

No. 19-3396

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Consumer Financial Protection Bureau,

Plaintiff-Appellee,

v.

Consumer First Legal Group, LLC, *et al.*,

Defendants-Appellants.

On Appeal From the United States District Court
For the Western District of Wisconsin

Hon. William M. Conley

Case No. 3:14-cv-513

**CONSUMER FINANCIAL PROTECTION BUREAU'S
PETITION FOR PANEL OR EN BANC REHEARING**

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Statement Concerning Rehearing En Banc

Regulation O is the federal law that governs mortgage-relief services. Such services include offering to help homeowners in seeking modifications to the terms of their mortgage loans. The rule protects consumers who may be desperate for help staying in their homes from harmful and deceptive practices—practices all too often engaged in by some licensed attorneys.

The panel in this case erroneously concluded that practicing attorneys are categorically exempt from Regulation O. And its reasoning would strip the Consumer Financial Protection Bureau of the authority given it by Congress to hold attorneys to account for violations not just of Regulation O, but of a host of other federal laws as well.

The panel's ruling is of exceptional importance. It splits with the only other circuit to have addressed this issue. It would reshape the enforcement scheme for multiple consumer-protection laws. It would expose Americans nationwide to the risk of harmful and illegal practices, including in the mortgage-relief market, and at a time when conditions appear ripe for a resurgence in foreclosures. It would offer unscrupulous attorneys a safe harbor available in this Circuit and no other.

Statement

1. **The Consumer Financial Protection Bureau** was established by the Consumer Financial Protection Act of 2010 (“CFPA”) as “the federal government’s primary consumer protection agency when it comes to financial matters.” *CFPB v. Consumer First Legal Grp., LLC*, 6 F.4th 694, 700 (7th Cir. 2021) (“*CFLG*”). The Bureau administers the “Federal consumer financial laws,” a category that includes:

(1) the CFPA itself; (2) 18 “enumerated consumer laws,” such as the Fair Debt Collection Practices Act (“FDCPA”); and (3) additional authorities transferred to the Bureau from other agencies under subtitles F or H of the CFPA (“transferred authorities”). *See* 12 U.S.C. § 5481(12), (14); *id.* § 5511(a). The Bureau is generally authorized to issue rules under the federal consumer financial laws, to supervise entities for compliance with those laws, and to enforce those laws. *Id.* §§ 5512(a)-(b), 5514-5515, 5563-5564.

The CFPA limits in certain respects the Bureau’s authority over attorneys. The relevant provision, 12 U.S.C. § 5517(e) (reproduced in the attached Appendix), has three parts. Paragraph 1 states that, “[e]xcept as provided under paragraph (2),” the Bureau may not exercise “supervisory or enforcement authority” over “an activity engaged in by an attorney as part of the practice of law.” Paragraph 2 states that Paragraph 1 “shall not be construed” to limit the Bureau’s authority over consumer financial products or services provided outside the scope of an attorney-client relationship between attorney and consumer. Paragraph 3—titled “Existing Authority”—states that Paragraph 1 “shall not be construed” to limit the Bureau’s authority with respect to an attorney “to the extent that such attorney is otherwise subject” to an enumerated consumer law or transferred authority.

2. **Regulation O** is the federal rule governing “mortgage assistance relief providers.” *See* 12 C.F.R. pt. 1015. The FTC first promulgated the rule in 2010. *See* Mortgage Assistance Relief Services, 75 Fed. Reg. 75092 (Dec. 1, 2010). The rule prohibits providers from misrepresenting material aspects of their services and from collecting upfront fees before they have secured consumers relief on their mortgages.

12 C.F.R. §§ 1015.3, .5. In adopting the rule, the FTC found that many attorneys had engaged in the harmful practices that the rule addresses—and it accordingly declined to exempt attorneys altogether, as that “would open a large loophole.” 75 Fed. Reg. at 75128-30. Instead, the FTC exempted attorneys from the rule only if they meet certain conditions, such as being licensed to practice law in the consumer’s state and complying with relevant state laws and regulations. *Id.* at 75143; 12 C.F.R. § 1015.7 (reproduced in the attached Appendix). A provider-attorney who does not meet these conditions is subject to Regulation O, just like any other provider of mortgage-relief services.

