

**Committee on Special Discipline Case Audit – COPRAC Subcommittee’s Outline of
Issues to Consider Re: Proposed Amendments to Rules 1.4 and 1.15**

I. Overall Considerations

- A. On whole, we support revisions to the rules of professional conduct that better articulate lawyer’s duties and provide guidance to lawyers for the protection of clients and the public.
- B. The proposed revisions appear reactionary to an egregious and exceptional situation. There are also questions about whether these proposed rule changes, or any related rule changes, would prevent future similar conduct.
- C. While we generally support providing specific and clear guidance to lawyers, the proposed revisions are overbroad and may unnecessarily shift the burden of proof or result in disciplinary charges despite a lawyer’s good faith and reasonable conduct.

II. Comments to Proposed Revisions to Rule 1.4

- A. We support this proposed new comment clarifying that the lawyer’s receipt of funds on behalf of a client is a significant development requiring prompt and reasonable communications with the client, but recommend it be moved to a Comment to rule 1.15.
 - 1. This approach would be consistent with the comment to the settlement communications rule 1.4.1.
 - 2. Rule 1.4 does not provide other examples and we don’t believe this example should be highlighted or deemed more important than others.
 - 3. To the extent the proposed time limitations remain in rule 1.15, this will also help avoid confusion of whether “promptly” under rule 1.4 means 14 days.

III. Comments to Proposed Revisions to Rule 1.15

- A. No Time Limitations: Some recommend against the use of a specific time limitation in subsection (d)(1) to specify the deadline by which a lawyer must notify a client or other person of the receipt of funds, securities, or other property. Others believe the time limitations would be helpful to include.
 - 1. Lawyers may wait until the 14-day deadline before notifying the client or other person even in situations where it is reasonable to provide earlier notice.
 - 2. The ABA does not specify a time limitation and we are unaware of other states that have adopted specific time limitations.

3. Most of the other California rules do not specify a time limitation.
 4. This may create confusion as to whether the use of “promptly” in the other rules means 14 days.
- B. Removal of Triggering Request for Distribution: We support the removal of “as requested by the client or other person” from subsection (d)(7) as the trigger for prompt distribution of undisputed funds or property.
1. We have not had a chance yet to review case law/executive summary to rule to understand the significance of this clause.
 2. This is inconsistent with ABA model rule and other state counterparts.
 3. A comment should be added to clarify that subsection (d)(7) is not intended to apply to advanced fees or the client file.
- C. Removal of Presumed Violation: We recommend removal of proposed comment [4] to subsection (f), which would create a presumed violation if funds are not distributed within 45-days of the lawyer’s determination that the funds are undisputed.
1. A lawyer may not be able to distribute funds within 45 days despite good faith, reasonable and diligent conduct for numerous reasons. Yet the proposed comment [4] to subsection (f) only cites one example. Given the number of other potentially valid reasons, it is unfair and unreasonable to use a rebuttable presumption.
 2. The 45-day time limitation may cause some attorneys to wait to distribute funds until closer to the deadline even in situations where it is reasonable to distribute funds much earlier.
 3. There is not a “one-size fits all” time limitation that is feasible; the use of “promptly” provides much-needed flexibility.
 4. We recommend that the State Bar instead consider the ABA model rule approach in Model Rule 1.15(d) and (e), making clear all undisputed funds must be promptly distributed “[e]xcept as stated in this rule or otherwise permitted by law or by agreement with the client.”
 5. Model Rule 1.15(e) also provides valuable guidance regarding the lawyer’s obligation with respect to disputed funds, which should be considered.
 6. Proposed comment [4] unfairly shifts the burden of proof by “clear and convincing” evidence to the accused lawyer.

7. The constitutional issues relating to shifting the burden of proof to the accused should be evaluated.
8. This shifting of the burden of proof is also inconsistent with State Bar Rules or Procedure, Rule 5.103, which places the burden of proving culpability of a violation by “clear and convincing evidence” on the State Bar.
9. We are not aware of a rebuttable presumption in any other California rule, or the ABA model rules.
10. As an alternative, at least some members would prefer a “without good cause” standard, noting that “the failure to distribute undisputed funds within 45 days, absent good cause, will constitute a violation.”
 - a) This approach would be more efficient and conserve State Bar resources by avoiding unnecessary initiation of charges in situations where the lawyer clearly has good cause.
 - b) One subcommittee member only supports removal of the rebuttable presumption if this alternative is used.
11. We also do not understand why this presumption would only apply to funds in subsection (d)(7), and not property.

