



WSBA

TRUST ACCOUNT RESPONSIBILITIES AND RETAINERS TASK FORCE

Meeting Minutes July 18, 2006

Task Force Chair Mark Johnson called the meeting to order at 1:40 p.m. Members present included: Randy Beitel, David Boerner, Liza Burke, Marc Christianson (by phone), David Heller (by phone), Alison Holcomb, Peter Jarvis (by phone), Marijean Moschetto, Art Lachman, Jody McCormick, Nancy Pacharzina, and Judge Mary Alice Theiler (by phone). Also attending the meeting were: Douglas Ende (WSBA staff liaison) and Jason Holman (law student intern).

Call to Order: Mr. Johnson welcomed the members and other participants, who introduced themselves.

Preliminary Matters: Mr. Johnson spoke briefly about the purpose of the Task Force and directed the Task Force's attention to the agenda and written materials previously distributed. To provide context for defining the Task Force's work, Mr. Johnson asked Mr. Lachman to relate some background information regarding the ethical dilemmas created by "nonrefundable" fee agreements and the efforts of the WSBA Rules of Professional Conduct Committee to draft an opinion to replace former Formal Ethics Opinion No. 186. Following Mr. Lachman's overview, Professor Boerner noted that the Task for will need to take into account the recently adopted changes to RPC 1.5 and its associated comments.

Discussion: The Chair asked each of the Task Force members to provide their "unvarnished views" about what should be done about the dilemma of advance flat fees, including whether the Task Force should propose a new rule or draft an ethics opinion.

- Mr. Lachman opined that the Kagele and Deruiz decisions foreshadow the Supreme Court's inclination to eventually prohibit advance flat fee arrangements. He views such fee arrangements as permissible at this point. He is undecided about whether they should be prohibited, but feels that if such arrangements are permitted, the fee agreement must include appropriate disclosures so clients understand the risks.
- Judge Theiler suggested that the Task Force should decide whether its mission is to review applicable authorities and make a recommendation as to how to conform to existing law, or to make a policy recommendation about what the law should be. She is not yet convinced that anything needs to be done; existing law may suffice, with problems left to be addressed by the Office of Disciplinary Counsel.
- Mr. Beitel questioned whether there was a need for a new rule to address the issue. He noted that the Office of Disciplinary Counsel believes there is at present a sufficient basis to charge violations under RPC 1.14 and the Deruiz precedent. His office believes it is preferable for all advance fees to be held in a trust account until earned, and warned against using a legal fiction to avoid compliance with the trust account rules.
- Ms. Pacharzina agreed with Judge Theiler that the Task Force needs to define its goal after thorough analysis of existing authority. She thought a rule change should only be

considered as a last resort, and is favorably inclined towards the draft Formal Ethics Opinion requiring a written fee agreement with disclosures [*see* Nov. 2005 “Discussion Group Draft,” Materials pp. 92-95]. Ms. Pacharzina inquired whether the recommended approach should differ depending on whether a representation is civil or criminal and whether distinctions could be made based on the amount of the fee. She emphasized the Legal Foundation’s central concern that there be clarity about when a fee goes into the trust account and when it may be taken out.

- Mr. Ende noted that as an alternative to suggesting an amendment to RPC 1.5 or drafting an ethics opinion, there might be a middle-ground approach of drafting an additional comment to RPC 1.5.
- Ms. McCormick expressed a preference for proposing a new rule, since lawyers look to rules first and may not be aware of the availability of an ethics opinion. She believes it is important that an agreement for these sorts of fees be in writing with appropriate disclosures so the client understands the nature of the bargain.
- Ms. Holcomb noted that one option is not to do anything to change the status quo. She believes education of lawyers on existing responsibilities under revised RPC 1.5 and its comments would suffice. Alternatively, she would favor drafting an ethics opinion over suggesting a new rule.
- Ms. Burke emphasized the need for clarity. Owing to the difficulty of obtaining a consensus about a replacement for Formal Opinion 186, she initially favored a rule change, but now considers that doing nothing may be an option in light of the new comments [11] and [12] to Rule 1.5.
- Ms. Moschetto urged the Task Force to be mindful of the effect of any recommendation on small law practices. She would like to be further educated about the issue and the options before taking a position.
- Professor Boerner mentioned that historically recommendations requiring written fee agreements have not been successful. He noted that the problem is that many lawyers do not accept the basic premise that all fees must be reasonable. He is not opposed to the concept of nonrefundable fees so long as they are reasonable.
- Mr. Christianson advised the Task Force that it is misguided to change the law applicable to all lawyers in order to regulate the misconduct of a few dishonest lawyers. He would favor a definitive rule over an ethics opinion.
- Mr. Jarvis added that the most important goal is to bring clarity and certainty to this area of legal ethics. He is not convinced a rule is needed; an ethics opinion would suffice.
- Mr. Heller opined that all that is needed is a comment to the existing fee rule stating that a fee must always be reasonable under the circumstances. He noted that there are many thousands of these types of agreements entered into every year in Washington, and only a tiny fraction of them create problems.

The Chair asked the members to consider the Louisiana approach to fee disputes about advance flat fees. Under Louisiana RPC 1.5(f)(5), when a dispute arises over whether a flat fee was earned, the lawyer is obligated to place the disputed amount into a trust account until the dispute is resolved. [*See* Materials pp. 3-9.]

Discussion ensued over the nature of the issues that ought to be addressed by the Task Force. Issues for potential consideration included:

- Whether advance flat fees must always go into a trust account,
- If advance flat fees need not be placed into a trust account, when and how must a lawyer refund unearned sums?
- How should it be determined whether a portion of a fee is earned and reasonable?
- How can clients be protected from unfair or dishonest use of advance flat fees?
- Whether flat, “nonrefundable” type fee arrangements are inherently unethical/undesirable.
- Whether use of the word “nonrefundable” should be permitted.
- The viability of placing advance flat fees in a trust account and disbursing the fee in increments or “milestones”

It was noted that it would be helpful to have statistical information on the number of individuals in Washington victimized by the unscrupulous use of nonrefundable fee arrangements, and that it would be useful to have information about whether, in states where nonrefundable fees have been prohibited, this has had a demonstrable adverse effect on criminal law practitioners or the public defense system.

Planning: The Chair asked Mr. Ende to schedule two Task Force meetings in September, and to ask Bob Welden to address the Committee about the Lawyers Fund for Client Protection. Mr. Beitel will attempt to locate statistical information about grievances involving nonrefundable fee arrangements. The Chair requested that Mr. Holman compile a chart reflecting rules applicable to these fee arrangements in all states, and attempt to locate information about the impact in other states of prohibiting nonrefundable/advance flat fees.

The Chair encouraged the Committee members to continue to exchange information on these issues using the listserv address.

The meeting was adjourned at 4:00 p.m.

Prepared by
Douglas J. Ende
WSBA Staff Liaison