



# WSBA

## TRUST ACCOUNT RESPONSIBILITIES AND RETAINERS TASK FORCE

### Meeting Minutes June 15, 2007

Task Force Chair Mark Johnson called the meeting to order at 11:00 a.m. The meeting was held via telephone conference.

**Members present** (all appeared by phone): Randy Beitel, David Boerner, Liza Burke, Marc Christianson, Ann Guinn, David Heller, Art Lachman, Jody McCormick. **Members not present:** Alison Holcomb and Marijean Moschetto. **Also attending:** Doug Ende (WSBA staff counsel).

WACDL Response to June 4 Draft: The Chair noted for the record that Ms. Holcomb had distributed an e-mail to the Task Force indicating that the WACDL Board of Governors voted unanimously to authorize the president of WACDL to submit to the WSBA Board of Governors a letter supporting the Task Force Draft of Rule 1.5(f) and Rule 1.15A as approved at the June 4 Task Force Meeting, as well as the substance of comments as set forth in that draft. However, WACDL expressed a concern regarding the second sentence of paragraph (f)(3), to wit, that the Task Force had changed the originally-proposed phrase “the amount that a reasonably prudent lawyer would believe to be reasonably in dispute” to “the amount that the lawyer reasonably believes to be in dispute.” WACDL noted that “the amount that the lawyer reasonably believes to be in dispute” will always have to be the amount the client says is in dispute, regardless of the reasonableness of the client’s demand, because a lawyer’s reasonable belief would have to be that all fees are in dispute if the client claims that is the case. WACDL has asked that the Task Force restore the original proposed language in order to clarify that the determination of what is in dispute is subject to an objective standard, i.e., that the lawyer be reasonably prudent in determining an appropriate amount. After discussion, a motion to substitute “the amount that a reasonably prudent lawyer would believe to be reasonably in dispute” passed by a vote of seven in favor and one opposed. Mr. Beitel moved to amend the language to substitute “the amount that is reasonably in dispute” instead. The motion failed for lack of a second.

Discussion & Drafting of Comments: On behalf of the Ad Hoc Comment Drafting Subcommittee, Mr. Lachman and Mr. Ende directed the Task Force’s attention to a number of revisions to the comments:

- Comment [12] – At Mr. Beitel’s suggestion, language was added to emphasize the importance of using written fee agreements when a lawyer and client agree to a system of withdrawing fees from the trust account on a basis other than billing for actual hours worked. The following language was adopted by consensus: “For example, when an advance fee deposit is placed in trust, a lawyer may withdraw amounts based on the actual hours worked. In the case of a flat fee that constitutes an advance fee deposit

because it does not meet the requirements of paragraph (f)(2), the lawyer and client may mutually agree, preferably in writing, on a reasonable basis for determining when portions of the fee have been earned, such as specific ‘milestones’ reached during the representation or specified time intervals that reasonably reflect the actual performance of the legal services.” Ms. Holcomb, in her e-mail, had recommended changing “retainers and flat fees” to “retainers or flat fees.” This change was approved by consensus.

- Comment [14] – At the suggestion of Pete Roberts, the word “specified” was inserted before the final word “services” in the last sentence. This change was approved by consensus. There was some discussion of the final sentence of the Comment, drafted by Mr. Lachman, regarding “minimum fees,” but no decision was reached.
- Comment [16] – At Ms. Guinn’s suggestion, language was added to address situations involving hybrid fees where part of the fee is required to be placed in the trust account and the remainder (a flat fee or a retainer) may not be. The split deposit prohibition of RPC 1.15A(h)(1)(ii) would require that a check inclusive of both amounts be deposited intact into the trust account, with the lawyer’s portion promptly withdrawn. To address this situation, the following language (with a few other minor alterations elsewhere in the comment) was approved by consensus: “If the payment is in one check or negotiable instrument, it must be deposited intact in the trust account, and the flat fee portion belonging to the lawyer must be withdrawn at the earliest reasonable time. See Rule 1.15A(h)(1)(ii) & (h)(4). See also Comment [10] to Rule 1.15A (explaining prohibition on split deposits).”
- Comment [17] – Ms. McCormick suggested removal of the reference to Informal Opinion No. 2034, which is not entirely relevant and could be misleading. The Task Force agreed by consensus to delete the reference and to otherwise conform the comment to the revision to paragraph (f)(3) of Rule 1.5 agreed upon earlier in the meeting.

