Brett Schreiber
SINGLETON SCHREIBER LLP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2023

Client Trust Account Protection Program

THE TOM GIRARDI SCANDAL LEADS TO NEW CAL BAR PROGRAM: WHAT YOU DON'T KNOW CAN KILL YOU!

Unless you've had your head buried in the sand, you are well aware that Tom Girardi was a crook hiding in plain sight. You've also learned that the State Bar of California was complicit in his crookery. In an effort to repair its image and to put some guardrails in place to ensure that another Girardi-esque Ponzi scheme disaster doesn't splash across the front page anytime soon, the State Bar has created a new registration and certification program known as the Client Trust Account Protection Program (CTAPP). This well intended but poorly executed program has arrived on our collective doorstep and if you're reading this article it applies to you and your practice.

In fact, by the time this article is published you most likely have had to register your trust accounts and certify your compliance with a host of rules designed to ensure greater transparency in handling and distribution of client funds. This is an overview of the new rule regime to help you avoid committing a presumptive violation. This article will also raise questions that are currently unanswerable because the State Bar's roll-out of this new program was done without any meaningful input from the California plaintiff's trial bar. In the past two months I have done multiple presentations on CTAPP for local, regional, and State Bar associations and I have yet to meet *anyone* who was actually involved in the development of these new rules. As you'll see when you register and certify compliance with CTAPP, the lack of real-world practitioner input is evident.

The back story

I won't beat this dead horse further, but the State Bar was asleep at the wheel while Girardi stole tens of millions of dollars in client money that should have been distributed to widows, orphans and the critically injured. To make matters worse – and why the Girardi story has become such fodder for the national news – Girardi and his minions not only ripped off the widows and orphans but then spent the money on escorts and Glam Squads. Not that it should matter what they did with their ill-gotten gains, but perception is reality and the perception of our profession has taken a serious hit thanks to this fraudulent and repugnant behavior. Accordingly, the State Bar decided it needed to act fast. So, it did, for better and for worse.

Now what?

In response to the scandal, the California Supreme Court issued Rule 9.8.5, which required the State Bar to establish new rules of professional conduct governing the handling of client trust

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2023

funds. While there are a number of rule changes, for purposes of this article we will focus on two: Rules of Professional Conduct 1.4 and 1.15. The purpose of these new rules is two-fold: to create a *certification program* where *all* licensees must certify annually that they're responsible for client funds and know the rules governing trust accounting, and secondarily, to create an account *registration* program where *all* licensees must register each and every trust account where such funds were held. From a policy standpoint these are great additions to the Rules of Professional Conduct. How could you possibly be against greater transparency of lawyer trust accounting and ensuring greater understanding and compliance of handling client funds? No one is. But like so many things in this business, the devil is in the details.

Who and when?

If you're reading this article and have already spent time on the State Bar's website reviewing its FAQs, watched the three-minute CTAPP video on the State Bar's website or watched a CLE discussion on this topic, then you're likely not part of the problem. In one of our most recent CTAPP webinars we had nearly 500 attendees. While it was great to see that kind of interest, what's more concerning is that we didn't have 5,000 attendees. After all, if you have a State Bar license, this affects you. Per the new rules, if you represent a client "in a matter in which funds have been received by the licensee or the licensee's firm" and/or you "act as a signatory on a trust account," then you must have reported your trust account information and certified compliance by February 1, 2023.

Put another way, if you can sign the checks in the trust account or work for a firm that receives money from or for clients, then this applies to you. In fact, the *only* categories of lawyers that the State Bar rules call out as not having to comply are (1) government employee lawyers; (2) lawyers on inactive status; and (3) document-review lawyers (presumably contract-based?) who have no client interaction in any way, shape, or form. (Personally, I think there are situations where the last category of document-review lawyers could still be obligated to comply, but that's a discussion beyond the scope of this article.)

When you try to pay your State Bar dues this year you will be forced to comply with CTAPP. At bottom, you'll be swearing/affirming that you or your firm have received client funds in the previous year, that you are familiar with Rule 1.15 and in compliance "with applicable rules and statutes governing a trust account and safekeeping of funds entrusted by clients and others." By certifying compliance, you will be attesting to the following:

- That *you* put your client's money in trust and not a piggy bank or under a mattress.
- That *you* don't commingle funds between trust and operating.
- That *you* ensure that fees/costs are "withdrawn at earliest reasonable time" when such funds become fixed.
- That *you* notify clients *no later than 14 days* of the receipt of funds to which the client has an interest.
- That *you* maintain complete records of all funds coming into the firm.
- That *you* promptly notify clients of receipt of funds (thanks to the crooks on this one; just in case you didn't get the message the first time, above).
- That *you* preserve all records and comply with audits.
- That *you promptly* distribute *any undisputed* funds to clients.

Client notification

For most of you handling single-event personal injury cases, the two areas you need to be acutely aware of are the requirements of notifying your client within 14 days of receipt of settlement funds and that you "promptly" disburse "undisputed" settlement funds. As to the former, it is critical that you create deadline chains or other calendar triggers to ensure that within two weeks of receiving a settlement check you notify the client. A form letter or e-mail will suffice, but this needs to be worked into your practice immediately.