D. Move interpretative guidance to comment: We recommend the following helpful language from subsection (g) be moved to a new comment [5]: “Possible issues concerning the entitlement to the funds include, but are not limited to, resolution of entitlement issues arising from: medical liens; statutory liens; prior attorney liens; disputed costs or expenses; disputed attorney fees; a bank’s policies for clearing a check or draft; any applicable conditions on entitlement such as a plaintiff’s execution of a release and dismissal; or any legal proceeding, such as an interpleader action, concerning the entitlement of any person to receive all or a portion of the funds.” [We discussed this change at our subcommittee meeting, but based on feedback received, we should discuss whether to include this guidance as part of rule. This explanatory note with examples would typically be part of rule comments.]

E. Guidance re: lawyer’s obligation to promptly resolve disputes: Consider added as new comment [6] to subsection (g) the following language to remind lawyers of their obligation to promptly resolve disputes over funds or property: “A lawyer must promptly take ‘appropriate, substantive steps’ to resolve disputes 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. *See* Cal. State Bar Formal Opn. 2009-177 at 2-3."

1. If the State Bar tracks the ABA Model Rule 1.15(e) language, this could be a clarifying comment to this subsection.
2. We should discuss whether this should be part of the comments or a new subsection to Rule 1.15. This is one of the factors involved in evaluating whether distribution was prompt.

Rule 1.4 Communication with Clients
(Discussion Draft #2 – Clean Version)

(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. As just one example, a lawyer’s receipt of funds on behalf of a client is a significant development requiring prompt and reasonable communications with the client. See rule 1.15(d)(1) which specifically provides that a lawyer shall “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.” See also rule 1.15(f) which requires this notification to be given no later than 14 days after receipt of funds, securities, or other property.

[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.

Rule 1.4 Communication with Clients
(Discussion Draft #2 – Redline Comparison to Current Rule)

(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. As just one example, a lawyer's receipt of funds on behalf of a client is a significant development requiring prompt and reasonable communications with the client. See rule 1.15(d)(1)

72 which specifically provides that a lawyer shall “promptly notify a client or other person* of the
73 receipt of funds, securities, or other property in which the lawyer knows* or reasonably should
74 know* the client or other person* has an interest.”^[DR1] See also rule 1.15(f) which requires this
75 notification to be given no later than 14 days after receipt of funds, securities, or other property.

76 [2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant
77 documents by electronic or other means. This rule does not prohibit a lawyer from seeking
78 recovery of the lawyer’s expense in any subsequent legal proceeding.

79 [3] Paragraph (c) applies during a representation and does not alter the obligations applicable
80 at termination of a representation. (See rule 1.16(e)(1).)

81 [4] This rule is not intended to create, augment, diminish, or eliminate any application of the
82 work product rule. The obligation of the lawyer to provide work product to the client shall be
83 governed by relevant statutory and decisional law.

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Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons*
(Discussion Draft #2 – Clean Version)

- (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 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;

