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**March 25, 2016 OCTC Email to RRC2:**

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**K. Rule 4-100 [Preserving Identity of Funds and Property of a Client]**

The question of whether advance attorney fees must be maintained in trust until earned is an unsettled issue in California. (Compare *T&R Foods, Inc. v. Rose* (1996) 47 Cal.App. 4th Supp. 1, 6-7, [advanced fees are funds received or held for the benefit of the client and, therefore, must be deposited into a trust account] and *Barnowski v. State Bar* (1979) 24 Cal.3d 153, 164, where the court declined to resolve the issue.) The California Practice Guide: Professional Responsibility, sections 9:108-109, states that the issue is unresolved, but finds that the language of the rule “seems broad enough to cover fees paid in advance” and that “prudence dictates treating such funds as the client’s property and keeping them in a trust account until fixed or earned.” Many jurisdictions have found that advance fees must be deposited into a client trust account until earned and fixed. (See *Iowa Supreme Court Board of Professional Ethics and Conduct v. Apland* (Iowa 1998) 577 N.W.2d 50, 55 [majority of authorities now agree advance fees must be deposited into trust account]; *In re Sather* (Colo 2000) 3 P.3d 403, 409; and *In re Mance* (D.C. 2009) 980 A.2d 1196, 1203.) A revision of rule 4-100 expressly resolving this question would be of benefit to the membership.

It would also be advisable for subsection (B)(3) of the rule to clarify that the accounting required under that rule be provided to the client in writing. Oral accountings are fleeting. Clients should not be expected to retain an accounting in their heads. (See *Chambers v. Kay* (2002) 29 Cal.4th 142, 157 [a client should not be expected to mentally retain fee sharing agreement information throughout the pendency of the case].) Further, clients should be able to take an accounting home and carefully review it, potentially with another trusted person. A written accounting protects the client.

**April 29, 2016 McCurdy Email to Drafting Team, cc Difuntorum, Mohr, Marlaud:**

OCTC’s additional comments on Rule 4-100 are attached and also pasted below for ease of reference. Please consider these comments in preparation for the May meeting.

Attached:

RRC2 - [5-110 & 5-220][1-400][3-210][3-500][3-310][3-300][3-400][3-410][3-700][4-100][5-210] - 03-25-16 OCTC Memo to RRC2.pdf

**B. Rule 4-100 [Preserving Identity of Funds and Property of a Client]**

Please see OCTC’s March 25, 2016 comment. (also attached)

Additionally, OCTC notes the recent case of *In re Scheer* (Ninth Circuit 2016) \_\_ Fed.3d \_\_, 2016 WL 1459217, where the Ninth Circuit Court of Appeal ruled that an attorney may avail herself of bankruptcy protection to avoid refunding improperly collected attorney fees.<sup>1/</sup> This is an example of a risk clients assume when they provide an attorney fees that may never be earned and why rule 4-100 should clarify whether such payments are to be held in trust until earned.

<sup>1/</sup> In *Scheer*, the fees were received in violation of the prohibition against advance fees in loan modification matters. This ruling, however, could logically apply to all advance and unearned fees.