Congress granted the FTC authority to issue the rule in Section 626 of the Omnibus Appropriations Act of 2009, Pub. L. 111-8, 123 Stat. 524. Nothing in that Act (or in the FTC’s organic statute) limited the FTC’s ability to apply the rule to attorneys. When Congress created the Bureau, it transferred authority over the rule to the Bureau in subtitle H of the CFPA. *See* Pub. L. 111-203, Title X, subtitle H, § 1097, 124 Stat. 2102-03. Congress also designated Section 626 of the Omnibus Appropriations Act of 2009 as an “enumerated consumer law.” *See* 12 U.S.C. § 5481(12)(Q). Thus, Regulation O is an “authority transferred under subtitle[] ... H,” and the statute under which it was promulgated is an enumerated consumer law.

The Bureau later re-issued the FTC’s rule, including the conditional exemption for attorneys, without material change. *See* Mortgage Acts and Practices, 76 Fed. Reg. 78130 (Dec. 16, 2011).

3. **This appeal** arises from a civil enforcement action the Bureau brought under Regulation O against four attorneys and their two mortgage-modification

businesses. Defendants targeted homeowners who were struggling in the wake of the 2008 financial crisis, offering to help them modify the terms of their mortgage loans. Defendants misled these homeowners into paying thousands of dollars for basic document-preparation services the homeowners could have received for free, or in many cases done themselves. Among other misrepresentations, Defendants promised consumers they would receive legal representation by an attorney. In fact, attorneys did little if any work for consumers. When they did, it was almost always limited to certain cursory tasks that did not involve the practice of law. For Defendants, the real purpose of these attorneys was to evade Regulation O by creating the appearance that Defendants' operation was exempt. It was not. As the district court found after trial, Defendants were subject to Regulation O, and their misrepresentations and collection of prohibited upfront fees violated that law.

This Court affirmed on liability. In doing so, it held that Defendants were not engaged in the practice of law. *See CFLG*, 6 F.4th at 706-08. For this reason alone, the CFPA's practice-of-law provision in Section 5517(e) did not bar the Bureau from bringing suit, *see* 12 U.S.C. § 5517(e)(1) (limitation applies only to conduct "engaged in ... as part of the practice of law"), and Defendants did not qualify for the Regulation O exemption, *see* 12 C.F.R. § 1015.7(a)(1) (exemption applies only to attorneys providing mortgage-relief services "as part of the practice of law").

Although the panel concluded that Defendants were not practicing law, it also discussed at length the Bureau's authority over attorneys who *are* practicing law. The panel read Section 5517(e) to strip the Bureau of any authority over such attorneys

(subject only to the clarification in Paragraph 2 of that section). *CFLG*, 6 F.4th at 704-06.

The panel acknowledged the language in Paragraph 3—which states that Paragraph 1 “shall not be construed” to limit the Bureau’s authority over attorneys subject to transferred authorities such as Regulation O—but held that Paragraph 3 merely “clarif[ied]” that attorneys can be held liable for violating such laws “in [their] personal capacit[ies].” *Id.* at 705. It did not address the Ninth Circuit’s contrary analysis in *CFPB v. Seila Law LLC*, 923 F.3d 680, 684-85 (9th Cir. 2019).¹

The panel saw an irreconcilable conflict between Section 5517(e) and the conditions for exemption in Regulation O, 12 C.F.R. § 1015.7. It decided that all of the regulatory conditions were invalid save the requirement that, to be exempt, an attorney must offer mortgage-relief services “as part of the practice of law.” *CFLG*, 6 F.4th at 704-06 (concluding that 12 C.F.R. § 1015.7(a)(1) is valid but that 12 C.F.R. § 1015.7(a)(2)-(b) is invalid). The effect would be to dramatically broaden the exemption to carve out any practicing attorney from the consumer-protection rules in Regulation O.

