WSBA

TRUST ACCOUNT RESPONSIBILITIES AND RETAINERS TASK FORCE

Meeting Minutes
April 28, 2007

Task Force Chair Mark Johnson called the meeting to order at 9.10 a.m.

Members presented included Randy Beitel, David Boerner Alison Holcomb, Marijean Moschetto, Art Lachman, Nancy Pacharzina, and Ann Guinn. Members not present included: Liza Burke, Marc Christianson, David Heller, and James Dixon. Also attending the meeting were: Doug Ende (WSBA staff liaison), Jason Holman (law student intern), Pete Roberts (WSBA LoMAP), and Anna Schmidt (WSBA paralegal).

Approval of Minutes: The minutes of the April 18, 2007 meeting were approved as submitted by consensus.

Preliminary Matters: The Chair showed the Task Force's most current draft rule to WSBA President Ellen C. Dial. He explained to her that ODC and WACDL will be submitting alternative drafts to the BOG. Ms. Dial understood the difficulty in drafting a rule that will be accepted by both ODC and by Bar Members. She asked that the draft rule be submitted as soon as possible, along with a detailed presentation to the BOG, with plenty of time for circulation. President Dial appreciates the Task Force's efforts and understands that the Puget Sound Business Journal (see p. 1 of the April 28 meeting materials) misconstrued the Chair's words in their April article.

Discussion & Drafting: The Task Force decided to go over each subpart of the proposed rule.

Subpart #1

Task Force members discussed whether the introductory sentence should be changed to "collection" or "receipt" of a fee instead of payment, as this rule would only regulate lawyers (not clients) and such language would be consistent with other parts of the rule. The phrase "in advance of services" or "in advance of performance of services" were also suggested in order to clarify that the fee was for a future performance. Mr. Ende worried that the language might be too narrow as this rule is to govern the entire series of this species of fee arrangement. Discussion turned to the ABA model rule language, which Ms. Pacharzina pointed out had been rejected at the last meeting because the language was considered too broad and inflammatory. Mr. Ende, Mr. Lachman, and Mr. Beitel all opined that the rule should really be in 1.15, and that putting it in 1.5

changes the focus of that rule. Mr. Beitel pointed out that there should at least be a cross reference to rule 1.15 so that the rules don't contradict each other.

Ms. Moschetto motioned to change the introductory phrase to the following: "A fee agreed to, charged, or collected in advance of services to be performed shall be subject to the following rules…" and then write the two specific exceptions. The motion was seconded and discussion ensued regarding the motion. Mr. Ende pointed out that he would vote against the motion because the phrase should be "agreed to, charged, and collected…" Ms. Moschetto amended her motion. The Chair pointed out that this was simply an introductory sentence and probably shouldn't be substantive. He opined that the suggested changes were making it substantive. Mr. Beitel moved to table Ms. Moschetto's motion. Mr. Beitel's motion was seconded and agreed to by consensus. Ms. Pacharzina motioned that the first paragraph contain two sentences: The lawyer can accept advance fees and those advance fees will go into trust." The motion was not seconded. Ms. Holcomb motioned that the introduction sentence be stricken and replaced with "A fee received in advance of performance of services shall be handled in compliance with 1.15A, subject to the following exceptions:…" The motion was seconded and discussion ensued. The Chair and Mr. Ende proposed amending the phrase to include language from the ABA's Model Rule 1.15(c), which Ms. Holcomb agreed to do. The motion passed with 5 members for and 3 opposed. Ms. Moschetto withdrew her earlier motion. Mr. Lachman motioned to amend the language in the first phrase to "Fees and expenses paid in advance…" The motion was seconded. Mr. Beitel suggested striking the term "client" in front of "trust account." Mr. Lachman accepted the suggestion and added it to his motion.

Ms. Pacharzina felt there is a lack of clarity in the phrase. Discussion ensued about whether 1.5(f) would be in conflict with 1.15A(c)(3). Mr. Lachman made additional suggestions to add the model language to the 1.15A and cross reference it to 1.5. The Chair asked Mr. Lachman to write out his suggestion: "Except as provided in Rule 1.5(f), and subject to the requirements of paragraph (h) of this Rule, a lawyer shall deposit into a 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." The motion passed by consensus.

<u>Subpart #2</u>

Note that subparagraph 2 in the previous draft becomes subparagraph 1. Mr. Ende pointed out that 1.15A uses the phrase "paid in advance" while Ms. Holcomb's phrase is "received in advance." Ms. Holcomb agreed that it would be better to use the phrase "paid in advance." Ms. Pacharzina suggested the following phrase: "Fees for performance of a service…"

Discussion ensued as to whether the word "general" should precede availability and whether the phrase "unrelated to specific legal services" is necessary in 1.5(f)(1). Mr. Ende felt the phrase is ambiguous. Discussion ensued over the definition of "availability retainer." Ms. Holcomb understood that a retainer is always the lawyer's property and felt

it should be clear that a retainer is not a fee. Ms. Moschetto like Ms. Pacharzina's phrase because she felt it was more positive. Mr. Beitel suggested giving lawyers the option to leave retainer funds in trust by rewriting the phrase: "…need not be held in trust." Mr. Boerner worried about lawyers getting into trouble if they chose to keep proportionally earned money in their trust accounts. Mr. Beitel didn't think this would occur if no benchmarks for payments existed. The members agreed that a lawyer may accept an availability retainer that is not in writing, however the funds would all need to go into the trust account.

