

OCT 24 2022

Jorge Navarrete Clerk

S276567

ADMINISTRATIVE ORDER 2022-10-19-06

Deputy

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

ORDER RE APPROVAL OF RULE 9.8.5 OF THE CALIFORNIA RULES OF COURT
AND AMENDMENTS TO RULES 1.4 AND 1.15
OF THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT

On September 26, 2022, the court received a request from the State Bar of California to approve rule 9.8.5 of the California Rules of Court and amendments to rules 1.4 and 1.15 of the California Rules of Professional Conduct. On October 7, 2022, the State Bar filed an amended request. The amended request is granted.

Rule 9.8.5 of the California Rules of Court and amendments to rule 1.15 of the California Rules of Professional Conduct are approved as modified by the court. Amendments to rule 1.4 are approved as submitted by the State Bar. The approved rules are set forth in the Attachment and are effective January 1, 2023.

It is so ordered.

CANTIL-SAKAUYE

Chief Justice

CORRIGAN, J.

Associate Justice

LIU, J.

Associate Justice

KRUGER, J.

Associate Justice

GROBAN, J.

Associate Justice

JENKINS, J.

Associate Justice

GUERRERO, J.

Associate Justice

ATTACHMENT

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 Client Trust Account Protection 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.

(1) The State Bar must impose the following requirements under this program:

- (A) Annual Trust Account Certification - All licensees must annually (1) report whether or not, at any time during the prior year, they were responsible for client funds and funds entrusted by others under the provisions of rule 1.15 of the Rules of Professional Conduct and (2) if they were responsible, 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; and
- (B) Annual Trust Account Registration - All licensees who were responsible for client funds and funds entrusted by others under the provisions of rule 1.15 of the Rules of Professional Conduct must, annually, register each and every trust account in which the licensee held such funds at any time during the prior year by identifying account numbers and financial institutions in a manner prescribed by the State Bar for such reporting that will securely maintain the information submitted.

(2) Among the other requirements the State Bar may impose under this program are the following:

- (A) Annual Self-Assessment - All licensees who were responsible, at any time during the prior year, for a client trust account under the provisions of rule 1.15 of the Rules of Professional Conduct must complete an annual self-assessment on client trust accounting duties and practices;
- (B) Compliance Review - If selected by the State Bar, a licensee must complete and submit to the State Bar a client trust accounting compliance review to be conducted by a certified public accountant at the licensee's expense; and

(C) Additional Actions - If selected by the State Bar, an additional action or actions based on the results of a compliance review may include an investigative 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, including a rule or regulation that defines a licensee who is responsible for client funds and funds entrusted by others under the provisions of rule 1.15 of the Rules of Professional Conduct.

(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.

(d) Fees and penalties

The State Bar has the authority to set and collect appropriate fees and penalties.

Rule 1.4 Communication with Clients

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;
 - (2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;
 - (3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and
 - (4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.
- (d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances. For example, a lawyer's receipt of funds on behalf of a client requires communication with the client pursuant to rule 1.15, paragraphs (d)(1) and (d)(4) and ordinarily is also a significant development requiring communication with the client pursuant to this rule.

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

- (a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.
- (b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:
 - (1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and
 - (2) if the flat fee exceeds \$1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.
- (c) Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except:
 - (1) funds reasonably* sufficient to pay bank charges; and
 - (2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (d) A lawyer shall:
 - (1) 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), unless the lawyer, and the client or other person* agree in writing that the funds or property will continue to be held by the lawyer, there shall be a rebuttable presumption affecting the burden of proof as defined in Evidence Code sections 605 and 606 that a violation of paragraph (d)(7) has occurred if the lawyer, absent good cause, fails to distribute undisputed funds or property within 45 days of the date when the funds become undisputed as defined by paragraph (g). This presumption may be rebutted by proof by a preponderance of evidence that there was good cause for not distributing funds within 45 days of the date when the funds or property became undisputed as defined in paragraph (g).
- (g) As used in this rule, “undisputed funds or property” refers to funds or property, or a portion of any such 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, or any portion thereof, has become fixed and there are no unresolved disputes as to the client’s or other person’s* entitlement to receive 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 the client has agreed to pay in advance, or the client file, or any other property that the client or other person* has agreed in writing that the lawyer will 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] Upon rebuttal by proof by a preponderance of the evidence of the presumption set forth in paragraph (f), a violation of paragraph (d)(7) must be established by clear and convincing evidence without the benefit of the rebuttable presumption.

[6] Whether or not the rebuttable presumption in paragraph (f) applies, 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 disputes concerning a client’s or other person’s* entitlement to funds or property received by a lawyer.

[7] Under paragraph (g), possible disputes requiring resolution may include, but are not limited to, disputes concerning entitlement to funds arising from: medical liens; statutory liens; prior attorney liens; costs or expenses; attorney fees; a bank's policies and fees 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.