

# ARTHUR J. LACHMAN

## ATTORNEY AT LAW

P.O. Box 65261  
Seattle, WA 98155  
(206) 295-7667

Email: ArtLachman@LawAsArt.com

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Board of Governors  
Washington State Bar Association  
1325 Fourth Avenue, Suite 600  
Seattle, WA 98101-2539

**Re: Trust Account Responsibilities and Retainers Task Force  
Response to ODC Memorandum**

Dear Governors:

I am a member of the Trust Account Responsibilities and Retainers Task Force. The focus of my practice is on consulting and advising lawyers and law firms on ethics and risk management issues. I also previously worked on the retainer and advance fee payment issues as a member of the WSBA Rules of Professional Conduct Committee from 2003 to 2005.

In a memorandum dated July 10, 2007, the WSBA Office of Disciplinary Counsel urges the Board of Governors to reject TARRTF's proposal allowing lawyers to deposit advance flat fees into their operating accounts if certain requirements are met.<sup>1</sup> ODC says that the adoption of ABA Model Rule 1.15(c) in several jurisdictions supports its position, arguing that "the clear trend is for the more progressive states to follow the lead of the ABA in protecting the consuming public." I respectfully take issue with this argument.

ODC creates the impression that in jurisdictions adopting Model Rule 1.15(c) or substantially equivalent language, advance fee payments must always be deposited into a client trust account. While the language in the model rule is certainly broad, the fact is that the ABA Ethics 2000 Committee said nothing in rules or comments about so-called "nonrefundable fees" and "earned upon receipt fees," arrangements that at the time of enactment in 2002 were permitted almost everywhere, including Washington. The ABA essentially punted on this issue, choosing not to come to grips with advance fee payments that are deemed earned on receipt or otherwise belong to the lawyer under applicable state law. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §44, cmt. [f] (2000) ("if a payment to a lawyer is a flat fee paid in advance rather than a deposit out

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<sup>1</sup> ODC agrees that retainers for availability only need not be deposited in a lawyer's trust account, which appears to be the case everywhere.

of which fees will be paid as they become due, the payment belongs to the lawyer” and need not be deposited in a client trust account).

Any doubt about this conclusion disappears in light of what has occurred since the model rule was promulgated. Several jurisdictions that have adopted the model rule language permit lawyers to avoid the trust account requirement for advance fees in certain circumstances. Some states, such as Arizona, Ohio, South Carolina, and Wisconsin, have accomplished this by adopting language elsewhere in the ethics rules (usually Rule 1.5) and/or in the supporting commentary creating exceptions to the general requirement that advance fees be deposited into trust. TARRTF has used this approach in proposing the model rule language as the “general rule” in RPC 1.15A(c)(2), and proposing exceptions to the general rule for availability retainers and advance flat fees in RPC 1.5(f).

But even the fact that a jurisdiction has adopted only the model rule language does not establish that all advance fees must always go into trust. The clearest example of this is in Oregon, where, notwithstanding the adoption of the language in Model Rule 1.15(c) (effective January 1, 2005), a 2005 ethics opinion discussing the new provision and applying prior case law states that “if there is a written agreement that the fixed fee is earned upon receipt, the funds belong to the lawyer and may not be put in the lawyer’s client trust account.” Or. Formal Ethics Op. 2005-151, at 3 (emphasis added); *see also In re Conduct of Bolacca*, 151 P.3d 154, 160 (Or. 2007) (under Oregon’s prior Code of Professional Responsibility, “client funds must be deposited into a lawyer trust account *unless* a written agreement provides that the funds are nonrefundable and deemed earned upon receipt”). Following Oregon’s example, it would not be surprising to see other states that have adopted the language of Model Rule 1.15(c) rely on earlier cases and ethics opinions to carve out exceptions to the general rule that all fee advances must be placed in trust. *See, e.g., In re Kendall*, 804 N.E.2d 1152, 1160 (Ind. 2004) (implying that advance flat fees need not be deposited in a trust account and refusing to hold that nonrefundable fees are per se unenforceable); Utah Ethics Op. 136 (1993).

When jurisdictions have wanted to prohibit nonrefundable fees, they have expressly said so in an unambiguous way. New York’s high court did just that in a 1994 case. *In re Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994). Colorado now expressly prohibits nonrefundable fees and nonrefundable retainers in its version of Rule 1.5, and clarifies in that rule that ALL unearned fees must be placed in trust. And the New Hampshire Supreme Court has made this result clear in a comment to its proposed amendment to Rule 1.15.

Admittedly, several of the states listed in footnote 1 of ODC’s July 10<sup>th</sup> memorandum have adopted the model rule language where there is no additional guidance in the ethics rules or commentary, ethics opinions, or case law.<sup>2</sup> In my opinion, however, we simply

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<sup>2</sup> I question whether three of the jurisdictions mentioned in footnote 1 of ODC’s memorandum should be included on this list: a comment to Delaware Rule 1.5 discusses an exception to the trust account rule for certain “smaller fees”; an earlier ethics opinion in Florida permits advance fees to be placed in the lawyer’s operating account in certain circumstances; and although the status of rule changes in Michigan is not

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don't know whether a court, bar association, or ethics committee in these jurisdictions would interpret the model rule to permit advance fees to be received into the lawyer's general account under some circumstances as many other states have done. In short, the adoption of Model Rule 1.15(c) by a jurisdiction, without saying more, does not support ODC's position on this issue.

Thus, I do not see a "clear trend" of states requiring that all advance fees be deposited into trust as ODC contends. While I respect ODC's principled reasons for advocating that all unearned fees other than availability retainers must be placed in trust, and the Board of Governors and/or the Washington Supreme Court may ultimately determine that public policy dictates that result in our state, I do not believe that the ABA's adoption of Model Rule 1.15(c) and the promulgation of the model rule in other jurisdictions materially support that position. In fact, the TARRTF proposal goes further than many (if not most) states in protecting consumers of legal services and, in my view, properly balances the competing policy concerns. It does so by (a) creating limited and well defined exceptions to the general rule that advance fee payments must be deposited in trust, (b) imposing a writing requirement for the exceptions to apply, and (c) prohibiting the use of misleading labels (i.e., "nonrefundable," "earned upon receipt," and "minimum") in describing fee arrangements.

I have appreciated the opportunity to weigh in on these important issues. Please feel free to contact me if you have any questions.

Sincerely,

Arthur J. Lachman

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entirely clear to me, a 2004 proposal to permit "nonrefundable" or "lump-sum" fees to be considered earned upon receipt under certain circumstances has been promulgated by the Michigan Supreme Court and apparently remains pending.