- 122 (3) maintain complete records of all funds, securities, and other property of a client or
123 other person* coming into the possession of the lawyer or law firm*;
- 124 (4) promptly account in writing* to the client or other person* for whom the lawyer
125 holds funds or property;
- 126 (5) preserve records of all funds and property held by a lawyer or law firm* under this
127 rule for a period of no less than five years after final appropriate distribution of such
128 funds or property;
- 129 (6) comply with any order for an audit of such records issued pursuant to the Rules of
130 Procedure of the State Bar; and
- 131 (7) promptly distribute any undisputed funds or property in the possession of the
132 lawyer or law firm* that the client or other person* is entitled to receive.
- 133 (e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt
134 standards as to what “records” shall be maintained by lawyers and law firms* in accordance
135 with subparagraph (d)(3). The standards formulated and adopted by the Board, as from
136 time to time amended, shall be effective and binding on all lawyers.
- 137 (f) As used in paragraph (d)(1), “promptly notify” means that the required notice must be given
138 soon after receipt of funds, securities, or other property but in no event later than 14 days
139 after receipt.
- 140 (g) For purposes of determining a lawyer’s compliance with paragraph (d)(7), absent a request
141 from the client or other person* that the funds or property continue to be held by the
142 lawyer, it shall constitute a presumed violation for a lawyer to fail to distribute funds or
143 property within 45-days of the lawyer’s reasonable determination that the funds or
144 property held by the lawyer or law firm* are undisputed funds or property. A “presumed
145 violation” means that there is a rebuttable presumption affecting the burden of proof as
146 defined in Evidence Code sections 605 and 606.
- 147 (h) As used in this rule, “undisputed funds or property” refers to funds or property in the
148 possession of a lawyer or law firm* where the lawyer knows* or reasonably should know*
149 that the ownership interest of the client or other person* in the funds or property has
150 become fixed and there are no unresolved issues as to the client’s or other person’s*
151 entitlement to receive the funds or property. Possible issues concerning the entitlement to
152 the funds or property may include, but are not limited to, resolution of entitlement issues
153 arising from: medical liens; statutory liens; prior attorney liens; disputed costs or expenses;
154 disputed attorney fees; a bank’s policies for clearing a check or draft; any applicable
155 conditions on entitlement such as a plaintiff’s execution of a release and dismissal; or any
156 legal proceeding, such as an interpleader action, concerning the entitlement of any person
157 to receive all or a portion of the funds or property.

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.

188 **Comment**

189 [1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a)
190 to hold funds on behalf of a person* other than a client in situations where client funds are
191 subject to a third-party lien will depend on the relationship between the lawyer and the third-
192 party, whether the lawyer has assumed a contractual obligation to the third person* and whether
193 the lawyer has an independent obligation to honor the lien under a statute or other law. In
194 certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and
195 disburses funds in contravention of the lien. (See *Kaiser Foundation Health Plan, Inc. v. Aguiluz*
196 (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665].) However, civil liability by itself does not establish
197 a violation of this rule. (Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-
198 156 [49 Cal.Rptr. 97] [“When an attorney assumes a fiduciary relationship and violates his duty
199 in a manner that would justify disciplinary action if the relationship had been that of attorney
200 and client, he may properly be disciplined for his misconduct.”] with *Crooks v. State Bar* (1970)
201 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] [lawyer who agrees to act as escrow or stakeholder for a
202 client and a third-party owes a duty to the nonclient with regard to held funds].)

203 [2] As used in this rule, “advances for fees” means a payment intended by the client as an
204 advance payment for some or all of the services that the lawyer is expected to perform on the
205 client’s behalf. With respect to the difference between a true retainer and a flat fee, which is
206 one type of advance fee, see rule 1.5(d) and (e). Subject to rule 1.5, a lawyer or law firm* may
207 enter into an agreement that defines when or how an advance fee is earned and may be
208 withdrawn from the client trust account.

209 [3] Absent written* disclosure and the client’s agreement in a writing* signed by the client
210 as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in
211 the lawyer’s trust account. Paragraph (b) does not apply to advance payment for costs and
212 expenses. Paragraph (b) does not alter the lawyer’s obligations under paragraph (d) or the
213 lawyer’s burden to establish that the fee has been earned.

214 [4] Paragraph (f) establishes a rebuttable presumption that, absent a request from a client or
215 other person* that the lawyer not distribute funds or property held by the lawyer or law firm,*
216 undisputed funds or property must be distributed to a client or other person* within 45-days of a
217 lawyer’s reasonable determination that the funds held by the lawyer are undisputed funds. As just
218 one example, settlement funds from a defendant might be undisputed funds that are cleared for
219 distribution to the plaintiff by the plaintiff’s lawyer but the plaintiff might request that their lawyer
220 continue to hold the funds while the client seeks the advice of a tax professional. In this example,
221 the rebuttable presumption in paragraph (f) is not applicable because the client has requested that
222 the lawyer continue to hold the funds. Although the rebuttable presumption in paragraph (f) might
223 not apply in every situation, a lawyer must still comply with all other applicable provisions of this
224 rule. This includes a lawyer’s diligent steps to initiate and complete the resolution of issues
225 concerning a client’s or other person’s* entitlement to funds or property received by a lawyer.

