



The State Bar of California

OPEN SESSION AGENDA ITEM 705 MARCH 2022

DATE: March 24, 2022

TO: Members, Board of Trustees

FROM: Leah Wilson, Executive Director
Randall Difuntorum, Program Director, Office of Professional Competence
Kelsey Lyles, Principal Program Analyst, Office of Research & Institutional Accountability

SUBJECT: Discussion and Update on Development of the Client Trust Account Protection Program and Request to Circulate Three Rules for Public Comment

EXECUTIVE SUMMARY

The Committee on Special Discipline Case Audit presented its final report and recommendations for development and implementation of the Client Trust Account Protection Program (CTAPP) to the Board of Trustees at its November 19, 2021, meeting. The report's recommendations focused on prevention of attorney misconduct and strengthened regulatory management and oversight through data collection, attorney education, and intervention. This agenda item provides an update on the progress and development of the CTAPP implementation activities, a request to modify the CTAPP design, and a request to circulate three rules for public comment.

BACKGROUND

In July 2021, the Board of Trustees established a special committee of the Board, the Committee on Special Discipline Case Audit, to analyze the audit report on closed discipline cases against Thomas Girardi and develop a proposed corrective action plan. Pursuant to the committee's authorizing charter, the committee presented its final report on increasing the State Bar's ability to effectively and proactively regulate attorney client trust accounts (CTAs) based on this corrective action plan to the Board of Trustees at its meeting on November 19, 2021. The Board of Trustees adopted the following resolutions accordingly:

RESOLVED, that the Board of Trustees, upon recommendation of the Committee on Special Discipline Case Audit, directs staff to finalize CTAPP design and effectuating rule proposals for consideration at the Board of Trustees' January or March 2022 meeting; and it is

FURTHER RESOLVED, that the Board of Trustees, upon recommendation of the Committee on Special Discipline Case Audit, refers proposed changes to rule 1.15 to Committee on Professional Responsibility and Conduct (COPRAC) for finalization; and it is

FURTHER RESOLVED, that the Board of Trustees, upon recommendation of the Committee on Special Discipline Case Audit, refers proposed changes to rule 1.4 to COPRAC for finalization; and it is

FURTHER RESOLVED, that the Board of Trustees, upon recommendation of the Committee on Special Discipline Case Audit, directs staff to study the potential role of bonds and insurance in CTA protection; and it is

FURTHER RESOLVED, that the Board of Trustees, upon recommendation of the Committee on Special Discipline Case Audit, approves to an extension of the deadline for public comment period on all recommendations stemming from the committee's work to June 30, 2022.

DISCUSSION

Staff has been working to address the action items reflected in the Board's direction. In addition to advancing the specific implementation activities outlined by the Board, these efforts have included a substantive review of CTAPP's design and stakeholder engagement to assess the feasibility of securing the necessary resources to advance all aspects of the program.

PROGRESS ON CTAPP IMPLEMENTATION ACTIVITIES:

- **Recommendation: Annual Registration of CTAs and Certification of Compliance.** The State Bar will require, as part of annual license renewal, that every licensed attorney report whether they are or are not responsible for one or more CTAs and provide data points on their CTAs. Additionally, every attorney licensed by the State Bar who is responsible for CTAs will certify in writing that they are knowledgeable about and compliant with the provisions of the Rules of Professional Conduct rule 1.15, "Safekeeping Funds and Property of Clients and Other Persons."
 - **Status:** The State Bar's Office of Research and Institutional Accountability and Office of Information Technology have drafted a CTA self-reporting form to be integrated into the online My State Bar Profile portal.
 - **Anticipated Effective Date:** 2023 billing cycle.
- **Recommendation: Annual Self-Assessment.** The State Bar will require all attorneys responsible for CTAs to complete an annual self-assessment.

- **Status:** The State Bar’s Office of Professional Competence has secured a vendor to produce the self-assessment module. The Board approved a contract on February 25, 2022, and a project kick-off meeting with the vendor was held on March 16, 2022.
- **Anticipated Effective Date:** 2023 billing cycle.
- **Recommendation: Revise or Clarify Rule 1.15.** The Board of Trustees directed the COPRAC to draft a revision or clarification of rule 1.15 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.
 - **Status:** COPRAC reviewed and revised rule language, which is provided below for public comment.
 - **Anticipated Effective Date:** fall–winter 2023.
- **Recommendation: Clarify Rule 1.4.** The Board of Trustees directed COPRAC 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).
 - **Status:** COPRAC reviewed and revised rule language, which is provided below for public comment.
 - **Anticipated Effective Date:** fall–winter 2023.

