

Date of Hearing: May 6, 2014

ASSEMBLY COMMITTEE ON JUDICIARY  
Bob Wieckowski, Chair  
AB 1515 (Gonzalez) – As Amended: March 20, 2014

As Proposed to be Amended

SUBJECT: ATTORNEYS: ADVANCE FEES AND EXPENSES

KEY ISSUE: SHOULD THE EXISTING PROFESSIONAL OBLIGATIONS OF ATTORNEYS REGARDING CLIENT FUNDS BE CLARIFIED TO REQUIRE THAT FUNDS RECEIVED FROM CLIENTS IN ADVANCE OF LEGAL SERVICES BE SEGREGATED UNTIL EARNED OR INCURRED?

**SYNOPSIS**

*This bill seeks to clarify that money received by an attorney in advance of fees earned and costs incurred is to be kept separate from the attorney's own funds. Existing law provides a comparable rule for funds received or held for the benefit of clients. However, it is not clear whether this rule is sufficiently broad to cover advance payments for fees received from or on behalf of the client. This bill would resolve that potential ambiguity. There is no known opposition.*

SUMMARY: Clarifies attorney duties regarding advance fees and expenses. Specifically, this bill:

- 1) Provides that it is the duty of an attorney to deposit into a client trust account funds received in advance from or for the client for fees, costs or expenses that have been paid in advance for legal services, which shall be withdrawn by the attorney only as fees are earned or costs or expenses incurred.
- 2) Provides that the specified legal services may be provided in stages, and the fee may be withdrawn when the attorney has performed and completed the specified stage or stages, provided the agreement with the client specifies each stage and sets the amount of the advance fee for each stage. For purposes of this subdivision, any fee that is paid in advance as the set amount of the fee for specified legal services, whether paid as a “fixed” fee, a “flat” fee, or under any other label, is earned only when the attorney has performed and completed the legal services agreed to be provided in exchange for that fee.
- 3) Provides that the State Bar shall adopt for approval by the Supreme Court any necessary amendments to its rules of professional conduct to conform with this subdivision.

EXISTING LAW:

- 1) Provides pursuant to the State Bar Act for the regulation and licensure of attorneys by the State Bar of California, imposes various duties on an attorney, including the duty to maintain the confidences and preserve the secrets of his or her client at every peril to himself or herself, and authorizes the Board of Trustees of the State Bar, with the approval of the

Supreme Court, to formulate and enforce rules of professional conduct for all members of the State Bar. (Business and Professions Code section 6000 *et seq.*)

- 2) Provides for the establishment of client trust accounts. (Business and Professions Code section 6211.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: The author states that this bill would clarify that an attorney has a clear and explicit statutory duty to deposit fees and expenses that a client has paid in advance for legal services into a client trust account, to be withdrawn by the attorney only as fees are earned or expenses incurred.

This Bill Would Address Potential Ambiguity Under Existing Rules Regarding the Segregation of Client Funds Received In Advance. The State Bar of California notes:

Rule 4-100(A) of the Rules of Professional Conduct provides, in part: "All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled 'Trust Account,' 'Client's Funds 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."

According to the State Bar, "Although the safest thing for an attorney to do – and the customary practice by many – is to hold advance fees (as well as costs and expenses) in a client trust account and draw them out as they are earned, Rule 4-100(A) does not clearly and explicitly refer to "advance fees." This bill would clarify the situation by explicitly imposing a duty to deposit into a client trust account fees and expenses that a client has paid in advance for legal services, to be withdrawn by the attorney only as fees are earned or expenses incurred." These funds are to be held in client trust accounts consistently with Business and Professions Code section 6211.

The Bar observes that in *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 163, the California Supreme Court found that the predecessor to Rule 4-100 (former Rule 8-101, with the same language as current Rule 4-100 to the extent relevant here) "expressly requires that sums advanced to pay costs or expenses be placed in a separate trust account; it does not expressly deal with advance legal fees."

It should be noted that while the *Baranowski* court commented that the rule did "not expressly deal with advanced legal fees," the court explicitly declined to decide the question of whether the rule covers advanced legal fees. (*Baranowski*, 24 Cal.3d at 164.) Thus, the question appears to be an open one under the Rules of Professional Conduct.

The State Bar comments that this bill is consistent with ABA Model Rule of Professional Conduct, Rule 1.15(c), which it states is the rule in at least 30 other states requiring an attorney to deposit and hold legal fees paid in advance in a client trust account and not withdraw them until they are earned. Imposing this obligation explicitly in California will serve to further public protection and public confidence in the legal profession, the State Bar argues.

According to the Bar, the language in this bill would not apply to a “true retainer.” Under Rule 3-700(D)(2), the Bar states, a “true retainer” is one that is paid “solely for the purpose of ensuring the availability of the member.” The Bar states that this definition of a “true retainer” was adopted by the California Supreme Court in *Baranowski*: “An ‘advance fee payment’ as used in this context is to be distinguished from a classic ‘retainer fee’ arrangement. A [classic] retainer is a sum of money paid by a client to secure an attorney’s availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client.” (*Baranowski v. State Bar*, *supra*, 24 Cal.3d at p. 164 fn.4).

Author's Technical Amendments. To avoid potential ambiguity, the author proposes the following technical revisions:

(p) To deposit into a client trust account funds received in advance from or for the client for fees, costs and or expenses that have been paid in advance for legal services ~~into a client trust account~~, which shall be withdrawn by the attorney only as fees are earned or costs or expenses incurred.

~~(1) For purposes of this subdivision, any fee that is paid in advance as the set amount of the fee for specified legal services, whether paid as a “fixed” fee, a “flat” fee, or under any other label, is earned only when the attorney has performed and completed the legal services agreed to be provided in exchange for that fee. The specified legal services may be provided in stages, and the fee may be withdrawn when the attorney has performed and completed the specified stage or stages, provided the agreement with the client specifies each stage and sets the amount of the advance fee for each stage. For purposes of this subdivision, any fee that is paid in advance as the set amount of the fee for specified legal services, whether paid as a “fixed” fee, a “flat” fee, or under any other label, is earned only when the attorney has performed and completed the legal services agreed to be provided in exchange for that fee.~~

(2) The State Bar shall adopt for approval by the Supreme Court any necessary amendments to its rules of professional conduct to conform with this subdivision.

#### REGISTERED SUPPORT / OPPOSITION:

##### Support

None on file

##### Opposition

None on file

Analysis Prepared by: Kevin G. Baker / JUD. / (916) 319-2334