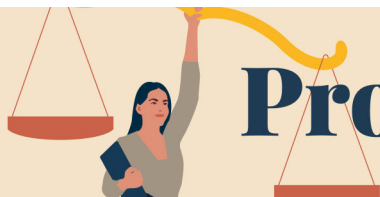


Daily Journal

MARCH 1, 2023



TOP Professional Responsibility LAWYERS

How to be prepared for the coming trust account audits

BY ERIN JOYCE LAW

The Client Trust Account Protection Program (CTAPP) was recently implemented by the State Bar as a direct response to the Girardi fiasco, where over 100 disciplinary complaints, mainly from clients who alleged mishandling of client funds, were closed without action. The goal of revisions to the trust accounting rules is to further protect the public, guarantee some degree of accountability, create more transparency, and to ensure there are more controls in place.

There are two basic phases for the CTAPP program. First, all licensees are required to register their trust accounts with the State Bar through their State Bar profiles, and then random audits or compliance reviews will begin. New Rule of Court 9.8.5 requires that all licensees annually certify compliance with CTAPP. Specifically, “[a]ll 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.” Any attorney who fails to certify compliance with Rule 1.15 by the extended deadline of April 3, 2023, will face both administrative and potentially disciplinary penalties.

In order to complete the CTAPP requirements on the State Bar profile, attorneys must identify all trust accounts, both IOLTA and individual trust accounts by routing number, financial institution, account number and closing balance as of Dec. 31, 2022. The next step is to take a self-assessment to ensure familiarity with the trust accounting requirements. Finally, the attorney must certify knowledge and compliance with the rules regarding handling of client funds. The certification and declaration re compliance must be accurate as of the time of submission, since the CTAPP materials on the State Bar website detail how attorneys who are working to ensure compliance may need to take corrective action. For the first year after implementation of CTAPP, the State Bar provided a grace period until April 3, 2023, so attorneys will have time to make corrections and accurately certify current compliance.

Almost all practicing attorneys will have to comply with CTAPP. Licensees who were not on active status during any part of the reporting period (January 1 through December 31, 2022) need not comply with CTAPP. Attorneys who are in-house counsel or government lawyers who do not maintain a trust account are also exempt from reporting. However, all licensees who are responsible for any of the duties concerning trust funds or property under Rule 1.15 must



comply with CTAPP. This includes most associates of law firms, unless they engage solely in document review and have no direct contact with any firm clients. However, associates at law firms can rely on the representation of their managing attorney or partner in making the certification required under CTAPP that the law firm is properly handling client and third party funds. The associate need not have any direct access to the firm’s trust account to make the required certification. An associate or “of counsel” who has direct client contact is required under Rule 1.15 to report receipt of funds at minimum to the client, even if the attorney has no ability to pay out client funds and has no access to the firm’s trust account.

Before completing the CTAPP certification process through their State Bar profiles, practitioners must be assured that they are in full compliance with Rule 1.15 for safeguarding and disbursement of funds. Any false certification is likely to be prosecuted by the State Bar as an intentional misrepresentation to the State Bar in violation of Business and Professions Code section 6106 – moral turpitude. A moral turpitude offense carries significant actual suspension under the Standards for imposition of discipline in State Bar proceedings, which are essentially the sentencing guidelines for ethics offenses in California.

How do attorneys ensure they are in full compliance with Rule 1.15? First, it is important to gather and maintain going forward all required trust account documentation, including bank statements, copies of all canceled checks, copies of all deposits (including the deposit slips and any deposited checks), a trust account journal, client ledger cards and a record of monthly reconciliations of the trust account. A trust account journal is essentially a checkbook register, detailing all account activity in chronological order on the trust account. A client ledger card reflects all deposits and disbursements in the trust account on behalf of a particular client.

The best approach is to use a commercially available accounting software program, such as QuickBooks Online or Xero, which are both cloud based systems, to maintain the client trust account. Using an Excel spreadsheet is another viable option for a trust account which is not particularly active. Since under Rule 1.15 attorneys need to maintain – for up to five years from the last disbursement all trust account records to be ready for an audit – attorneys should have all required trust account records, including monthly reconciliations back to January 2018.

It is acceptable to employ outside help or the services of staff to update and reconcile the firm's trust

account; however, an attorney's duty to comply with Rule 1.15 is a non-delegable duty. Even if an outside accountant, bookkeeper or CPA maintains the trust account records, the attorney should confirm on a monthly basis that the trust account is in balance and the accounting records tie back appropriately to the bank statements. The only explainable difference should be the outstanding checks which have been written and will be reflected in the QuickBooks ledger, but which have not yet been negotiated through the bank.

Failing to certify compliance by the deadline of April 3, 2023, will result in both administrative action by the State Bar and possible referral for disciplinary prosecution. After April 3, 2023, attorneys who have not certified compliance will be fined, and eventually enrolled on involuntary inactive status. Attorneys who do not certify compliance will also face discipline.

After April 3, 2023, the State Bar will be starting compliance audits. These random audits are not entirely random. Attorneys will be selected for audit based on identified risk factors such as area of practice (personal injury being the top of the list), size of law office, whether the attorney has had any insufficient funds activity reported on a trust account previously, and balance in the trust account as of Dec. 31, 2022. While a large balance in a trust account is not inherently a problem because it can be explained by a recent large settlement or busy personal injury practice, a large balance may signify a potentially higher risk of client harm. Therefore, it is likely one of the factors to be used to identify those attorneys who will be subject to audit. Attorneys who regularly handle client and third party funds, such as personal injury or family law attorneys, are also at greater risk of being audited during the CTAPP compliance reviews.

With the adoption of CTAPP, the Supreme Court approved two ma-

terial changes to Rule 1.15 in the duties attorneys owe concerning entrusted funds. First, an attorney now has 14 days to notify the client and any third party claimants of receipt of funds. And second, there is now a rebuttable presumption that an attorney must distribute entrusted funds within 45 days, or establish good cause for the delay. To comply with Rule 1.15(d) (2), attorneys need to adopt procedures to notify the client and lienholders who may have a claim on any funds received and deposited into the trust account within the two week window. To ensure funds are promptly paid out within the 45 days of receipt, or to establish good cause for the delay, law firms will be required to document their efforts to reduce liens and to disburse entrusted funds. This will require law firms to expend more staff time in lien negotiation and formalize efforts to contact third parties who have claims on funds in trust accounts.

The other change to the Rules of Professional Conduct is to Rule 1.4 which deals with client communications. It is crystal clear under the new rule that receipt of funds on behalf of a client constitutes a significant development in the client's matter, which needs to be timely communicated to the client.

Since the CTAPP program is so new, exactly how the State Bar will enforce the new procedures is being finalized. The State Bar has published resources on the State Bar website to answer many questions about CTAPP. Practitioners should review the Client Trust Accounting Handbook, the CTAPP Resources page and the CTAPP FAQ page before they certify CTAPP Compliance. The State Bar also invites calls to the Ethics Hotline (800-238-4427), or the special number set up to field CTAPP questions, the State Bar Contact Center (888-800-3400).

ERIN JOYCE is a State Bar defense and ethics attorney at *Erin Joyce Law*.