Argument

Rehearing Is Needed to Ensure That the Bureau Can Address Violations of the Federal Consumer Laws by Attorneys Subject to Those Laws

The panel’s ruling limiting the Bureau’s authority with respect to violations of law committed by practicing attorneys should be reexamined. The panel’s conclusion breaks with the only other court of appeals to have considered the issue. It contradicts the plain

¹ The Ninth Circuit’s decision was vacated on other grounds and remanded, 140 S. Ct. 2183 (2020), after which the court reinstated its holding on Section 5517(e), 984 F.3d 715, 720 (9th Cir. 2020), *rehearing en banc denied as amended*, 997 F.3d 837 (2021).

text of the statute. It implausibly reads that statute—which Congress passed to expand protections for consumers in the wake of a catastrophic collapse of the mortgage market—as having *rolled back* existing protections for distressed mortgage borrowers. It threatens to disrupt the existing federal regulatory scheme for multiple consumer laws and expose ordinary people across the country to an increased risk of harm from illegal practices. Nor was the panel’s ruling necessary to the outcome, since the panel correctly concluded that Defendants were not engaged in the practice of law. For this reason, the Court could simply withdraw its analysis regarding the Bureau’s authority over attorneys who *are* practicing law.

A. The panel’s reasoning would erroneously strip the Bureau of authority granted it by Congress to enforce preexisting federal consumer laws.

The panel adopted a mistaken reading of Section 5517(e) and, based on that reading, would gut the carefully crafted exemption in Regulation O.

1. Section 5517(e) does not limit the Bureau’s ability to pursue a civil enforcement action against an attorney to the extent the attorney is subject to certain (not all) federal consumer financial laws, including Regulation O. Paragraph 3 of Section 5517(e) states that the general limitation on the Bureau’s supervisory or enforcement authority in Paragraph 1 “shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or [transferred authorities].” *See* 12 U.S.C. § 5517(e)(3). Regulation O is a transferred authority, and the statute under which it was issued is an enumerated consumer law. Thus, by its express terms, Section 5517(e) does not restrict

the Bureau's ability to address violations of Regulation O by practicing attorneys who are subject to that rule.

Were it necessary to consider, the legislative history is equally clear. The main Senate report accompanying the CFPA, for example, explained that Section 5517(e)'s limitation "does not extend to an attorney who is ... subject to an enumerated consumer law or transferred authority." S. Rep. No. 111-176, at 170 (2010). Section 5517(e) thus does "not diminish[]" the "existing regulatory authority over activities of attorneys, either under enumerated consumers laws as defined in the bill," or under laws "transferred to the new Bureau from existing agencies." 156 Cong. Rec. 12,460 (June 30, 2010) (statement by House Conferee Rep. Conyers). Congress well understood and intended that Paragraph 3 would operate according to its plain language to ensure that the general limit in Paragraph 1 would not grant attorneys new immunity from laws to which they were previously subject.

Relying on the statute's express language, the only other appellate court to interpret Section 5517(e) held that it does not restrict the Bureau's ability to enforce transferred authorities (there, the Telemarketing Sales Rule). *See Seila Law*, 923 F.3d at 684-85 (citing 12 U.S.C. § 5517(e)(3)).

Splitting with the Ninth Circuit, the panel in this case concluded that Section 5517(e) *does* limit the Bureau's ability to enforce the preexisting enumerated consumer laws and transferred authorities. It gave three reasons.

First, the panel said that to apply Paragraph 3 by its terms "would effectively render [Paragraph 1] a nullity." *CFLG*, 6 F.4th at 705. But in fact, Paragraph 1 continues

to have force under the Bureau and the Ninth Circuit's reading by restricting the Bureau's ability to file suit against practicing attorneys for violations of the CFPA itself—including the CFPA's central prohibitions on engaging in or substantially assisting unfair, deceptive, or abusive practices. *See* 12 U.S.C. §§ 5531, 5536(a)(1), (3). This is so because the CFPA is not an enumerated consumer law or transferred authority and thus not covered by Paragraph 3.