The effective dates noted above do not align with the CTAPP implementation timeline included in the November 2021 Board report. Some activities have taken longer than anticipated while others need to be postponed indefinitely, as described below.

CHANGES TO CTAPP IMPLEMENTATION TIMELINE AND APPROACH NEEDED

The original project plan outlined three phases of activity as follows:

- **Phase I (first-half 2022)**
 - Annual Registration of CTAs
 - Annual Certification of Compliance
- **Phase II (second-half 2022)**
 - Enhanced State Bar Education and Professional Development
 - Annual Self-Assessment by All Attorneys
 - Public Education and Client Outreach
- **Phase III (2023)**
 - Annual Compliance Review by Certified Public Accountants of Selected Attorneys
 - Annual Risk Review and Follow-Up Actions, Including Audits

Since submission of the final committee report, staff determined that the sequence and timing of activities, namely those related to the drafting of implementing rules and the onset of mandatory CTA registration, would need to be modified; in essence, the implementing rules must be fully in place prior to initiation of mandated registration.

In addition, at this time staff is not confident that the 2023 fee bill will include an additional assessment to support fully articulated program costs which are estimated to total \$3.35 million annually with an additional one-time start-up cost of \$500,000. The State Bar General Fund cannot sustain the entirety of implementation costs absent a corresponding license fee increase. The 2022 State Bar Budget recently adopted by the Board does however include seed funding for the CTAPP of approximately \$250,000. This funding can be used to support the following program elements, which are recommended as an initial set of implementation activities to be completed in a revised phase I:

- **Phase I (2022)**
 - Annual Registration of CTAs
 - Annual Certification of Compliance
 - Annual Self-Assessment
 - State Bar Implementation Authority Effectuated
 - Rules Issued for Public Comment and Adopted

Phase II activities, which can also be supported at least in part by the seed funding included in the budget, include the following:

- **Phase II (2022–2023)**
 - Enhanced State Bar Education and Professional Development
 - Public Education and Client Outreach
 - Research on Mandatory Bank Reporting (proposed addition)

Phase III efforts cannot be launched absent a licensing fee increase and are considered on hold at this time:

- **Phase III (TBD)**
 - Annual Compliance Review by CPAs of Selected Attorneys
 - Annual Risk Review and Follow-Up Actions, Including Audits

CTAPP DESIGN CHANGE NEEDED

In addition to the phase I–III implementation activities above, which were included in the November 2021 Board item, staff recommends that the CTAPP design be modified to include mandatory bank reporting of CTA information to the State Bar. This would be effectuated via a statutory provision expanding upon the overdraft notice requirements delineated in Business and Professions Code section 6091.1. While bank reporting would not substitute for self-reporting, it provides an additional important analytical data point. Self-reporting is essential for receiving certification of compliance with rules, prompting completion of the self-assessment, and holding licensees accountable to compliance. Bank reporting will provide the State Bar with the ability to verify self-reported information from a credible independent source.

Staff seeks approval to amend the CTAPP design to include mandatory bank reporting as a CTAPP component.

Development of a Rule that Grants the State Bar Authority to Require Attorney Participation in the CTAPP – Request for Public Comment on Proposed New Rule 9.8.5 of the California Rules of Court:

Staff has drafted proposed new rule 9.8.5 of the California Rules of Court to function as an enabling rule for the CTAPP. This proposed rule expressly authorizes the Board to formulate and adopt rules and regulations to administer CTAPP. Staff recommends that proposed new rule 9.8.5 be authorized for a 60-day public comment circulation.

Discussion and Summary of Proposed New Rule 9.8.5 of the Rules of Court

I. “Codification” of the Enabling Rule in the Rules of Court

The State Bar’s authority to carry out its various regulatory programs, including the promulgation of rules and regulations for those programs, can be found in statutory law,¹ the Rules of Professional Conduct,² and the Rules of Court. For CTAPP, a new Rule of Court is recommended as there are other rules that similarly authorize a program and Board rulemaking for regulatory activities related to attorney education and self-reporting. As examples, Rule of Court 9.31 directs the State Bar to establish the minimum continuing legal education program and Rule of Court 9.8 provides that the Board is authorized to adopt rules and regulations to carry out the State Bar’s responsibility to maintain the roll of attorneys. The proposed new CTAPP rule would be numbered rule 9.8.5, and this rule would fall in sequence between Rule of Court 9.8 [“Roll of Attorneys Admitted to Practice”] and Rule of Court 9.9 [“Online Reporting by Attorneys”]. .

