



# WSBA

## TRUST ACCOUNT RESPONSIBILITIES AND RETAINERS TASK FORCE

### Meeting Minutes April 18, 2007

Task Force Chair Mark Johnson called the meeting to order at 10:10 a.m.

Members present included: Randy Beitel, David Boerner, Liza Burke (by phone), Marc Christianson (by phone), Ann Guinn, Alison Holcomb, Art Lachman, Jody McCormick, Marijean Moschetto, David Heller, and Nancy Pacharzina. Also attending the meeting were: Douglas Ende (WSBA staff liaison), Jason Holman (law student intern), and Anna Schmidt (WSBA Paralegal).

Approval of Minutes: The minutes of the February 26, 2007 meeting were approved as submitted by consensus.

Preliminary Matters: The Chair reminded the Task Force of the upcoming and possibly final Task Force meeting on Saturday, April 28<sup>th</sup>, and noted that he planned to report to the Board of Governors at its meeting on June 1, 2007.

The Chair mentioned that immediately prior to the meeting Mr. Beitel had distributed a memo consisting of the Office of Disciplinary Counsel's "Rule Proposal for the Trust Account Retainers and Responsibilities Task Force." [Numbered as supplemental pages 12-14 of the April 18, 2007 meeting materials.] The Chair praised the memo as clear and well-written and assured the Task Force that it would be provided to the Board as a minority report. Mr. Lachman pointed out that although some states have, as noted in the memo, adopted Model Rule 1.15(c), some of them nevertheless have other provisions exempting certain types of advance fees from the trust account requirement. Mr. Beitel commented that he intends to supplement that portion of the research identifying other states that have adopted Model Rule 1.15(c). The Chair requested that Mr. Beitel, in consultation with Mr. Lachman, finalize the memo in time for the June Board meeting.

Additional Authorities of Interest: Mr. Lachman observed that the National Organization of Bar Counsel Fee Survey [Materials pp. 3 – 5] is ambiguous in a number of respects and may not be wholly accurate, particularly in that it does not in all cases take into account each state's decisional law. The Chair requested that Mr. Holman evaluate the accuracy of the chart and report back to the Task Force.

Discussion: Pointing out that the various alternative rules in the materials collectively represent a general policy distinct from the policy underlying the ODC Rule, the Chair requested a straw vote on the sentiment of the Task Force with respect to the ODC approach. Two members favored the ODC Rule, though other members commented that their position might be contingent on what is presented as the alternative.

The Chair asked the drafter of each of the alternative drafts to explain his or her intent.

According to Mr. Lachman, his draft [Materials pp. 9-10], which would be designated as a new RPC 1.15C, begins with the general rule requiring lawyers to deposit all advance fees and expenses into a trust account, and then specifically excepts two situations: engagement retainers and fixed/flat fees. Each type of fee is specifically defined, and the required disclosures applicable to each exception are set forth. He omitted a provision regarding dispute resolution, leaving that issue to be addressed by the previously formed dispute resolution subcommittee.

After noting his nonvoting status and disavowing any position on the substantive merits of the various proposals, Mr. Ende pointed out that his draft [Materials p. 11], essentially a pared down version of Mr. Lachman's draft, is intended to address the advance flat fee problem as narrowly as possible. The exception is drafted as a new paragraph (f) to RPC 1.5, as most lawyers are most likely to look for a rule regulating fees there. Mr. Ende's version omits any definition or regulation of "engagement retainers," but includes dispute-resolution language mandating that 50% of any collected fee be placed in the lawyer's trust account if the lawyer and client cannot agree on the amount in dispute. It also requires the lawyer to take prompt action to resolve the fee dispute, language analogous to that found in RPC 1.15A(g).

The Chair adverted briefly to the so-called Modified Louisiana Rule [Materials p. 7], presented at a prior meeting [*see* Minutes of July 18, 2006 meeting]. Ms. Holcomb briefly reviewed the WACDL alternative draft [Materials p. 8], also presented at a prior meeting [*see* Minutes of October 26, 2006 meeting], noting that the WACDL draft does not specify a writing requirement but that WACDL agrees that such a provision could be included in paragraph (5).

