Proposed Changes to State Bar Rules of Professional Conduct

By Cheryl L. Stengel, Esq., CLS-B

The State Bar of California’s Board of Trustees has adopted proposed new and amended Rules of Professional Conduct. Earlier this year, the State Bar submitted the proposed rules to the California Supreme Court for approval, where this remains pending.

Generally, the proposed rules changes pertain to attorney conduct in the following areas:

1. Enhancing competence or promoting lawyer-client communication;
2. Strengthening lawyer responsibilities as a fiduciary, including responsibilities involving fee arrangements;
3. Responding to access to justice needs and public interest practice concerns;
4. Targeting key areas of lawyer conduct; and
5. Lawyer use of technology, particularly electronic communication.

Significantly, Proposed Rule 1.15, if approved, will change attorney responsibilities regarding fee arrangements. There will be a new requirement that advance fees or “flat fees” must be held in trust (See proposed Rule 1.15(a), (b)). Under the Proposed Rule, funds received for the benefit of a client, or other person to whom the lawyer owes a duty, including advances for fees, costs and expenses, must be deposited into the attorney’s
trust account. A flat fee paid in advance for legal services may be deposited in a lawyer’s or law firm’s operating account only with written client disclosure and consent: (1) the lawyer must disclose to the client in writing that the client has the right that the flat fee be deposited into the trust account until the fee is earned, and 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 (2) if flat fee exceeds $1,000, the client agrees in writing to deposit the flat fee in the lawyer’s operating or other non-trust account. As flat or advance fee arrangements for attorney services are commonly used in many practice areas, including criminal, family, bankruptcy, and estate planning, this proposed rules change is certain to have broad applicability.

Other fee-related Proposed Rules changes will include: requirements for obtaining client consent when a lawyer accepts compensation for legal services paid by someone other than the lawyer’s client (Rule 1.8.6.); procedures for obtaining client consent to a fee splitting arrangement with a lawyer in a separate firm, including referral fees (Rule 1.5.1.); and the duty of safekeeping of client funds and property to encompass responsibilities to a non-client to whom a duty is owed, including duties involving third party liens on trust funds (See proposed Rule 1.15(a)).

REMINDER TO MEMBERS

If you have not renewed your membership for the 2017 – 2018 year, your membership has now lapsed. The Foothills Bar Association’s 2018 Attorney Directory will soon be prepared, which will include all current members. The directory is a valuable resource for our members and potential clients. In addition to the Attorney Directory, Foothills Bar member benefits include the on-line member directory on the Association’s website. The online directory includes your area of practice and contact information, a short biography and photo (if submitted). To maintain your membership standing and be included in the Attorney Directory book and the on-line directory, you must renew your membership promptly. Membership renewal or sign up for new members may be done on-line at http://foothillsbar.org/membership/.
Tenant Triggers Collateral Estoppel Trap

By Keith A. Jones, Esq.

I have noted in previous articles that a landlord needs to establish the existence of a landlord-tenant relationship in order to successfully evict a tenant. In a recent appellate court decision, the timing of the decision in the landlord's eviction lawsuit gutted the tenant's lawsuit for fraud and other claims even though the tenant filed his lawsuit first.

In late 1999, the landlord agreed to assist the tenant with financing the purchase of a five-unit property by purchasing the property in the landlord's name because the tenant couldn't qualify for a loan. The tenant paid the 20% down payment as part of the transaction, agreed to pay the landlord's loan payments plus $200 per month, and occupied at least one of the units. The parties signed a "Residential Lease with Option to Purchase (Short Form)" which gave the tenant until December 31, 2004 to exercise the option to purchase. The tenant didn't read the contract before signing because he trusted the landlord who was also a real estate broker.