II. Summary of Proposed New Rule 9.8.5

Rule 9.8.5 is entitled “Client Trust Account Protection Program” and has three paragraphs. (The text of proposed new rule 9.8.5 is provided as Attachment A) Paragraph (a) is the general enabling provision stating that the State Bar must establish and administer a program for the protection of client funds held by a State Bar licensee. It indicates that detection and deterrence of client trust accounting misconduct is the objective of the program. Paragraph (a) has five subdivisions that describe the types of requirements that the State Bar may impose pursuant to the program. These requirements include: annual reporting; registration of CTAs; completion of self-assessments; and participation in a compliance review to be conducted by a certified public accountant.

Paragraph (b) functions as the express authorization for the Board to formulate and adopt such rules and regulations as it deems necessary and appropriate to administer CTAPP. It is anticipated that the details for the administration of CTAPP will be addressed in the Rules of the

¹ See e.g., Business and Professions Code § 6086.14, subd. (a), that expressly provides: “The Board of Trustees of the State Bar is authorized to formulate and adopt rules and regulations necessary to establish an alternative dispute resolution discipline mediation program to resolve complaints against attorneys that do not warrant the institution of formal investigation or prosecution.”

² See e.g., rule 5.4(e) that authorizes the Board to formulate and adopt minimum standards for State Bar’s certified lawyer referral service program. See also, rule 7.1(b) authorizes the Board to formulate and adopt standards for lawyer advertising and solicitation communications that are presumed to violate the rules.

State Bar. Title 2 of these rules addresses the “Rights and Responsibilities of Licensees.” This title includes the State Bar rules governing “Licensee Record” (Division 1) and “Trust Accounts” (Division 5). Amended chapters or new chapters in these divisions can be considered for the details of CTAPP.

Paragraph (c) describes the consequences for a licensee’s failure to comply with a requirement imposed under CTAPP. It indicates that the primary consequence for noncompliance is that a licensee must be enrolled as an inactive licensee of the State Bar under the rules to be adopted by the Board.³ However, it also makes clear that inactive enrollment imposed for noncompliance with a CTAPP requirement is cumulative and does not preclude a disciplinary proceeding or other actions for violations of the State Bar Act, the California Rules of Professional Conduct or other applicable laws.

Amendments to the Rules of Professional Conduct to Clarify and Strengthen Client Trust Accounting Duties – Request for Public Comment on Proposed Amended Rules 1.15 and 1.4 of the California Rules of Professional Conduct:

The California Rules of Professional Conduct establish attorney conduct standards, the violation of which will subject a lawyer to discipline. (See rule 1.0(a) and Bus. & Prof. Code, § 6077.) Rule 1.15 is the trust accounting rule that governs a lawyer’s safekeeping of entrusted funds and property, including requirements to: (i) give prompt notice regarding receipt of funds on behalf of a client (rule 1.15(d)(1)); and (ii) promptly distribute, as requested by a client, any undisputed funds in the possession of a lawyer, such as settlement proceeds received for a client (rule 1.15(d)(7)).

Rule 1.4 is the client communication rule that governs when a lawyer has a duty to communicate certain information to the lawyer’s client, including a requirement that a lawyer keep a client reasonably informed about “significant developments” in the client’s case or matter (rule 1.4(a)(3)).

The report of the Committee on Special Discipline Case Audit and the recommendations adopted by the Board in response to the report describe possible amendments to rules 1.15 and 1.4 that could enhance a lawyer’s compliance with client trust accounting duties.

In accordance with the Board’s action, COPRAC was assigned to assist in the drafting of rule amendment language to be considered by the Board for public comment circulation. COPRAC was informed that the Board’s policy decision to explore these rule amendment concepts resulted from the study conducted by the Committee on Special Discipline Case Audit. COPRAC understood that their assignment was a time-sensitive rule drafting task and not a typical rule revision project.

³This is intended to be similar to the consequence for a licensee’s failure to comply with Minimum Continuing Legal Education requirements. See Rule of Court 9.31 (d) which provides that: “A licensee of the State Bar who fails to satisfy the requirements of the State Bar’s minimum continuing legal education program must be enrolled as an inactive licensee of the State Bar under rules adopted by the Board of Trustees of the State Bar.”