Ms. Holcomb motioned to redraft 1.5(f)(1) to the following: "A lawyer may charge a client an availability retainer if agreed to in advance in a writing signed by the client. An availability retainer is a fee that a client pays to a lawyer in addition to and apart from any other compensation for legal services performed, to be available to the client during a specified period or on a specified matter. An availability retainer becomes the lawyer's property on receipt and must not be placed in the lawyer's trust account." The motion was seconded. Suggestions were made to remove "availability" and to change "must" to "shall." Mr. Beitel suggested changing "must not be placed in…" to "need not be placed in…" Ms. Holcomb agreed to all the suggested changes. Mr. Beitel pointed out that removing "availability" may allow lawyers to think they can call any ordinary advance fee a "retainer" and put it directly into the operating account.

Doug re-organized Alison's motion to clarify it: "A lawyer may charge a retainer which is a fee that a client pays to a lawyer, in addition to and apart from any compensation for legal services performed, to be available to the client during a specified time or on a specified matter. A retainer must be agreed to in writing, signed by the client. Unless otherwise agreed, a retainer becomes the lawyer's property on receipt and shall not be placed in the lawyer's trust account." Alison agreed to replace her earlier motion with Doug's reworked version. The motion was seconded and Ms. Moschetto made a friendly amendment to change the clause to: "…that a client pays to the lawyer to be available to the client during a specified time or on a specified matter." The motion passed by unanimous agreement.

Subpart #3

Mr. Lachman requested that the term "specifically described" be replaced with "specified." Doug suggested changing "in part or in whole" to "in whole or in part." Ms. Holcomb suggested using the term "flat" instead of "fixed" as it's a more common term. Ms. Holcomb motioned to make all of the above changes. The motion was seconded and passed unanimously.

Mr. Boerner felt that the term "easily" in the phrase "in a manner that can easily be understood by the client" in 1.5(f)(2)(a) creates too high of a standard for lawyers to meet. However, the term "easily" comes from the court rule on informed consent. Discussion turned to 1.5(f)(2)(a)(iii) and whether the phrase "…a refund of a portion of a flat fee…" would be too strong a phrase since a client may not be entitled to a refund. Mr. Boerner motioned to replace the prong with: "…the client may be entitled to a

refund of a portion of the flat fee if the agreed upon legal services have not been completed." Mr. Ende suggested the phrase speak in terms of the lawyer's obligations versus the client's entitlement. Mr. Boerner's motion was seconded and passed unanimously. Mr. Lachman moved that the word "deemed" be removed and replaced with "is." Mr. Beitel explained that the term "is" connotes something innate and unsusceptible to the fact that this is a process. The motion to change "deems" to "is" passed by a vote of 5 to 3. Ms. Holcomb moved for 1.5(f)(2)(a) to be: "If agreed to in advance in a writing signed by a client, a flat fee is the lawyer's property on receipt. The written agreement shall in a manner that can easily be understood by the client, disclose the following: (i) the fee is the lawyer's property immediately on receipt and will not be placed in a trust account…" This passed by a unanimous vote.

<u>The "Safe Harbor" Disclosure</u>

Ms. Pacharzina motioned to accept the following change in the sample disclosure in 1.5(f)(2)(a): "Upon [Lawyer/Law Firm's] receipt of the all or a portion of the flat fee, the funds are the property of the [Lawyer/Law Firm] and will not be placed in a trust account. The fact that you have paid your fee in advance does not affect your right to terminate the client-lawyer relationship. In the event our relationship is terminated before the agreed upon legal services have been completed, you may or may not have a right to a refund of a portion of the fee." The motion was seconded and passed unanimously.

Ms. Pacharzina further suggested converting the three subparts in 1.5(f)(2)(a) to five subparts: "(i) the scope of the services to be provided; (ii) the entire amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed." The motion was seconded and discussion ensued as to how this rule might affect a non-English speaking client in an unbundled fee situation. The members were unanimous in suggesting that such a disclosure would need to be translated for the client. The motion passed unanimously. Mr. Boerner moved to add language to 1.5(g) banning the use of certain terms: "A lawyer shall not characterize any fee either orally or in writing as non-refundable or "earned upon receipt." The motion was seconded and passed unanimously.

<u>Subpart #4</u>

Ms. Holcomb questioned why 1.5(f)(3) is limited to flat fees and proposed it be broadened to include availability retainers. Ms. Pacharzina suggested the following: "In the event of a fee dispute regarding a fee described in paragraph (f)(1) or (2), the lawyer shall immediately refund to the client that portion of the fee, if any, the lawyer reasonably believes is unearned." Discussion ensued as to whether the provision about the unearned fee amount going back to the client is necessary as it is undisputed that an unearned fee will go back to the client (and contained in 1.16D). Ms. Pacharzina pointed out that

1.16D is when the lawyer is terminated while the lawyer may not necessarily have been terminated in this rule. The Task Force discussed whether the term "reasonably" should remain in the provisions and whether the provision is even necessary. The Chair explained that, while drafting the rule, the drafters substituted the phrase "the amount that the lawyer-client agree is in dispute" with the reasonableness standard. The motion was voted on and passed 5 to 3.

Dispute Resolution Provisions

The members discussed the differences when a dispute arises between an attorney putting a retainer into his trust account versus one putting the money in an operating account. Task Force members pondered whether it was really necessary to add a dispute resolution mechanism. Mr. Beitel explained that under 1.15A(g), you are only required to give notice prior to removing the funds from the trust account. Ms. Moschetto questioned how to adjudicate the reasonableness of the amount in dispute. The members agreed that Alternate Dispute Mechanism C is the least contentious, but that it also gives the client the least protection. Mr. Beitel also pointed out that this mechanism does address the issue of when a lawyer has disappeared. Ms. Moschetto suggested imposing a time limit (for example, thirty days) where the lawyer "shall" suggest a dispute resolution. Mr. Ende suggested offering a listing of different options.

The Chair decided that the Task Force will meet one more time to re-consider the provision pertaining to the Dispute Resolution Mechanism.

The meeting was adjourned at 3:55 p.m.