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons*
(Discussion Draft #2 – Redline Comparison to Current Rule)

- (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;

- 264 (3) maintain complete records of all funds, securities, and other property of a client or
265 other person* coming into the possession of the lawyer or law firm;*
- 266 (4) promptly account in writing* to the client or other person* for whom the lawyer
267 holds funds or property;
- 268 (5) preserve records of all funds and property held by a lawyer or law firm* under this
269 rule for a period of no less than five years after final appropriate distribution of such
270 funds or property;
- 271 (6) comply with any order for an audit of such records issued pursuant to the Rules of
272 Procedure of the State Bar; and
- 273 (7) promptly distribute, ~~as requested by the client or other person,*~~ any undisputed
274 funds or property in the possession of the lawyer or law firm* that the client or
275 other person* is entitled to receive.
- 276 (e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt
277 standards as to what “records” shall be maintained by lawyers and law firms* in accordance
278 with subparagraph (d)(3). The standards formulated and adopted by the Board, as from
279 time to time amended, shall be effective and binding on all lawyers.
- 280 (f) As used in paragraph (d)(1), “promptly notify” means that the required notice must be given
281 soon after receipt of funds, securities, or other property but in no event later than 14 days
282 after receipt. [DR2]
- 283 (g) ~~Regarding the prompt distribution of funds required by [DR3]~~ For purposes of determining a
284 lawyer’s compliance with paragraph (d)(7), absent a request from the client or other
285 person* that the funds or property continue to be held by the lawyer, ~~paragraph (d)(7),~~ it
286 shall constitute a presumed violation for a lawyer to fail to distribute funds or property
287 within 45-days of the lawyer’s reasonable determination that the funds or property held by
288 the lawyer or law firm* are undisputed funds or property. A “presumed violation” means
289 that there is a rebuttable presumption affecting the burden of proof as defined in Evidence
290 Code sections 605 and 606. ~~This presumption does not apply to the distribution of property~~
291 ~~in the possession of a lawyer or law firm.*~~
- 292 (h) [DR4] As used in this rule, “undisputed funds or property” refers to funds or property in
293 the possession of a lawyer or law firm* where the lawyer knows* or reasonably should
294 know* that the ownership interest of the client or other person* in the funds or property
295 has become fixed and there are no unresolved issues as to the client’s or other person’s*
296 entitlement to receive the funds or property. Possible issues concerning the entitlement to
297 the funds or property may include, but are not limited to, resolution of entitlement issues
298 arising from: medical liens; statutory liens; prior attorney liens; disputed costs or expenses;
299 disputed attorney fees; a bank’s policies for clearing a check or draft; any applicable
300 conditions on entitlement such as a plaintiff’s execution of a release and dismissal; or any

legal proceeding, such as an interpleader action, concerning the entitlement of any person to receive all or a portion of the funds or property.

Standards:

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(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] Paragraph (f) establishes a rebuttable presumption that, absent a request from a client or other person* that the lawyer not distribute funds or property held by the lawyer or law firm,* undisputed funds or property must be distributed to a client or other person* within 45-days of a lawyer’s reasonable determination that the funds held by the lawyer are undisputed funds. As just one example, settlement funds from a defendant might be undisputed funds that are cleared for distribution to the plaintiff by the plaintiff’s lawyer but the plaintiff might request that their lawyer continue to hold the funds while the client seeks the advice of a tax professional. ~~If this accommodation to the client results in the lawyer holding the funds longer than the 45 days described in paragraph (f), then the client’s request would constitute a circumstance that the lawyer may assert to rebut a presumed violation.~~In this example, the rebuttable presumption in paragraph (f) is not applicable because the client has requested that the lawyer continue to hold the funds. Although the rebuttable presumption in paragraph (f) might not apply in every situation, a lawyer must still comply will all other applicable provisions of this rule.^[DR5] This includes a

372 lawyer's diligent steps to initiate and complete the resolution of issues concerning a client's or
373 other person's* entitlement to funds or property received by a lawyer. [DR6]

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Main document changes and comments

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Although no other examples are mentioned, the intent is to specifically alert lawyers to the duty to communicate with clients about receipt of funds, including a cross-reference to the separate notice requirement in rule 1.15. To omit or move this language would defeat the intent of this amendment. By alerting a lawyer with this additional comment language, a lawyer who only consults the communication rule will know what is expected when funds are received. This is the desired prevention goal of this change and it should at least have the benefit of public comment to help the Board to decide if this change should be adopted.