It is the panel's reading that would fail to give effect to all parts of Section 5517(e). On its view, Paragraph 3 does nothing more than “confirm[] that an attorney who otherwise is subject to liability for violating consumer laws in his personal capacity—that is, outside the context of an attorney-client relationship—cannot escape liability simply by virtue of being an attorney.” *CFLG*, 6 F.4th at 705. But that is already the case under Paragraph 1 (which limits the Bureau's authority only with respect to conduct attorneys engage in “as part of the practice of law”) and Paragraph 2 (which makes clear that the Bureau's authority is not limited when attorneys are not acting “exclusively within the scope of the attorney-client relationship”). The panel's interpretation would render Paragraph 3 a nullity.

Second, the panel noted that Paragraph 3 is couched in terms of how Paragraph 1 “shall ... be construed,” which the panel took to mean that Paragraph 3 clarifies but does not alter Paragraph 1. *Id.* This point, however, provides no grounds for distinguishing Paragraph 2, which uses identical language and which the panel appeared to agree “limit[s]” the scope of the general rule in Paragraph 1. *Id.* Moreover, interpreting Paragraph 1 so as to limit the Bureau's authority to enforce a transferred authority such as

Regulation O would necessarily require “constru[ing]” Paragraph 1 in exactly the way that Paragraph 3 prohibits: as “limit[ing] the authority of the Bureau with respect to an[] attorney ... subject to” a transferred authority.

Third, the panel observed that Paragraph 1 begins, “Except as provided under paragraph (2)...” but does not similarly refer to Paragraph 3. *Id.* This is no reason to overlook the unambiguous language in Paragraph 3. The introductory proviso in Paragraph 1 merely reflects the fact that, during the legislative process, the provisions in what became Paragraphs 2 and 3 were originally combined into a single “paragraph (2).” *See* H.R. 4173, 111th Cong. § 4205(n)(2) (as passed by House, Dec. 11, 2009). The congressional drafters later split those provisions into separate paragraphs but left the proviso in Paragraph 1 unaltered. This drafting history in no way repeals or negates the express statutory command in Paragraph 3, as enacted.

The Bureau’s plain-language interpretation also poses no conflict with “the traditional role that states play in regulating attorney conduct.” *See CFLG*, 6 F.4th at 700. Instead, it serves to maintain existing federal authority to enforce certain consumer protection laws against practicing attorneys who are already subject to those laws—for example, debt-collection attorneys covered under the FDCPA or real-estate attorneys subject to the Real Estate Settlement Practices Act (“RESPA”). *See generally Heintz v. Jenkins*, 514 U.S. 291, 299 (1995) (FDCPA applies to debt-collection attorneys engaged in litigation); *Wesolowski v. Title Source, Inc.*, 608 F. App’x 724, 726 (11th Cir. 2015) (allowing RESPA claim against attorney to proceed). Nor, of course, are attorneys generally exempted from the requirements of federal law simply because they are

practicing law. *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 235-39 (2010) (Bankruptcy Code’s definition of “debt relief agency” includes attorneys; rejecting argument that such reading “impermissibly trenches on an area of traditional state regulation”).

2. Because Section 5517(e) does not limit the Bureau’s ability to issue or enforce Regulation O, the panel erred in concluding that the rule’s conditions for attorney exemption exceeded statutory bounds and were invalid. There is no conflict between Section 5517(e) and the Regulation O exemption. Section 5517(e), again, limits the Bureau’s supervisory or enforcement authority over practicing attorneys; but Paragraph 3 provides that this limitation does not restrict the Bureau’s authority under Regulation O. The Bureau therefore in no way transgressed Section 5517(e)’s limits when it re-issued Regulation O, including the rule’s provision setting out the conditions that provider-attorneys must meet to be exempt.² The panel should have concluded that the regulatory exemption was valid in full, if it chose to address the issue at all.

B. It is important that the Court reconsider its rulings on this issue or, in the alternative, withdraw them as unnecessary to the outcome here.

The consequences of the panel’s reasoning may be far-reaching and, for ordinary people like the homeowners who were harmed in this case, severe. The panel’s reading of

² In addition, Section 5517(e) is a restriction only on the Bureau’s “supervisory or enforcement authority”—not its authority to issue regulations. 12 U.S.C. § 5517(e)(1). In contrast, numerous other provisions in Section 5517 specifically constrain the Bureau’s “*rulemaking, supervisory, enforcement or other authority*” with respect to other categories of persons. *Id.* § 5517(a), (b), (c), (d) (emphasis added). For this reason as well, the Bureau did not run afoul of Section 5517(e) when it re-issued the same Regulation O exemption that the FTC had originally promulgated.