COPRAC formed a drafting team to prepare the proposed rule language and the full committee worked on the language during COPRAC’s January 7, 2022, and February 18, 2022, meetings. The proposed amended rules prepared by COPRAC are provided as Attachment B. COPRAC’s transmittal, including identification of certain issues and concerns that arose in the drafting process, is provided as Attachment C. In its transmittal, COPRAC raises the issue of potential constitutional enforceability concerns based on the inclusion of a presumed violation in proposed amended rule 1.15 that would shift the burden of proof in some disciplinary cases. In light of the seriousness of this concern, staff obtained independent legal advice from attorneys Heather L. Rosing and Dan Lawton who possess expertise on attorney professional responsibility, complex litigation, and appellate law. Based on the advice, staff has determined that under existing law, the proposed rebuttable presumption presents no concerns grounded in lawyers’ constitutionally-guaranteed rights to due process.

I. Rule 1.15 Prompt Disbursement of Entrusted Funds or Property

To clarify and strengthen the duty to “promptly distribute” trust funds or property, COPRAC has drafted the following three changes to rule 1.15:

- i. Removing the existing condition that a lawyer’s duty to distribute trust funds or property is triggered only when a request is made by a client or other person entitled to the funds or property,⁴
- ii. Adding a new subdivision (f) establishing a presumption of a violation of the requirement to promptly distribute undisputed funds or property⁵ that is supported by a new subdivision (g), which adds a definition of “undisputed funds or property” and two new comments: one comment clarifying the scope of the presumption standard (i.e., that the presumption does not apply to the release of a client’s file or a refund of a fee paid in advance, as those topics are governed by more specific rules); and another comment reminding lawyers about the general duty to act diligently in resolving

⁴ 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))].

⁵ A presumption of a disciplinary violation is found in both existing case law and the current rules. In the current rules, a presumption affecting the burden of proof in a disciplinary proceeding is expressly provided for 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.

In disciplinary case law, when a trust account balance drops below the amount the attorney is required to hold for a client, a presumption of misappropriation arises. The burden then shifts to the attorney to show that misappropriation did not occur and that the attorney was entitled to withdraw the funds. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.)

disputes that are delaying the distribution of funds or property;⁶ and

- iii. Revising paragraph (d)(1) to replace the “promptly notify” standard with a more direct requirement providing that absent good cause, notification of receipt of funds or property must be given no later than 14 days after the receipt of funds or property.

Both clean and redline in Attachment B.⁷

I. Rule 1.4 Communication with Clients Concerning Entrusted Funds or Property

Rule 1.4 refers to a “significant development” in a client’s representation as a matter that triggers a lawyer’s duty to proactively communicate with a client but the rule is silent concerning specific developments involving a lawyer’s receipt of funds or property of the client.

To make clear that a lawyer has specific duties to notify a client about receipt of funds or property and to provide an accounting to a client, COPRAC has drafted new language for Comment [1] to rule 1.4 which states that a lawyer’s receipt of funds on behalf of a client is a significant development requiring client communication and provides a cross-reference to relevant provisions in rule 1.15. The cross-reference specifically directs a lawyer to: (i) paragraph (d)(1) of rule 1.15, which states the proposed new 14-day timeframe for notifying a client about receipt of funds or property; and (ii) paragraph (d)(4) of rule 1.15, which states that a lawyer has a duty to promptly account for funds and property.

Both clean and redline text of the relevant provisions in rule 1.4 are set forth in Attachment B.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

⁶ See e.g., *In the Matter of Kroff* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, at p. 854. [The Review Department held that where a client asks an attorney to distribute funds claimed by the client and where the attorney claims an interest in the funds, the attorney must promptly take appropriate, substantive steps to resolve the dispute in order to disburse the funds.]

RECOMMENDATIONS

- I. **Should the Board of Trustees concur with the proposed change to add mandatory bank reporting to the CTAPP design, passage of the following resolution is recommended:**

RESOLVED, that the Board of Trustees authorizes staff to include and pursue mandatory bank reporting of CTA information in the CTAPP design.

- II. **Should the Board of Trustees concur in the proposed action on new Rule of Court 9.8.5, passage of the following resolution is recommended:**

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment, for a period of 60 days, proposed new rule 9.8.5 of the California Rules of Court; and it is

FURTHER RESOLVED, that this authorization for release of public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new Rule of Court.

