



The State Bar of California

D.3. Rule Amendments
01-07-22 Meeting
Open Session

OFFICE OF PROFESSIONAL
COMPETENCE

DATE: December 21, 2021

TO: Members of COPRAC

FROM: Randall Difuntorum

SUBJECT: Committee on Special Discipline Case Audit – Consideration of Proposed Amendments to the Rules of Professional Conduct

Earlier this year, the Board of Trustees established a special committee of the Board, the Committee on Special Discipline Case Audit, to further analyze the audit report on closed discipline cases against Thomas Girardi and to develop a proposed corrective action plan to be approved by the Regulation and Discipline Committee or the Board of Trustees. The committee was directed to develop recommendations for increasing the State Bar's ability to effectively and proactively regulate attorney client trust accounts and attorney client trust account management. The committee submitted its [report](#) to the Board at the Board's November meeting.

Among the recommendations presented in the report are the following Rule of Professional Conduct proposals:

Recommendation: Revise or Clarify Rule 1.15(d)

The Board of Trustees should direct the Committee on Professional Responsibility and Conduct (COPRAC) to draft a revision to or clarification of rule 1.15(d) to remove the burden of soliciting reimbursement from the client and to clarify the meaning of "promptly" by replacing that term with a rebuttable presumption timeframe for disbursement, likely 30–60 days.

Recommendation: Clarify Rule 1.4

The Board of Trustees should direct State Bar staff to clarify rule 1.4 to ensure that developments regarding the receipt and disbursement of funds on behalf of clients are specifically included in the language of that rule, including reference to rule 1.15(d)(1).

The Board is anticipated to consider possible public comment proposals for the above rule revisions and COPRAC's assistance is requested in developing the public comment drafts. To

facilitate COPRAC's work, State Bar staff has prepared the discussion drafts and explanations below.¹

I. Prompt Disbursement to a Client of Funds Held in Trust that a Client is Entitled to Receive

To provide greater clarity on the requirement of "prompt" distribution of trust funds, the committee discussed three enhancements: (i) removing the existing condition that a lawyer's duty to disburse trust funds is triggered only when a request is made by a client or other person entitled to the funds;² (ii) adding a new subdivision in the rule that would establish a presumption of a violation of the requirement to promptly distribute funds;³ and (iii) adding a new Comment [4] to [rule 1.15](#) describing what is ordinarily considered compliant for meeting the promptness requirement and explaining the presumption provision. Discussion drafts for these proposals are provided below.

Rule 1.15 – Amendment to Remove Existing "Client Request" Condition

Rule 1.15 Safekeeping Funds and Property of Clients and other Persons

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(d) A lawyer shall:

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(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.

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¹ Complete redline/strikeout drafts of both rules 1.4 and 1.15 are provided as Attachment 1.

² See *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 126–127 [under former rule 4–100(B)(4), no violation found for failing to disburse promptly where the lawyer's client did not make a request for the funds]; and *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 188) [request by client for payment of funds held by attorney is "an essential element of the offense" under former rule 8–101(B)(4) (predecessor to rule 4–100(B)(4))].

³ A provision in the rules providing for a presumption affecting the burden of proof in a disciplinary proceeding is currently found in rule 7.1(b) which provides that:

The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules.

"Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

Rule 1.15 Safekeeping Funds and Property of Clients and other Persons

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(f) For purposes of determining a lawyer's compliance with paragraph (d)(7), absent a request from the client or other person* that the funds continue to be held by the lawyer, a lawyer's failure to distribute funds to a client or other person within 60-days of a lawyer's receipt of the funds shall constitute a presumed violation. A "presumed violation" means that there is a presumption affecting the burden of proof as defined in Evidence Code sections 605 and 606.

Comment

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[4] Paragraphs (d)(7) and (f) establish a presumption that, absent a request from the client or other person that the funds continue to be held by the lawyer, funds must be distributed to a client or other person within 60-days of a lawyer's receipt of the funds. This requires a lawyer to be diligent in resolving any issues concerning the entitlement to the funds including, but not limited to, resolution of: medical liens; statutory liens; prior attorney liens; disputed costs or expenses; disputed attorney fees; issues arising from a bank's policies for clearing a check or draft; and any applicable conditions on entitlement such as a plaintiff's execution of a release and dismissal. Necessary and reasonable delays in resolving any such issues may serve as a basis for overcoming the presumption.