Section 5517(e) would constrain or, at minimum, complicate the Bureau’s ability, given it by Congress, to enforce not just Regulation O but also other enumerated consumer laws and transferred authorities. Likewise, the panel’s view that nearly all the conditions on Regulation O’s exemption are invalid would categorically exempt practicing attorneys who provide mortgage-relief services from the same rules that apply to any other provider of such services, to the detriment of consumers. For all that, the panel’s rulings on the Bureau’s authority over practicing attorneys were unnecessary to the result in this case because the panel correctly found that Defendants were not practicing law.

1. By reading Paragraph 3 out of Section 5517(e), the panel’s interpretation would make it more difficult and in some cases impossible for the Bureau—“the federal government’s primary consumer protection agency when it comes to financial matters,” *CFLG*, 6 F.4th at 700—to adequately enforce not just Regulation O but also numerous *other* enumerated consumer laws and transferred authorities.³ For instance, the panel’s reasoning would seem to bar the Bureau from bringing suit to enforce the important protections in the Telemarketing Sales Rule, 16 C.F.R. pt. 310, (a transferred authority) against debt-relief attorneys subject to that rule. *But see Seila Law*, 923 F.3d at 684-85 (Bureau can enforce TSR against attorneys). It might also cast doubt on the Bureau’s ability to enforce the FDCPA (an enumerated consumer law) with respect to debt-

³ This result may be especially consequential given recent developments limiting the capacity of other plaintiffs to enforce the consumer laws. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (emphasizing strict requirements for private-plaintiff standing); *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (holding that FTC cannot secure monetary relief for consumers under Section 13 of FTC Act).

collection attorneys covered by that law (though debt-collection attorneys are also subject to Bureau enforcement actions under Paragraph 2). *See Heintz*, 514 U.S. at 299. It could preclude the Bureau from addressing violations of RESPA (another enumerated consumer law) by attorneys subject to that law by virtue of their role in real-estate closings. In short, the panel's ruling would alter the enforcement scheme that Congress put in place for a wide range of consumer laws.

Even in cases where the Bureau might otherwise show that Section 5517(e) does not bar an enforcement action—*e.g.*, because the attorney was not actually engaged in practicing law—doing so will often be extremely fact-intensive, requiring more time to investigate, slowing the pace of enforcement, and increasing the burden on courts and the parties. This case provides an example: After the district court erroneously held invalid part of the Regulation O exemption, thus making central the question whether Defendants were engaged in the practice of law, this litigation extended for years of additional proceedings in which the parties disputed that fact-bound issue—an issue that ultimately required a week-long trial to resolve. Paragraph 3 provides that such an undertaking is not required anytime the Bureau seeks to address violations of an enumerated consumer law or transferred authority by attorneys subject to those laws.

2. The interpretation adopted here would also expose homeowners nationwide to an increased risk of injury by categorically exempting practicing attorneys from Regulation O. When it issued the rule, the FTC found that attorneys were highly active in the market for mortgage-relief services and that a significant number were engaging in unfair and deceptive conduct. 75 Fed. Reg. at 75098, 75125-26. In creating Regulation

O's conditional exemption, the FTC carefully considered the balance it was striking between concerns about attorneys' participation in mortgage-relief scams and the legitimate help that attorneys can provide consumers. *See id.* at 75125-33. The panel's interpretation would upend that balance and exempt any practicing attorney who offers mortgage-relief services—including those willing to engage in harmful and deceptive conduct like that in this case—from the federal rules that apply to other providers.