The tenant didn't timely exercise the option, and the landlord raised the rent by $200 per month in 2008 without the tenant objecting. Although the tenant hadn't timely exercised the option, the landlord nonetheless offered to sell the property to the tenant in 2011 under the option terms, including giving the tenant a credit for the down payment, even though the tenant had been paying rent late. The tenant objected, contending that he shouldn't have to buy a property that he already owned.

In June 2012, the tenant filed a lawsuit against the landlord for fraud, breach of contract, specific performance and other causes of action, asserting that he had held equitable title to the property under an installment sales contract. In July 2012, the landlord filed an unlawful detainer action to evict the tenant. The tenant filed a motion to quash in the unlawful detainer action based on his equitable title claim that had been alleged in his June 2012 lawsuit.

The unlawful detainer judge held an evidentiary hearing over a one and one-half day period after the tenant deposed the landlord. The unlawful detainer judge found that the parties had entered into a landlord-tenant relationship based on the Residential Lease, and that the tenant did not have any claim of equitable title to the property. The tenant pursued a writ of mandate to challenge the ruling, but the appellate division panel agreed with the unlawful detainer judge. The tenant did not file a responsive pleading and the landlord ultimately obtained a default judgment against the tenant and regained possession of the premises.
Continued from Page 3…

The landlord then challenged the tenant's lawsuit filed in June 2012 by a summary judgment motion using the collateral estoppel doctrine. The trial court agreed with the landlord, finding that the tenant was barred from re-litigating the equitable title issue that had been decided against him in the unlawful detainer action. The appellate court agreed, reasoning that collateral estoppel is the issue preclusion aspect of the res judicata doctrine.

Collateral estoppel would apply only if: i) a party to be bound agreed to submit an issue to prior adjudication; and ii) that party had a full and fair opportunity to litigate. While recognizing that the tenant didn't litigate the fraud and other claims in his June 2012 lawsuit in the July 2012 unlawful detainer action, the appellate court held that in order for the tenant to succeed with the June 2012 claims, he would have needed to succeed with his equitable title argument in the unlawful detainer case. The equitable title issue had been fully and extensively litigated in the unlawful detainer case to the point that the unlawful detainer judge's decision on the motion to quash went beyond the simple possession issue which is usually the narrow purpose of the unlawful detainer action.

The tenant had placed the fraud and claimed that there was no valid lease at issue in the unlawful detainer action. The unlawful detainer judge had ruled against the tenant on those issues such that further litigation on them would be barred by the collateral estoppel doctrine. The appellate court noted that the tenant could have filed a motion to consolidate the cases on the grounds that title, fraud and possession were so intertwined and complex that the case should have been classified as an ordinary civil action and not subject to the expedited procedure in the unlawful detainer action.

Generally, unlawful detainer actions have a very narrow focus of issues to be determined, and cross-complaints (particularly those raising issues for an ordinary civil action) are not allowed. However, as hinted by the appellate court, a motion to consolidate a separately filed lawsuit can operate to remove an unlawful detainer case from the expedited procedure track and avoid a potential collateral estoppel trap.
Notices

Looking for Speakers for Future FBA Civil Litigation Section Meetings:

If you have a litigation topic you would like to present at an upcoming Civil Litigation Section MCLE meeting, please contact Section Co-Chairs Mark Raftery at mark@thelawcorp.com or Cheryl Stengel clstengel@outlook.com.

Foothills Bar Association Notice of Board Meeting:

The Foothills Bar Association Board of Directors generally meets on the third Tuesday of each month. The next meeting will be on September 19, 2017 at the Law & Mediation Firm of Klueck & Hoppes, APC. 7777 Alvarado Road, Suite 413, La Mesa, CA 91942, beginning at 4:45 p.m. If you want your voice to be heard in policy discussion and upcoming events planning or would simply like to learn more about the organization, your attendance is welcome.

The Family Court needs settlement conference judges. Please volunteer and share your expertise. Contact Kelly Fabros at 619-456-4065 or Kelly.Fabros@SDCourt.CA.Gov.
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