PROPOSED REVISIONS TO THE CODE OF PROFESSIONAL CONDUCT
PROPOSAL 2023-007

March 24, 2023

The Code of Professional Conduct Committee has recommended amendments to Rule 16-115 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://supremecourt.nmcourts.gov/open-for-comment.aspx or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 24, 2023, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

16-115. Safekeeping property.

A. **Holding another's property separately.** A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five (5) years after termination of the representation.

B. **Client trust account deposits; discretionary.** A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in [~~an amount necessary for that purpose~~] the exact amount to be charged by the bank to the extent that it can be ascertained.

C. **Client trust account deposits; mandatory.** A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

D. **Notification of receipt of funds or property.** Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property

that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

E. **Severance of interest.** When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

[As amended, effective February 15, 1988; and effective January 1, 1990; March 4, 1999; July 31, 2000; April 1, 2002; as amended by Supreme Court Order No. 08-8300-25, effective January 1, 2009; as amended by Supreme Court Order No. _____, effective _____.]

Committee Commentary. —

[1] For recordkeeping requirements related to trust accounts, *see* Rule 17-204 NMRA. For specific requirements related to mandatory IOLTA accounts, *see* Rule 24-109 NMRA. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. *See*, *e.g.*, Rule 17-204 NMRA of the Rules Governing Discipline and ABA Model Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, Paragraph B provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph E also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow

agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

[Adopted by Supreme Court Order No. 08-8300-25, effective January 1, 2009; as amended by Supreme Court Order No. _____, effective _____.]

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comment regarding proposed amendment to Rule 16-115(B) NMRA

1 message

Stephen Waller <swaller@wallernm.com> Thu, Apr 20, 2023 at 10:47 AM
Reply-To: swaller@wallernm.com
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

I am writing to provide comment on the draft amendment to Rule 16-115(B) of the Rules of Professional Conduct.

While the proposed amendment regarding payment of bank service charges (imposed on attorney's trust accounts) has a valid aim, I respectfully submit that the rule would prove cumbersome in practice.

In my experience, the only bank-service charge imposed on my firm's trust account is a charge for incoming wire transfers. The amount of each such charge is predictable in advance.

However, when I provide clients or third parties with the necessary information with which to make a wire-transfer of funds to my firm's trust account, there is no guarantee that such a transfer will result as predicted.

For example, a settlement payment or other deposit may ultimately not be made (or may be made by other means, such as check or credit card, that do not result in service charges to the trust account). So even if my firm were to deposit the proper amount of funds into the trust account in advance (to cover bank service charges for an anticipated incoming wire transfer), that amount would need to be refunded to the firm.

Or, in some situations the sending party make elect to make two or more wire transfers (rather than one), or make one wire transfer instead of two. This means that even if the correct amount of service-charge funds for the anticipated number of wire-transfers is deposited into the trust account in advance, later developments may still make it necessary for the firm to make additional deposits (to cover "extra" service charges imposed) or to refund some deposits that were ultimately not needed to pay service charges.

A better approach, I suggest, would be to allow an attorney or law firm to deposit a "safe harbor" amount of firm (non-client) funds into each trust account to cover such bank-service charges, provided that the firm promptly* reimburse the trust account for such service charges so as to keep the total amount of non-client funds (in the trust account) at the safe-harbor amount or less. A safe-harbor amount of $100 (one hundred dollars) would be more than sufficient for my single-attorney firm, but perhaps a greater safe-harbor amount is needed for larger firms and/or firms with more frequent trust-account transactions. Whatever the dollar-amount selected, a "safe harbor" approach would enable attorneys and firms to promptly reimburse their trust accounts for service charges actually imposed, which would help achieve the goal of Rule 16-115(B) without adding more transactions that risk unnecessarily complicated the trust-accounting process.

[* Because bank statements are typically issued on a monthly basis, which facilitates monthly reconciliation of trust accounts (as a periodic backup to "live" trust accounting), perhaps the definition of "promptly" could be defined as within 45 days or similar.]

Sincerely,

Stephen Waller

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