That result is of particular concern because the Bureau expects that the demand for mortgage-relief services will continue to increase as a result of the COVID-19 pandemic and the phasing out of pandemic-related protections for homeowners. Due to the pandemic, millions of homeowners have experienced difficulty remaining current on their mortgage payments; as of July 2021, more than 1.8 million borrowers were enrolled in forbearance plans. *See* CFPB, MORTGAGE SERVICING COVID-19 PANDEMIC RESPONSE METRICS 3 (August 2021), *available at* <https://go.usa.gov/xMDfM>. At the same time, increasing numbers of borrowers are exiting forbearance while delinquent. *See* Protections for Borrowers Affected by the COVID-19 Emergency Under RESPA, 86 Fed. Reg. 34848, 34850-53 (June 30, 2021). If the last financial crisis is any guide, the current wave of distressed borrowers will be accompanied by a corresponding increase in those holding out the promise of help—including those who would take advantage of borrowers' desperation through illegal means.

Notably, the panel's view of Regulation O would affect not just the Bureau but also those other agencies that Congress empowered to enforce the rule: the FTC and state attorneys general. *See* 12 U.S.C. § 5538(a)(3), (b). These other regulators can and do

pursue violations of Regulation O by attorneys. *See, e.g., FTC v. Marshall*, 781 F. App'x 599 (9th Cir. 2019); *FTC v. Lanier Law, LLC*, 194 F. Supp. 3d 1238 (M.D. Fla. 2016), *aff'd*, 715 F. App'x 970 (11th Cir. 2017); *New Mexico v. Real Est. Law Ctr., P.C.*, 430 F. Supp. 3d 761 (D.N.M. 2019). The panel's reasoning, however, would foreclose all or most such actions—and on the basis of a limitation on the Bureau's enforcement authority, Section 5517(e), that does not even purport to apply to the FTC or the states.

3. At the same time that the panel's ruling could have such disruptive effects, it was unnecessary to the result in this case. The panel correctly affirmed the district court's factual finding, after a bench trial, that Defendants were not engaged in the practice of law. That fact was itself enough to establish that Section 5517(e) did not bar the Bureau from bringing this action and that Defendants did not qualify for the Regulation O exemption. *See CFLG*, 6 F.4th at 706-08. There was thus no need to address the question of how Section 5517(e) or Regulation O might apply in a different case involving attorneys who *were* practicing law. For this reason, the panel (or en banc Court) could choose to resolve this petition by simply withdrawing that portion of the panel's analysis as unnecessary to deciding this case.

Conclusion

The Court should reconsider, or withdraw, its ruling with respect to the Bureau's authority over practicing attorneys.

Dated: October 7, 2021

Respectfully submitted,

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Certificate of Compliance

This petition complies with the type-volume limitation in Federal Rule of Appellate Procedure 35(b)(2)(A). It contains 3,900 words, excluding the portions exempted by Rule 32(f).

/s/ Kevin E. Friedl

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Appendix

12 U.S.C. § 5517(e)

(1) IN GENERAL

Except as provided under paragraph (2), the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.

(2) RULE OF CONSTRUCTION

Paragraph (1) shall not be construed so as to limit the exercise by the Bureau of any supervisory, enforcement, or other authority regarding the offering or provision of a consumer financial product or service described in any subparagraph of [12 U.S.C. § 5481(5)]—

- (A)** that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the scope of the attorney-client relationship; or
- (B)** that is otherwise offered or provided by the attorney in question with respect to any consumer who is not receiving legal advice or services from the attorney in connection with such financial product or service.

(3) EXISTING AUTHORITY

Paragraph (1) shall not be construed so as to limit the authority of the Bureau with respect to any attorney, to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or the authorities transferred under subtitle F or H [of the CFPA].

12 C.F.R. § 1015.7

- (a) An attorney is exempt from this part [*i.e.*, Regulation O], with the exception of § 1015.5, if the attorney:
- (1) Provides mortgage assistance relief services as part of the practice of law;
 - (2) Is licensed to practice law in the state in which the consumer for whom the attorney is providing mortgage assistance relief services resides or in which the consumer's dwelling is located; and
 - (3) Complies with state laws and regulations that cover the same type of conduct the rule requires.
- (b) An attorney who is exempt pursuant to paragraph (a) of this section is also exempt from § 1015.5 if the attorney:
- (1) Deposits any funds received from the consumer prior to performing legal services in a client trust account; and
 - (2) Complies with all state laws and regulations, including licensing regulations, applicable to client trust accounts.