



# WSBA

## TRUST ACCOUNT RESPONSIBILITIES AND RETAINERS TASK FORCE

### Meeting Minutes

June 4, 2007

Task Force Chair Mark Johnson called the meeting to order at 2:05 p.m.

**Members present:** Randy Beitel, David Boerner, Marc Christianson, Ann Guinn, David Heller (by phone), Alison Holcomb, Art Lachman, Jody McCormick, and Marijean Moschetto.

**Members not present:** Liza Burke. **Also attending:** Doug Ende (WSBA staff counsel), Jason Holman (law student intern), Pete Roberts (WSBA LOMAP), and Anna Schmidt (WSBA paralegal).

Approval of Minutes: The minutes of April 28, 2007, were approved as submitted by consensus.

Discussion & Drafting: The Chair preliminarily noted that paragraph (f)(2) of the April 28, 2007 Draft required some modification because the form disclosure statement did not conform to the enumerated disclosure requirements (i) through (v). The Task Force proceeded to discuss the issue of whether the word "flat" should precede the phrase "fee agreement," whether the word "disclose" should become "include," and whether the word "entire" should become "total," in the third sentence of paragraph (f)(2). There was no support for use of the word "flat," by consensus the Task Force changed "disclose" to "include," and, by a vote of six in favor and four opposed, the Task Force substituted the word "total" for "entire." Thus, the first clause of the third sentence was amended to read: "The written fee agreement shall, in a manner that can easily be understood by the client, include the following:..". By consensus, the Task Force then revised the last sentence preceding the form disclosure to read as follows: "A statement in substantially the following form satisfies this requirement:". The disclosure form was amended to read as follows: "[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."

The remainder of the meeting was devoted to discussion and evaluation of possible dispute resolution mechanisms, and review of Alternate Dispute Resolution Mechanisms A, B, and C in the April 28 Draft. There being no support for Mechanism A, it was suggested that Options B and C be presented to the Board of Governors as alternatives. Mr. Lachman moved to approve Option B as the sole dispute resolution mechanism to be presented to the Board. Ms. Holcomb seconded the motion. The motion carried by a vote of six in favor and four opposed. The Chair

indicated that information on the various dispute resolution mechanisms considered by the Task Force would be included in the Task Force report to the Board.

Professor Boerner moved to approve the draft rule as amended. Mr. Christianson seconded the motion. The motion carried by a vote of eight in favor and two opposed.

Because miscellaneous issues relating to the form and substance of the comments had not been resolved, the Chair requested that the Ad Hoc Comment Drafting Subcommittee prepare draft revisions to the comments and circulate the draft via e-mail to the Task Force for approval.

The Chair will prepare a written report for the Board of Governors to be presented to the Board for a first reading on July 27. A draft of the report will be circulated to Task Force.

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

[A copy of the June 4, 2007 Task Force Draft is appended below.]

Minutes prepared by:

Douglas Ende, WSBA Staff Counsel  
Anna Schmidt, WSBA Paralegal

**DRAFT AMENDMENT TO RPC 1.5**  
*[Unfinished Task Force Draft – June 4, 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 fee 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 the lawyer reasonably believes to be 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 (10-14)

#### *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. See *In re DeRuiz*, 152 Wn.2d 558, 99 P.3d 881 (2004).

[11] [Unchanged.]

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

[12] In the absence of an 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. The lawyer’s fee may only be withdrawn when earned. See Rule 1.15A(h)(3). For example, a lawyer may collect an amount based on the actual hours worked or mutually agreed-upon “milestones” reached during the representation.

[13] Paragraph (f)(1) describes a fee structure sometimes known as an “availability retainer,” “engagement retainer,” “true retainer,” “general retainer,” or “classic retainer.” Such a fee secures availability alone, i.e., it presumes that the lawyer is to be additionally compensated for any actual work performed. 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] If a lawyer and a client agree to a retainer arrangement under paragraph (f)(1) or a flat fee arrangement under paragraph (f)(2) and the lawyer complies with the applicable writing and disclosure requirements, the fee is considered the lawyer’s property on receipt and may 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).

[15] In determining the amount the lawyer reasonably believes is unearned under paragraph (f)(3), see Rule 1.0(h) and (i) for the definitions of “reasonably” and “reasonably believes.”