AILA
Northern California Chapter

September 26, 2016

Board of Trustees, State Bar of California
Public Comment Submitted Online

Re: Proposed Rule of Professional Conduct 1.15 – Opposed

Dear Trustees:

On behalf of the Northern California Chapter of the American Immigration Lawyers Association, I write to raise concerns about one of the proposed amendments to the Rules of Professional Conduct. Our concern is that proposed Rule 1.15 potentially harms the public interest of greater access to legal services. We write to recommend two amendments to better balance that public interest against the stated purpose of the proposed amendment, which is to protect the ability of clients to obtain a refund of unearned fees. First, we recommend that the rule explicitly state that it does not apply to funds paid in advance for a consultation by a potential client. Second, an advanced flat fee should be exempt from the trust account requirement if the total anticipated fee for the matter does not exceed $1,000. With these amendments, our organization would take a neutral position on the proposed rule. Without them, we oppose the proposed rule.

Background

The American Immigration Lawyers Association (AILA) is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. Member attorneys represent tens of thousands of families, U.S. businesses, foreign students, researchers, entertainers, and asylum seekers. AILA's Northern California Chapter, which encompasses the majority of Northern California counties, currently has more than 850 members.

Proposed Rule 1.15 would replace current Rule 4-100 and amend it to require any fee paid in advance, including a flat fee, be held in trust until it has been earned. Subsection (a) of the proposed rule creates a default rule that all fees paid in advance must be deposited in a client trust account. Subsection (b) permits deposit of advanced flat fees in an operating account, but only with the informed written consent of the client.[1]

[1]Proposed Rule 1.15 provides as follows,

> (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 [a client trust account].
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> (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:

Potential Applicability to Consultation Fees

Our first concern is that the expansive language used in the proposed rule could be interpreted to apply to flat fees paid in advance for consultations by a potential client. Rule 1.15 applies to funds deposited for "a client, or other person to whom the lawyer owes a contractual, statutory, or other legal duty." This definition arguably includes consultees, even if they are not considered clients, since lawyers do owe them legal duties. The inclusion of consultees within the scope of the rule would make it overly burdensome and decrease access to legal services, as discussed below. We recommend clarification of the proposed rule to specifically exempt advance deposit of a flat consultation fee by a potential client.

Many of our members charge a consultation fee, since immigration consultations often do not lead to paid representation. Moreover, immigration lawyers commonly require payment of a flat consultation fee in advance, particularly for consultations by telephone or video conference. These types of long-distance consultations are not unusual because of the federal nature of our practice, where potential clients may be out-of-state or overseas.

Requiring that a consultation fee paid in advance be deposited in a trust account would be extremely cumbersome relative to the small amount of money typically involved. Depositing the funds into a trust account, even if it is an IOLTA pooled account, triggers a variety of responsibilities, including setting up a separate ledger for that person, withdrawing the funds within a reasonable time period after they are earned, maintaining the ledger and other records for a minimum of 5 years from final disbursement, providing an accounting to the person, etc.

The additional effort that would be required to comply with these requirements for the relatively small amount typical of a consultation fee is likely to increase the fee that lawyers charge for a consultation. The amount of a consultation fee is likely to increase even if the lawyer chooses to begin collecting the fee at the end of the consultation (once it has been earned and thus does not need to be placed in a trust account). Collecting a fee at the conclusion of a consultation creates the possibility that the consultee will not pay the fee, particularly for a telephone or video conference where the consultee is found to be not eligible to apply for the benefit sought or chooses not to retain the lawyer for it. To account for the risk of nonpayment, a rational lawyer would increase the amount he or she charges for a consultation. Alternatively, lawyers may become more resistant to providing telephone or video conference consultations. Either way, the increased expense or difficulty would decrease public access to legal services.

The reason for the amendment to Rule 1.15, as stated in the executive summary that

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> (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
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> (2) 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.

accompanies it, is to protect the public by making sure that unearned fees are available for refund. This rationale, however, carries little weight in the context of a consultation. A consultation fee, at least in immigration practice, is rarely more than a few hundred dollars. It seems highly unlikely that a lawyer would be unable to refund an unearned consultation fee of that amount even if he or she deposited it in an operating account. Further, a consultation typically occurs immediately or quite soon after payment of an advanced consultation fee. That means the chances that the lawyer would not be able to perform the agreed upon consultation and thus would need to refund the advanced fee is very low. Thus, public protection is not a significant justification for applying Rule 1.15 to advanced flat consultation fees.

We therefore recommend that the Trustees amend proposed Rule 1.15 to specifically exempt advance deposit of a flat fee for a consultation by a potential client. We oppose the proposed rule absent the recommended change.

Applicability to Other Fees Not Exceeding $1,000

Proposed Rule 1.15 applies to all advanced fees regardless of amount. Our concern is that the burdens associated with depositing these fees in a trust account are not sufficiently justified for smaller amounts. The likely result is only to increase the cost of legal services without providing meaningful public protection. We recommend that Rule 1.15 specifically exempt from the trust account requirement advance deposit of a flat fee where the total anticipated fee for the matter does not exceed $1,000.

AILA members often represent clients on smaller matters where the flat fees do not exceed $1,000. Examples of these matters include applying for an employment authorization or travel document, applying for Deferred Action for Childhood Arrival (DACA, President Obama's initiative for certain young people who arrived in the U.S. as children), FOIA requests for immigration records, simple naturalization applications, and applying for Temporary Protected Status (TPS). Some nonprofit legal services organizations, which also would have to comply with Rule 1.15, offer even more extensive services for fees that do not exceed $1,000.

As with consultations, depositing these small fees in a client trust account creates additional burdens that offer scant public protection. The rule would require lawyers that handle smaller matters to spend proportionally more time accounting and less time lawyering than lawyers who handle larger matters. In other words, representing 100 clients on small matters, each with their own trust account ledger and records, would require a lawyer to spend far more time accounting than a lawyer who represents a few clients on larger matters. The time that a lawyer spends accounting for all of the smaller matters is likely to be passed on to those clients, thus making it more difficult for them to afford legal services. And yet the smaller amount of funds involved in smaller matters means there is less justification for requiring the funds to be put in a trust account. It seems very unlikely that a lawyer would, for example, be unable to refund an unearned $500 DACA fee even if she placed those funds in her operating account.

We therefore recommend that the Board of Trustees amend Proposed Rule 1.15 to exempt advance flat fee deposits where the total anticipated fees for the matter do not exceed $1,000.

We oppose the proposed rule absent the recommended change.

Conclusion

We strongly urge the adoption of our two amendments to have a better balance between the public interest of greater access to legal services and the stated purpose of the proposed amendment, which is to protect the ability of clients to obtain a refund of unearned fees.

Moreover, we encourage the Rules Revision Commission to consider that the time and costs of an onerous trust accounting adds to the cost of legal services at a time when lawyers are trying to find ways to make our services more cost-effective and accessible to the public. This type of micro-managing rule raises the cost of providing legal services to the consumer, and it could have a dramatic impact on the day-to-day practices of many attorneys throughout the state. The ultimate cost of the additional burdens provided in this proposed rule will be borne by the client, not the lawyer.

The AILA Northern California Chapter would be glad to provide further input on proposed Rule 1.15 upon request.

Sincerely,

Olivia Lee, Chair
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Northern California Chapter
American Immigration Lawyers Association