the Board’s charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and enforceable articulation of disciplinary standards,” a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

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<sup>1</sup> The three are states are: Kansas, Nebraska, and Rhode Island.

<sup>2</sup> The fourteen jurisdictions are: Alaska, Arizona, District of Columbia, Georgia, Iowa, Kentucky, Maryland, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Vermont, and West Virginia.

<sup>3</sup> The thirty-four states are: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming.

**VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:**

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether to recommend a more flexible approach on holding client funds in a jurisdiction other than California, provided the client consents.

(2) Whether to recommend a policy change in the current approach to advance fees that would eliminate or restrict the lawyer's discretion to receive or hold such funds in an account other than the lawyer's trust account.

(3) Whether to recommend new terminology that would expressly state that the duties in the rule are applicable to funds entrusted to a lawyer by a person who is not a client. (See *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456.)

(4) Whether to recommend a clarification that commingling does not occur where a lawyer seeks to use ~~their~~ the lawyer's own funds to restore to the trust account funds that were initially withdrawn by mistake or due to an improper act.

(5) Whether to recommend that the rule explicitly provides s for a lawyer's use of modern ~~technological~~ electronic methods of payment, such as Paypal.

(6) Whether to recommend amendments addressing the application of the rule to multi-jurisdictional practice situations.

(7) Whether to recommend clarification of a lawyer's duty to account to a client's lien holders and/or other claimants asserting a lawful claim to trust funds held for a client. (See *Farmers Insurance Exchange v. Zerin* (1997) 53 Cal.App.4th 445 [61 Cal.Rptr.2d 707].) (See also *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196.)



(8) Whether to recommend greater detail in defining a lawyer's duty to obtain client authorization to disburse funds. For example, is there any requirement to confirm a client's agreement with a typical disbursement invoice or to wait for a certain amount of time?

**IX. Research Resources:**

- [Aronin v. State Bar](#) (1990) 52 Cal.3d 276 [276 Cal. Rptr. 160]
- [Baranowski v. State Bar](#) (1979) 24 Cal.3d 153, 164 [154 Cal.Rptr. 752] (true retainer)
- [Bernstein v. State Bar](#) (1972) 6 Cal.3d 909 [101 Cal. Rptr. 369]
- [Dudugjian v. State Bar](#) (1991) 52 Cal.3d 1092 [278 Cal. Rptr. 90]
- [Friedman v. State Bar](#) (1990) 50 Cal.3d 235, 240–241 [266 Cal.Rptr. 632] (disputed fees)
- [Kelly v. State Bar](#) (1991) 53 Cal.3d 509, 517 [280 Cal.Rptr. 298]
- [Waysman v. State Bar](#) (1986) 41 Cal.3d 452 [224 Cal. Rptr. 101]
- [T & R Foods, Inc. v. Rose](#) (1996) 47 Cal.App.4th Supp. 1 [56 Cal.Rptr.2d 41]
- *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420 (deposit of non-client business operating funds in trust account was misconduct)
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- *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752 (advance fees)
- *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632. (maintain records for trust funds or property)
- *Farmers Insurance Exchange v. Zerin* (1997) 53 Cal.App.4th 445 [61 Cal.Rptr.2d 707]
- *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456
- *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196

*State Bar Ethics Opinions:*

- [CAL 2007-172](#) (Credit Card Payments)
- [CAL 2005-169](#) (Client Trust Accounts)
- [CAL 2006-171](#) (Funds Withdrawn from a Client Trust Account)
- [CAL 2009-177](#) (Ethical Obligations in Enforcing Charging Liens)