As to the latter, you may be asking what are "undisputed" settlement funds? Under rule 1.15 "where the lawyer knows or reasonably should know that the ownership interest of the client to those funds – or any part – has become fixed and there's no unresolved disputes to client's entitlement to those funds," then those funds must be disbursed. Under Business & Professions Code section 6149, subdivision (b), any client is entitled to a statement within 10 days of demand. However, under the new rules, failing to provide a settlement disbursement statement within 45 days of receipt of funds creates a rebuttable presumption that you've committed a State Bar violation under 1.15 [three-week delay violates former rule (*McKnight v. State Bar* (1991) 53 Cal.3d 1025; six-week delay violates rule where attorney paid himself in the meantime, *In the Matter of Berg* (Review Dept. 1997) 3 Cal.State Bar Ct. Rptr. 725)].

Settling liens promptly

Put simply, set deadlines in your office from the moment settlement funds are received with both 14-day and 45-day cut-offs from receipt of funds. If your practice is personal-injury centric, start lien resolution *early.* Notifying lien holders early in the case and dealing with them proactively during settlement negotiations – rather than reactively post-settlement – must become your new practice. If your client demands a settlement statement and there are liens you are unaware of, you will be bumping up against a rebuttable presumption of a State Bar violation before you know it.

Recognizing that you may have situations where government payors or other lien holders may be slow to respond, the new rules do allow you to hold funds longer so long as there is an "agreement in writing." Toward that end, it is imperative you notify clients in writing within two weeks that funds are received, that you are working to resolve any outstanding liens/costs/fees/referrals,

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2023

and that you're doing so with their consent and authority. Should your client have any issues or concerns, advise them to put it in writing. After all, the paper trail needs to be crystal clear here and keeping your clients informed during the settlement process is more critical than ever.

Settlement-disbursement agreements

Finally, and perhaps most importantly, get settlement-disbursement agreements out *immediately* on undisputed amounts that are due your clients. Does this mean that you'll be issuing multiple checks to a single plaintiff? You bet. Does this mean that you'll need a clean paper trail should you be withholding funds when dealing with a slow-to-respond government lienholder? Absolutely. Does this mean that if you are holding client funds from a smaller settlement or in anticipation of funding the under-insured motorist claim, that you need written client consent to hold that money more than 45 days? For sure. Failing to do so is at your own peril.

Record keeping and retention

Additionally, Rule 1.15 requires you to keep records, i.e., general journal, client ledgers, bank statements and proof of monthly reconciliation, for five years post-disbursement. In the era of online accounting and banking software this is not as onerous of a requirement as it once was, but it is critical to have systems in place maintaining records of proper management of client funds.

Associates beware!

For those of you who are associates in larger firms (or have associates in your firm), it is similarly imperative that you open your books. The new rules make clear there is no such thing as an "I'm just an associate" defense. Regardless of your place in the pecking order, *you* are ultimately responsible for client funds and so *you* must certify compliance even if this is done by a supervising lawyer, a non-lawyer bookkeeper, and/or a CFO.

While a subordinate attorney may rely upon a supervisory attorney's confirmation that monthly reconciliation and other trust accounting practices are followed, Rules of Professional Conduct 5.1 and 5.2 do not provide a safe harbor if you believe something shady is going on. In other words, if you see something, say something. For law-firm owners, this means you need to provide your subordinate attorneys with sufficient detail on your trust accounting that they can honestly and in good faith comply with their own certification requirements under Rule 1.15. This is one of those places where the new rules are clear as mud. How much information is enough? How much is too much?

The new rules don't require that you provide every lawyer in your firm with unfettered access to your trust account, but you do need to strike the balance. In our firm – with over 30 lawyers – we are developing systems wherein our CFO circulates a declaration confirming that trust accounting best practices are followed each month, and similarly, we are looking into a third-party auditor to analyze our trust accounting compliance annually. Since the State Bar has provided no guidance in this regard, we are all left to our best guess on what information is enough and what compliance should look like.

Finally, as it relates to trust account reporting, we will each be required to identify all client trust accounts – in California or out of state – that are associated with our firms. For those of you with practices in multiple states, this will require identifying *all* trust accounts associated with your firm. For those of you with one California IOLTA account, this should be relatively easy. For those of you with firms who have utilized the State Bar's agency billing platform, you will similarly be able to use that same platform to register all relevant trust accounts to your firm which, by extension, will eliminate the need for your affiliated lawyers to register those same accounts.

I wish you well in this brave new world of client trust accounting. While the roll-out and confusion that followed has been suboptimal, this rule regime is a positive step forward that will lead to greater accountability and transparency in the management of client funds. Afterall, these are your clients' funds first. Allow that to be your North Star, document carefully and consistently and collaborate with your colleagues as we develop best practices.

Brett Schreiber is a founding partner of Singleton Schreiber. *A serious injury and mass tort super firm with over 30 lawyers and 150 staff and offices throughout California and New Mexico.*