Discussion ensued about the viability of the mandated disclosure language in Mr. Lachman's draft, with Ms. Holcomb stating that WACDL is open to discussion about mandated disclosures but has concerns about the language presented as it may encourage clients to initiate fee dispute. Ms. Holcomb urged the Task Force to reject any approach resulting in micromanagement of fee agreements. Acknowledging concerns expressed to the Chair in an e-mail from Ms. Burke, the Task Force also discussed whether "minimum fees" should be expressly mentioned in formulating a draft rule.

After observing that there appears to be general agreement among the Task Force that any fee arrangements excepted from the trust account rule should be in writing, the Chair asked each member to articulate a position on five salient issues raised by the various attempts to draft a rule excepting certain types of fee arrangements from the trust account requirement, to wit:

- (1) Should such a rule be located in RPC 1.5 or RPC 1.15?
- (2) Should engagement retainers be specifically defined and excepted?
- (3) Should "minimum" fees be expressly addressed?
- (4) Should there be mandated disclosures to the client about the characterization of the funds and potential refundability?
- (5) Should there be a dispute resolution mechanism, and if so, what type?

Each of the members provided an opinion on some or all of these issues. There was substantial discussion of the whether the language of any written disclosures should be specifically required, left to the discretion of the lawyer drafting the fee agreement, or approved as a “safe harbor.” The discussion also included evaluation of whether, assuming the rule required written fee agreements, a monetary threshold should be specified to exempt certain de minimis fee arrangements from the necessity of a writing, with a consensus emerging that such an exemption was unnecessary since most such fees are already earned at or about the time of payment. In general, the Task Force members favored drafting a flat fee rule as an amendment to RPC 1.5 with appropriate cross-references to RPC 1.15A, were divided on the need to define and expressly regulate availability retainers, achieved near-consensus that minimum fees should not be addressed, favored some degree of disclosure to the client, and lacked a clear position on a dispute resolution mechanism.

The Chair requested that the Task Force quantify its views on the issues by means of a series of straw votes. The results were as follows:

- Unanimous support for proposing a rule as an amendment to RPC 1.5 with cross references to RPC 1.15.
- Unanimous support for requiring that the designated fee agreements be in writing.
- Unanimous opposition to creating monetary threshold exemption from the writing requirement.
- Unanimous support for excluding the terminology “minimum fees” from the rule.
- Unanimous support for some form of mandated disclosure to the client about characterization of the funds and potential refundability. Three votes in favor of specific, mandatory language, seven opposed. Unanimous support for recitation of the general components of a disclosure, with specific language that is approved but not mandatory.

Discussion ensued regarding the scope of the rule. Referring to paragraph (f)(2) of the WACDL –Modified Draft, Ms. Holcomb opined that the rule should address general concepts of how funds are handled; it should avoid limiting a lawyer’s option to a few specifically defined fee agreements. Ms. Pacharzina urged the importance emphasizing the general trust account rule as the default (client funds go into a trust account) and narrowly tailoring the exceptions (certain advance fees need not go into a trust account under specifically defined circumstance). The Chair called for a vote on a motion in favor of drafting a rule with the following components (described by the Chair as the Lachman-Ende prepaid fixed fee concept combined with paragraphs (1), (3), and (4) of the Modified Louisiana Rule): a defined, prepaid fixed fee component, a defined general availability retainer, and a provision requiring advance deposits for costs and future services be deposited in a trust account. The motion was approved by a vote of eight in favor, two opposed, and one abstention.

Ms. Holcomb observed that the motion had in effect taken WACDL’s proposed paragraph (f)(2) off the table and substituted a much more restrictive approach. The Chair noted that the Board could be presented with WACDL’s proposal as an alternative favored by a minority of the Task Force.

The Chair next requested a series of straw votes on possible dispute resolution mechanisms. On the question of whether disputed funds should be put into a trust account, nine were in favor, one opposed, and one abstained. On the question of whether the rule should include a specific dispute resolution provision, seven were in favor and four were opposed. Only two members favored a requirement that lawyers with fixed fee disputes participate in binding fee arbitration upon client request.

Discussion ensued about the feasibility of a fee arbitration as a dispute resolution mechanism and whether fixed fee cases should be treated differently from other fee disputes in this regard.

The Chair advised the Task Force that he would appoint an ad hoc drafting subcommittee, which would present a draft rule to the Task Force on April 28.

The meeting was adjourned at 1:55 p.m.

Minutes prepared by:

Douglas J. Ende, WSBA Assistant General Counsel

Anna Schmidt, Paralegal