- III. **Should the Board of Trustees concur in the proposed action on amended rules 1.4 and 1.15, passage of the following resolution is recommended:**

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment, for a period of 60 days, proposed amended rules 1.4 and 1.15 of the California Rules of Professional Conduct; and it is

FURTHER RESOLVED, that this authorization for release of public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed amended Rules of Professional Conduct.

ATTACHMENTS LIST

- A. Proposed New Rule 9.8.5 of the Rules of Court
- B. Proposed Amended Rules of Professional Conduct 1.15 and 1.4
- C. COPRAC Comments on the Special Discipline Audit Committee's Proposed Revisions to Rules of Professional Conduct 1.15 and 1.4

PROPOSED NEW RULE 9.8.5 OF THE RULES OF COURT

Rule 9.8.5 State Bar Client Trust Account Protection Program

(a) Client trust account protection program requirements

The State Bar of California must establish and administer a program for the protection of client funds held in trust by a licensee that facilitates the State Bar's detection and deterrence of client trust accounting misconduct. Among the requirements that the State Bar may impose under this program are the following:

- (1) All licensees must annually report whether or not they are responsible for client funds and funds entrusted by others under the provisions of rule 1.15 of the Rules of Professional Conduct, and if they are responsible then they must certify that they are knowledgeable about, and in compliance with, applicable rules and statutes governing client trust accounts and the safekeeping of funds entrusted by clients and others;
- (2) All licensees who are responsible for a client trust account under the provisions of rule 1.15 of the Rules of Professional Conduct must register each and every trust account for which they are responsible by identifying account numbers and financial institutions in an online form on a secure system provided by the State Bar for such reporting;
- (3) All licensees who are responsible for a client trust account under the provisions of rule 1.15 of the Rules of Professional Conduct must complete an annual self-assessment;
- (4) If selected by the State Bar, a licensee must complete a client trust accounting compliance review to be conducted by a certified public accountant at the licensee's expense; and
- (5) If selected by the State Bar, an additional action or actions based on the results of a compliance review may include an audit, a notice of mandatory corrective action, and a referral for disciplinary action.

(b) Authorization for the Board of Trustees of the State Bar to adopt rules and regulations

The Board of Trustees of the State Bar is authorized to formulate and adopt such rules and regulations as it deems necessary and appropriate to comply with this rule.

(c) Failure to comply with program

A licensee who fails to satisfy the requirements of this program must be enrolled as an inactive

licensee of the State Bar under the rules to be adopted by the Board of Trustees of the State Bar. Inactive enrollment imposed for noncompliance with the requirements of this program is cumulative and does not preclude a disciplinary proceeding or other actions for violations of the State Bar Act, the Rules of Professional Conduct or other applicable laws.

PROPOSED AMENDED RULES OF PROFESSIONAL CONDUCT 1.15 AND 1.4

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons*
(Proposed Revised Rule – 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) absent good cause, notify a client or other person* no later than 14 days 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 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 or property continue to be held by the lawyer, it shall constitute a presumed violation for a lawyer, absent good cause, to fail to distribute undisputed funds or property within 45 days of the date when the funds become undisputed as defined by paragraph (g). A “presumed violation” means that there is a rebuttable presumption affecting the burden of proof as defined in Evidence Code sections 605 and 606.
- (g) As used in this rule, “undisputed funds or property” refers to funds or property in the possession of a lawyer or law firm* where the lawyer knows* or reasonably should know* that the ownership interest of the client or other person* in the funds or property has become fixed and there are no unresolved issues as to the client’s or other person’s* entitlement to receive the funds or property. Possible issues concerning the entitlement to the funds or property may 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 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.

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] Subparagraph (d)(7) is not intended to apply to a fee or expense paid in advance, the client file, or any other property that the client has asked the lawyer to keep or maintain. Regarding a lawyer’s refund of a fee or expense paid in advance, see rule 1.16(e)(2). Regarding the release of a client’s file to the client, see rule 1.16(e)(1).

[5] Although the rebuttable presumption in paragraph (f) might not apply in every situation, a lawyer must still comply with all other applicable provisions of this rule. This includes a lawyer’s duty to take diligent steps to initiate and complete the resolution of issues 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*
(Proposed Revised Rule – Redline)

- (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~~absent good cause, notify a client or other person* no later than 14 days 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 or property continue to be held by the lawyer, it shall constitute a presumed violation for a lawyer, absent good cause, to fail to distribute undisputed funds or property within 45 days of the date when the funds become undisputed as defined by paragraph (g). A “presumed violation” means that there is a rebuttable presumption affecting the burden of proof as defined in Evidence Code sections 605 and 606.
- (g) As used in this rule, “undisputed funds or property” refers to funds or property in the possession of a lawyer or law firm* where the lawyer knows* or reasonably should know* that the ownership interest of the client or other person* in the funds or property has become fixed and there are no unresolved issues as to the client’s or other person’s* entitlement to receive the funds or property. Possible issues concerning the entitlement to the funds or property may 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 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.