If members of COPRAC disagree or have a different approach that might also achieve this goal (e.g., adding other examples of significant development so that a lawyer has a fuller understanding of the concept of significant developments), then those members can submit public comment and the Board might be persuaded by that input.

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The approach of using a definition for a particular rule is used throughout the current rules and has been deployed in both the rule text (see, e.g., rule 3.5(c) and rule 8.2(f)) and the comments (see, e.g., rule 1.18 Cmt. [1]). By using a definition that applies only to paragraph (d)(1), the use of the “prompt” compliance standard in other rules remains at the status quo.

To assure that this is understood, the “legislative history” for the changes to rule 1.15 (e.g., the Board and Supreme Court materials) can expressly state that the 14-day standard is not intended to change any other existing use of the “prompt” compliance concept in other rules. The “legislative history” has been used by courts in interpreting the rules (see, e.g., *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602 and *Nalian Truck Lines v. Nakano Warehouse and Transportation* (1992) 6 Cal.App.4th 1256).

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At COPRAC’s January meeting, a member of COPRAC expressed a concern that the presumption should not apply to property received by a lawyer. This was accommodated in the post-meeting draft but has been reverted given that the drafting team subsequently questioned this change.

In addition, if there is a concern about possible ambiguity as to whether the concept of “property” includes client file materials, then that is separate issue that is already present in the current rule. It should not delay the consideration of the Board’s requested revisions. However, if members of COPRAC disagree and believe any existing ambiguity must be addressed as an inextricable part of the Board’s requested revisions, then those members can submit a public comment and the Board might be persuaded by that input.

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See comment above regarding the presumption applying to both funds and property.

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This is intended to clarify that the presumption is not triggered if the client requests that the lawyer continue to hold their funds/property. This means that the presumption narrowly applies only if: (1) there is no client request to continue to hold the funds/property; and (2) the funds/property are “undisputed” as defined. If there is either: (1) a client request to continue to hold funds/property; or (2) a situation involving disputed funds/property, then the State Bar will have the normal burden of proof.

This sentence has been added in response to Tobi's request that a statement about a lawyer's diligence in seeking to resolve disputes should be included with the Board's revisions.

See State Bar Formal Op. No. [2009-177](#) which includes the following description of a lawyer's duty under former rule 4-100:

"As a result, the attorney must fulfill his or her duty to promptly find other reasonable methods of delivering the undisputed portion to the client. Indeed, where the client requests that the attorney disburse the funds to the client and the attorney claims an interest in such funds, "the attorney violates rule 4-100(B)(4) if he or she does not promptly take appropriate, substantive steps to resolve the dispute in order to disburse the funds." (*In the Matter of Kroff* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838.) Attorney A may not simply sit back and wait for such a resolution. Where the attorney and client cannot reach agreement on disbursement of the funds, and the client has requested payment or delivery of those funds, the attorney has an affirmative obligation to seek arbitration or a judicial determination without delay in order to comply with rule 4-100(B)(4). (L.A. County Bar Assn. Formal Opn. No. 438.)"

(State Bar Formal Op. No. 2009-177 at pp. 2 – 3.)

Regarding possible consideration of ABA Model Rule 1.15(e), the Rules Revision Commission considered all of Model Rule 1.15 as a part of an intentional effort to promote a national standard of professional responsibility by eliminating unnecessary differences with the rules adopted in a preponderance of other jurisdictions. The Rules Revision Commission did not recommend adoption of Model Rule 1.15(e) and the Board's assignment to COPRAC does not include a de novo review of the Rules Revision Commission's work on rule 1.15.

However, if members of COPRAC believe that consideration of Model Rule 1.15(e) is appropriate in connection with this assignment, then those members can submit public comment and the Board might be persuaded by that input.