The Chair informed the Committee that another meeting would be scheduled to resolve the question of whether and how the draft rule should address “minimum fees.”

The meeting was adjourned at noon.

[A copy of the June 15, 2007 Task Force Draft is appended below.]

Minutes prepared by:

Douglas Ende, WSBA Staff Counsel

**RULE 1.5 FEES**

*[Unfinished Task Force Draft with Revised Comments – June 15, 2007]*

(a)-(e) [Unchanged.]

(f) Fees and expenses paid in advance of performance of services shall comply with Rule 1.15A, subject to the following exceptions:

(1) A lawyer may charge a retainer, which is a fee that a client pays to a lawyer to be available to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a retainer is the lawyer's property on receipt and shall not be placed in the lawyer's trust account.

(2) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total 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. A statement in substantially the following form satisfies this requirement:

[Lawyer/law firm] agrees to provide, for a flat fee of \$ \_\_\_\_\_, the following services: \_\_\_\_\_ . The flat fee shall be paid as follows: \_\_\_\_\_ . Upon [lawyer's/law firm's] receipt of all or any portion of the flat fee, the funds are the property of [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.

(3) In the event of a dispute relating to a fee under paragraph (f)(1) or (f)(2) of this Rule, the lawyer shall immediately refund to the client that portion of the fee, if any, that the lawyer reasonably believes is unearned. If the lawyer and the client disagree about the client's entitlement to a refund or the amount of a refund, the lawyer shall, within 30 days of the accrual of the dispute, deposit into a trust account governed by RPC 1.15A the amount **that a reasonably prudent lawyer would believe to be reasonably in dispute**. The lawyer shall maintain the funds in trust until the dispute is resolved. The lawyer shall take reasonable and prompt action to resolve the dispute in compliance with Rule 1.15A(g).

(g) A lawyer shall not characterize any fee as “nonrefundable” or “earned upon receipt.”

### Comment

[1] – [9] [Unchanged.]

### Additional Washington Comments (10-117)

#### *Reasonableness of Fee and Expenses*

[10] Every fee agreed to, charged, or collected, including a fee ~~denominated as “nonrefundable” or “earned upon receipt”~~that is a lawyer’s property on receipt under paragraph (f)(1) or (f)(2), is subject to Rule 1.5(a) and may not be unreasonable.

[11] Under paragraph (a)(9), one factor in determining whether a fee is reasonable is whether the fee agreement or confirming writing demonstrates that the client received a reasonable and fair disclosure of material elements of the fee agreement. Lawyers are encouraged to use written fee agreements that fully and fairly disclose all material terms in a manner easily understood by the client.

#### *Payment of Fees in Advance of Services*

[12] In the absence of a written agreement between the lawyer and the client to the contrary that complies with paragraph (f)(1) or (f)(2), all advance payments are presumed to be deposits against future services or costs and must, until the fee is earned or the cost incurred, be held in a trust account pursuant to Rule 1.15A. See Rule 1.15A(c)(2). This fee structure is known as an “advance fee deposit.” Such a fee may only be withdrawn when earned. See Rule 1.15A(h)(3). For example, when an advance fee deposit is placed in trust, a lawyer may withdraw amounts based on the actual hours worked. In the case of a flat fee that constitutes an advance fee deposit because it does not meet the requirements of paragraph (f)(2), the lawyer and client may mutually agree, preferably in writing, on a reasonable basis for determining when portions of the fee have been earned, such as specific “milestones” reached during the representation or specified time intervals that reasonably reflect the actual performance of the legal services.

[13] Paragraphs (f)(1) and (f)(2) provide exceptions to the general rule that fees received in advance must be placed in trust. Paragraph (f)(1) describes a fee structure sometimes known as an “availability retainer,” “engagement retainer,” “true retainer,” “general retainer,” or “classic retainer.” Under these rules, this arrangement is called a “retainer.” A retainer secures availability alone, i.e., it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer’s availability, but that will be applied to the client’s account as the lawyer renders services, is not a retainer under paragraph (f)(1). A written retainer agreement should clearly specify the time period or purpose of the lawyer’s availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer’s property immediately on receipt and will not deposit the fee into a trust account.