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] Subparagraph (d)(7) is not intended to apply to a fee or expense paid in advance, the client file, or any other property that the client has asked the lawyer to keep or maintain. Regarding a lawyer’s refund of a fee or expense paid in advance, see rule 1.16(e)(2). Regarding the release of a client’s file to the client, see rule 1.16(e)(1).

[5] Although the rebuttable presumption in paragraph (f) might not apply in every situation, a lawyer must still comply with all other applicable provisions of this rule. This includes a lawyer’s duty to take diligent steps to initiate and complete the resolution of issues concerning a client’s or other person’s* entitlement to funds or property received by a lawyer.

Rule 1.4 Communication with Clients
(Proposed Revised Rule – 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. For example, a lawyer’s receipt of funds on behalf of a client is a significant development requiring communication with the client pursuant to rule 1.15, paragraphs (d)(1) and (d)(4).

[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
(Proposed Revised Rule – Redline)

- (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. For example, a lawyer’s receipt of funds on behalf of a client is a significant development requiring communication with the client pursuant to rule 1.15, paragraphs (d)(1) and (d)(4).

[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.



The State Bar *of California*

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

DATE: March 4, 2022

TO: Members, Special Discipline Audit Committee of State Bar Board of Trustees

FROM: COPRAC Trust Rules Subcommittee

SUBJECT: Comments and Suggested Edits to Special Discipline Audit Committee's Proposed Revisions to Rules of Professional Conduct, Rules 1.4 and 1.15

BACKGROUND

A Special Discipline Case Audit Committee (committee) was established by the Board of Trustees 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 (RAD) 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 requested COPRAC's assistance in revising discussion draft amendments to rules 1.4 and 1.15 that were prepared by State Bar staff based on the Special Discipline Case Audit Committee's proposals. A staff memo and discussion draft amendments were briefly discussed at COPRAC's January 2022 meeting. See Exhibit A.

A COPRAC trust rules subcommittee was subsequently formed and assigned to analyze and propose revisions to the discussion draft amendments. COPRAC's subcommittee prepared an outline analyzing and commenting on the discussion draft amendments prepared by State Bar staff. See Exhibit B. The subcommittee raised concerns with some of the proposed amendments, including the proposal to create a presumed violation if funds are not distributed within 45 days of the lawyer's determination that the funds are undisputed.

State Bar staff subsequently revised its proposed amendments to rules 1.15 and 1.4 shortly before the February 2022 meeting. See Exhibit C. COPRAC discussed staff's revised proposed amendments to rules 1.15 and 1.4 at its February meeting. COPRAC members again raised significant concerns with the proposal to create a presumed violation. For instance, some of the members were concerned that creating a rebuttable presumption as proposed by State Bar staff in rule 1.15(g) impermissibly shifted the burden of proof to the attorney when the State Bar Rules of Procedure place the burden of proof on the Office of Trial Counsel to prove each and every element of a violation by clear and convincing evidence. State Bar Rules of Procedure, rule 5.103. Additionally, in shifting the burden of proof to the attorney, the members raised the question of what would be the attorney's burden of proof? Clear and convincing or simply a preponderance of the evidence? Along the same lines, some members were concerned that there is no rebuttable presumption in any other Rule and imposing a presumption in rule 1.15 may be construed as applying to other Rules. Lastly, if the Board wants to impose a 45-day deadline, the members were concerned that the language "within 45 days of the lawyer's reasonable determination that the funds or property held by the lawyer or law firm are undisputed funds or property" was ambiguous in terms of when the 45-day timeline begins. Does it begin upon receipt of the funds or property or at some other time?

Following COPRAC's February 2022 meeting, State Bar staff created a third discussion draft amendments based in part on COPRAC's proposed revisions to the second discussion draft amendments. See Exhibit D. This third discussion draft amendments, however, shows a redline comparison to State Bar staff's propped amendments to current rules 1.4 and 1.15, rather than to the second discussion draft amendments.