II. Client Communications Regarding Receipt of Trust Funds

Committee members expressed concerns that lawyers might be lacking in their efforts to keep clients apprised of case developments related to the receipt and disbursement of funds received on behalf of clients. In particular, it was felt that the concept of "significant developments" in [rule 1.4](#) did not adequately convey that developments related to the receipt and disbursement of funds triggers a lawyer's duty to engage in prompt and reasonable client communications to assure that the client is well-informed about the status of funds received by their lawyer. Amending the comment to rule 1.4 was discussed as a way of linking the general client communication duty in that rule to the specific notice mandate in the client trust accounting rule, [rule 1.15\(d\)\(1\)](#).⁴ Another consideration for clarifying the client communication responsibilities would be to establish a more specific time frame for the notice requirement in rule 1.15(d)(1). Discussion drafts of an amended comment to rule 1.4 and a modification to rule 1.15(d)(1) are provided below.

⁴ It should be noted that the communication rule applies to clients but that the notice requirement in rule 1.15(d)(1) applies to clients and other persons.

Rule 1.4 – Amended Comment to the Client Communication Rule

Rule 1.4 Communications with Clients

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Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. Developments related to a lawyer's receipt of funds on behalf of a client should be considered as significant and a lawyer should engage in prompt and reasonable communications with a client about any such developments. See rule 1.15(d)(1) which specifically provides that a lawyer shall "promptly, but in no event later than 14 days after receipt, notify a client or other person of receipt of funds, securities, or other property in which the lawyer knows or reasonably should know the client or other person has an interest."

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Rule 1.15 – Amended Requirement for Providing Notice of Receipt of Trust Funds

Rule 1.5 Safekeeping Funds and Property of Clients and Other Persons

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(d) A lawyer shall

- (1) Promptly, but in no event later than 14 days after receipt, 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;

* * * * *

REDLINE/STRIKEOUT VERSION OF RULE 1.4 DISCUSSION DRAFT

Rule 1.4 Communication with Clients

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. [Developments related to a lawyer's receipt of funds on behalf of a client should be considered as significant and a lawyer should engage in prompt and reasonable communications with a client about any such developments. See rule 1.15\(d\)\(1\) which specifically provides that a lawyer shall "promptly, but in no event later than 14 days after receipt, notify a client or other person of 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] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1).)

[4] This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

REDLINE/STRIKEOUT VERSION OF RULE 1.15 DISCUSSION DRAFT

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

(a) 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, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "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) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

(2) if the flat fee exceeds \$1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

(c) 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; and

(2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case 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.

(d) A lawyer shall:

(1) promptly notify, but in no event later than 14 days after receipt, 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 in writing* 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; and

(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.

(e) 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 (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

(f) For purposes of determining a lawyer's compliance with paragraph (d)(7), absent a request from the client or other person* that the funds continue to be held by the lawyer, a lawyer's failure to distribute funds to a client or other person within 60-days of a lawyer's receipt of the funds shall constitute a presumed violation. A "presumed violation" means that there is a presumption affecting the burden of proof as defined in Evidence Code sections 605 and 606.

Standards:

Pursuant to this rule, the Board of Trustees of the State Bar adopted the following standards, effective November 1, 2018, as to what "records" shall be maintained by lawyers and law firms* in accordance with paragraph (d)(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:

- (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

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. (See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665].) However, civil liability by itself does not establish a violation of this rule. (Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] [“When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct.”] with *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] [lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds].)

[2] As used in this rule, “advances for fees” means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client’s behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see rule 1.5(d) and (e). Subject to rule 1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client’s agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer’s trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer’s obligations under paragraph (d) or the lawyer’s burden to establish that the fee has been earned.

[\[4\] Paragraphs \(d\)\(7\) and \(f\) establish a presumption that, absent a request from the client or other person that the funds continue to be held by the lawyer, funds must be distributed to a client or other person within 60-days of a lawyer’s receipt of the funds. This requires a lawyer to be diligent in resolving any issues concerning the entitlement to the funds including, but not limited to, resolution of: medical liens; statutory liens; prior attorney liens; disputed costs or expenses; disputed attorney fees; issues arising from a bank’s policies for clearing a check or draft; and any applicable conditions on entitlement such as a plaintiff’s](#)

ATTACHMENT 1

execution of a release and dismissal. Necessary and reasonable delays in resolving any such issues may serve as a basis for overcoming the presumption.