[14] Paragraph (f)(2) describes a “flat fee,” sometimes also known as a “fixed fee.” A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort expended by the lawyer to perform or complete the **specified** services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be deposited initially in the lawyer’s trust account. See Washington Comment [12]. **A fee received from a client in advance that will be applied on an hourly basis, with a minimum amount kept by the lawyer regardless of the amount of time worked, is not a flat fee under paragraph (f)(2) because it does not constitute complete payment for specified legal services.**

[15] If a lawyer and a client agree to a retainer under paragraph (f)(1) or a flat fee under paragraph (f)(2) and the lawyer complies with the applicable requirements, including obtaining agreement in a writing signed by the client, the fee is considered the lawyer’s property on receipt and must not be deposited into a trust account containing client or third-party funds. See Rule 1.15A(c) (lawyer must hold property of clients separate from lawyer’s own property). For definitions of the terms “writing” and “signed,” see Rule 1.0(n).

[16] **In fee arrangements involving more than one type of fee**, the requirements of paragraphs (f)(1) and (f)(2) apply only to the parts of the arrangement that are retainers **or** flat fees. For example, a client might agree to make an advance payment to a lawyer, a portion of which is a flat fee for specified legal services with the remainder to be applied on an hourly basis as services are rendered. The latter portion is an advance fee deposit that must be placed in trust under Rule 1.15A(c)(2). If the requirements of paragraph (f)(2) are met regarding the flat fee portion, those funds are the lawyer’s property on receipt and must not be **kept** in a trust account. **If the payment is in one check or negotiable instrument, it must be deposited intact in the trust account, and the flat fee portion belonging to the lawyer must be withdrawn at the earliest reasonable time. See Rule 1.15A(h)(1)(ii) & (h)(4). See also Comment [10] to Rule 1.15A (explaining prohibition on split deposits).** Although a signed writing is required under paragraphs (f)(1) and (f)(2) only for the retainer or flat fee portion of the fee (and only if the lawyer and client agree that the fee will be the lawyer’s property on receipt), the lawyer should consider putting the entire arrangement in writing to facilitate communication with the client and prevent future misunderstanding. See Washington Comment [11].

[17] When a lawyer-client relationship terminates, a lawyer must refund the unearned portion of a fee. See Rule 1.16(d); *In re DeRuiz*, 152 Wn.2d 558, 574-75, 99 P.3d 881 (2004); ~~WSBA Informal Ethics Opinion No. 2034~~. Under paragraph (f)(3) of the Rule, if there is a dispute over the amount of a retainer under paragraph (f)(1) or a flat fee under paragraph (f)(2), the lawyer is obligated to refund to the client that portion of the fee that the lawyer reasonably believes is unearned, even though the fee was the lawyer’s property on receipt and was not being held in a trust account. In the event of a dispute about the refund amount or the obligation to make such a refund, the lawyer is obligated to place the amount **that a reasonably prudent lawyer would believe to be reasonably in dispute** into a trust account, at which point the lawyer has an affirmative obligation to attempt to resolve the dispute in accordance with the provisions of Rule 1.15A(g). For the definitions of “reasonably” and “reasonably believes,” see Rule 1.0(h) and (i).

In determining the efforts that a lawyer should undertake to resolve a dispute under paragraph (f)(3), see Comment [9] to this Rule and Washington Comment [9] to Rule 1.15A.

**RULE 1.15A: SAFEGUARDING PROPERTY**

*[Approved Task Force Draft with Revised Comments – June 15, 2007]*

(a) – (b) [Unchanged.]

(c) A lawyer must hold property of clients and third persons separate from the lawyer's own property.

(1) A lawyer must deposit and hold in a trust account funds subject to this Rule pursuant to paragraph (h) of this Rule.

(2) 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.

(3) A lawyer must identify, label and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt and the location of safekeeping. The lawyer must preserve the records for seven years after return of the property.

(d) – (j) [Unchanged.]

**Washington Comments**

[1] [Unchanged.]

[2] Client funds include, but are not limited to, the following: legal fees and costs that have been paid in advance (other than retainers and flat fees complying with the requirements of Rule 1.5(f)), funds received on behalf of a client, funds to be paid by a client to a third party through the lawyer, other funds subject to attorney and other liens, and payments received in excess of amounts billed for fees.

[3] – [7] [Unchanged.]

[8] If a lawyer accepts payment of an advanced fee deposit by credit card, the payment must be deposited directly into the trust account. It cannot be deposited into a general account and then transferred to the trust account. Similarly, credit card payments of earned fees, retainers meeting the requirements of Rule 1.5(f)(1), and flat fees meeting the requirements of Rule 1.5(f)(2) cannot be deposited into the trust account and then transferred to another account.

[9] – [15] [Unchanged.]