While COPRAC members do not endorse each of the proposed amendments, COPRAC was assigned the narrow task of offering only clarifying or limited revisions to the proposed amendments, rather than drafting, re-writing, or materially altering them. COPRAC's subcommittee was directed to produce a memo explaining its proposed revisions to State Bar staff's proposed amendments within just two weeks of COPRAC's February meeting. This period overlapped with school closures and the Presidents' Day holiday, and COPRAC and the subcommittee did not have sufficient time to thoroughly research, analyze and comment on

State Bar staff's proposed amendments. Notwithstanding its concerns with some of the proposed rule amendments, based on COPRAC's narrow assignment, this memo explains the subcommittee's proposed revisions to these amendments.

Thus, given the limited time that COPRAC has had to consider the proposed trust rules amendments, we emphasize that COPRAC believes more work needs to be done in evaluating and drafting proposed language for any amendments. But we hope that our initial input will support the committee's work.

The Board plans to consider public comment proposals for its proposed rule amendments following its meeting on March 24, 2022. Some COPRAC members plan on submitting public comments to explain the reasons for their opposition to certain proposed amendments.

DISCUSSION

Proposed Revision to Comment [1] to State Bar Staff's Proposed Amendments to Rule 1.4

COPRAC offers the following revisions to the second discussion draft proposed amendments to rule 1.4 prepared by State Bar staff:

[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~~ For example, a lawyer's receipt of funds on behalf of a client is a significant development requiring ~~prompt and reasonable~~ communications with the client pursuant to rule 1.15, paragraphs (d)(1) and (d)(4). ~~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.~~

Removing the term "promptly" from this proposed Comment to rule 1.4 and the proposed amendment to rule 1.15 (d)(1) may help to avoid confusion that "promptly" means 14 days in connection with rule 1.4 or other rules using this same term. COPRAC's other proposed revisions are intended to simplify this comment and refer the lawyer to the relevant provisions of rule 1.15 for further guidance.

Proposed Revisions to State Bar Staff's Proposed Amendments to Rule 1.15

Subparagraph (d)(1)—Board's Proposed 14-day Notification Deadline

The State Bar staff's proposed amendments would add a 14-day time limitation to subparagraph (d)(1), which requires a lawyer to "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.” To the extent the Board or Special Audit Committee has not already done so, COPRAC recommends that a written analysis be prepared that analyzes the reasonableness of this proposed time limitation. In certain situations, 14 days may not be reasonable, such as in mass tort class action. To account for unique situations, COPRAC recommends that language be added to clarify that the 14-day time limitation applies “absent good cause.” COPRAC also recommends that the term “promptly” be removed from subparagraph (d)(1) because a specific time limitation is being proposed. This is particularly true since subparagraphs (d)(2), (d)(4) and (d)(7) also use the term “promptly.” As noted above, the term “promptly” does not mean 14 days in other rules (or in other subparagraphs of rule 1.15) and COPRAC believes using this term in connection with a 14-day time limitation in rule 1.15(d)(1) could create confusion that “promptly” means 14 days in other contexts.

With this in mind, COPRAC discussed possible revisions to rule 1.15(d)(1) along these lines:

~~promptly~~absent good cause, notify a client or other person* no later than 14 days 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;

In light of COPRAC’s proposed revision to remove “promptly” from subparagraph (d)(1), COPRAC also recommends that State Bar staff’s proposed paragraph (f) be removed as it would not be necessary.

Alternatively, if the Board keeps the term “promptly” in subparagraph (d)(1), COPRAC recommends that the subparagraph be revised to include an “absent good cause” exception to account for those situations where the 14-day deadline is unreasonable. Additionally, if “promptly” remains, COPRAC recommends that the Board consider including the language of State Bar staff’s proposed paragraph (f) in the text of subparagraph (d)(1) to clarify that the 14-day deadline only applies to subparagraph (d)(1). This revision would also eliminate the need for paragraph (f).

Subparagraph (d)(7)—Board’s Proposed Removal of Triggering Demand by Client or Other Person for Undisputed Funds or Property.

The Board of Trustees also proposes to remove the language “as requested by the client or other person” from subparagraph (d)(7) as the trigger for a lawyer’s distribution of undisputed funds or other property:

~~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.

COPRAC members do not oppose this suggested revision as this triggering language is inconsistent with the American Bar Association model rule and other state counterparts. In light

of this removal, however, COPRAC members suggest the addition of a new Comment [4] to clarify the scope of subparagraph (d)(7) and avoid unintended consequences:

Subparagraph (d)(7) is not intended to apply to a fee or expense paid in advance, the client file, or any other property that the client has asked the lawyer to keep or maintain. Regarding a lawyer's refund of a fee or expense paid in advance, see rule 1.16(e)(2). Regarding the release of a client's file to the client, see rule 1.16(e)(1).

Paragraphs (f), (g)—Board's Proposed Rebuttable Presumption of Violation Based on 45-Day Distribution Deadline and Clarifying Comment:

The proposed amendment to add the rebuttable presumption in paragraph (g) generated a significant amount of discussion and concern amongst the COPRAC members. Specifically, there were constitutional concerns that have not been analyzed regarding the shifting of the burden of proof to the attorney with this rebuttable presumption, particularly in situations where a lawyer's license may be at stake. The Office of Trial Counsel has the burden of proof to establish each and every element of a violation by clear and convincing evidence. State Bar Rules of Procedure, rule 5.103. This rebuttable presumption impermissibly shifts the burden of proof to the attorney to prove why the 45-day deadline was not met. There can be numerous reasons that would constitute good cause for the failure or inability to meet this deadline. However, the mere fact that 45 days has expired would be sufficient for the Office of Trial Counsel to issue a Notice of Disciplinary Charges to the attorney without additional supporting facts. In addition, COPRAC recommends that the Board of Trustees further research and evaluate whether Evidence Code sections 605 and 606 are being properly invoked to establish a presumed violation of rule 1.15(d)(7). This presumed rule violation does not appear comparable to the examples provided in section 605 to establish the validity of certain relationships or facts, such as "the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others." The majority of members recommended that the presumption be eliminated altogether.

The other concern COPRAC members raised regarding proposed paragraph (g) is more of a timing issue relating to when the 45-day clock begins to run that may lead to unintended consequences. As currently phrased by State Bar staff, "fail to distribute funds or property within 45 days of the lawyer's reasonable determination that the funds or property held by the lawyer or law firm are undisputed funds or property" is vague and ambiguous. Does the 45 days commence with the receipt of funds or property or at some other time? For example, a strict reading of the proposed language could mean that if it takes the attorney three months from the receipt of funds or property to determine if the funds or property are undisputed, then the proposed language suggests that the attorney has 45 days from that point to distribute the undisputed funds or property. Furthermore, is the "reasonable determination" an objective or subjective standard?

These same concerns are applicable to the State Bar staff's proposed Comment [4] to rule 1.15, attempting to clarify the application of the rebuttable presumption.

However, recognizing COPRAC's limited scope of review of the State Bar staff's proposed changes to rule 1.15, COPRAC offers the following revisions to State Bar staff's proposed changes to paragraph (g) as follows:

For purposes of determining a lawyer's compliance with paragraph (d)(7), absent a request from the client or other person* that the funds or property continue to be held by the lawyer, it shall constitute a presumed violation for a lawyer, absent good cause, to fail to distribute undisputed funds or property within 45 days of the date when the funds become undisputed as defined by paragraph (g) ~~lawyer's reasonable determination that the funds or property held by the lawyer or law firm* are undisputed funds or property~~. A "presumed violation" means that there is a rebuttable presumption affecting the burden of proof as defined in Evidence Code sections 605 and 606.

In light of the rebuttable presumption proposed by the Board of Trustees, COPRAC members do not oppose State Bar staff's proposed addition of the following paragraph (g)⁸ to clarify the meaning of undisputed funds or property.

As used in this rule, "undisputed funds or property" refers to funds or property in the possession of a lawyer or law firm* where the lawyer knows* or reasonably should know* that the ownership interest of the client or other person* in the funds or property has become fixed and there are no unresolved issues as to the client's or other person's* entitlement to receive the funds or property. Possible issues concerning the entitlement to the funds or property may 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 or property.

COPRAC also discussed adding the following Comment [5] to rule 1.15 to confirm the lawyer's duty to diligently resolve any issues relating to disputed funds.

⁸ Based on COPRAC's proposal to remove paragraph (f) as discussed above, this paragraph would now be paragraph (g), rather than paragraph (h) as proposed by State Bar staff.

Comment [5]:

Although the rebuttable presumption in paragraph (f) might not apply in every situation, a lawyer must still comply with all other applicable provisions of this rule. This includes a lawyer's duty to take diligent steps to initiate and complete the resolution of issues concerning a client's or other person's* entitlement to funds or property received by a lawyer.