



WSBA

TRUST ACCOUNT RESPONSIBILITIES AND RETAINERS TASK FORCE

Meeting Minutes February 26, 2007

Task Force Chair Mark Johnson called the meeting to order at 1:30 p.m. Members present included: Randy Beitel, David Boerner, Liza Burke, Marc Christianson (by phone), David Heller (by phone), Marijean Moschetto, Art Lachman, Jody McCormick, Nancy A. Pacharzina, and Ann Guinn. Members not present included: Alison Holcomb. Also attending the meeting were: Douglas Ende (WSBA staff liaison), Jason Holman (law student intern), and Anna Schmidt (WSBA Paralegal).

Approval of Minutes: By consensus, the Task Force agreed to Ms. Burke's suggestion that paragraph four of page 3 be amended to state: "The subcommittee will also evaluate the terms 'fixed, flat, or minimum' fee used in paragraph two of the Discussion Draft." Doug Ende noted that there were minor typographical errors that would be corrected. The minutes were approved as amended by consensus.

Preliminary Matters: Nancy Pacharzina distributed a document titled "A History of the Client Protection Rules."

The Chair noted that Mary Alice Theiler has resigned from the Task Force. He also noted that Ann Guinn had been approved as a member. He also mentioned that he will be at the Board of Governors' meeting in June reporting on the progress of the Task Force.

New Business: Mr. Lachman reviewed recent rules and cases from other states addressing issues of relevance to the work of the Task Force [*see* Materials pp. 5-30]. Mr. Lachman opined that that there appeared to be a trend toward expressly addressing the prepaid fixed fee or "nonrefundable" advance fee dilemma and specifying whether such fees must be held in the trust account. Discussion ensued regarding the extent to which Comment [10] to RPC 1.5 constituted a recognition that "earned on receipt" and "nonrefundable" fee arrangements are permissible in Washington.

Subcommittee Status Reports

Trust Account Rule Harmonization Subcommittee: The Chair directed the Task Force's attention to the subcommittee's memo, prepared by Alison Holcomb [*see* Materials pp. 38-40], which addresses potential changes to RPC 1.15A that might be made in conjunction with potential alternative amendments to RPC 1.5 that may be recommended by the Task Force. The Chair noted that there would be no great obstacle to enacting appropriate amendments to RPC 1.15A, but that no decision could be reached before resolution of the central, underlying issues. Mr. Beitel disagreed with the subcommittee's preliminary conclusions about the extent to which Rule 1.15A would need to be amended in order to conform with changes to RPC 1.5. [*See also* Mr. Beitel's e-mail to the Chair, Materials pp. 36-37].

Definitions Subcommittee: Mr. Lachman reported on the subcommittee's preliminary draft of definitions [see Materials pp. 31-32]. He noted a general philosophical preference to minimize the number of terms to be defined, a sentiment that was echoed during ensuing Task Force discussion. Ms. Guinn suggested that the Task Force consider defining the term "earned." Mr. Lachman further noted that after lengthy consideration, he saw no rationale basis for differentiating the trust account treatment for paid-in-advance task-based fixed fees and paid-in-advance hourly fees. Discussion ensued about the need for definitions of particular terms. A number of members opined that the Task Force could limit itself to defining the specific type of paid-in-advance fixed fee that will be excepted from ordinary trust accounting principles. After polling the members, the Chair summarized the Task Force's conclusions about the need for definitions: (1) define "availability retainer" (without further elaboration of "general" vs. "special" retainers); (2) determine the precise type(s) of fixed-fee arrangement(s) that are excepted from the general trust account requirement and define it/them; and (3) prohibit use of the terms "nonrefundable" and "earned on receipt." Mr. Beitel observed that, in his view, there are only two fee types: prepaid and fully earned.

Dispute Resolution Subcommittee: Ms. Moschetto directed the Task Force's attention to the Subcommittee's Status Report memo [see Materials pp. 33-35], which outlines the positions of the three subcommittee members about how to resolve lawyer-client disputes over whether a prepaid fixed fee has been earned. Ms. Pacharzina inquired about the rationale for treating fixed fee disputes differently (and more protectively) than those involving disputes over whether a trust account was earned. Discussion ensued about the extent to which prepaid fixed fee arrangements are actually used. Ann Guinn remarked that for new lawyers and small offices, disallowing deposit of prepaid fixed fees into the lawyer's operating account would create a hardship. Ms. Moschetto called for a vote of the members about a series of questions relating to dispute resolution [see bullet point list, Materials p. 33]. On the issue of whether disputed sums should be deposited in the lawyer's trust account or elsewhere (such as with WSBA or a court) by a vote of 7-4 the Task Force concluded that disputed fees should be deposited into the lawyer's trust account pending resolution of the dispute. As to how much amount of the deposit, Ms. McCormick suggested modifying the 50% bright-line rule recommended by Mr. Ende as follows: the lesser of the amount the client claims is in dispute or 50% of the collected amount. Evaluating this proposal vs. the "reasonably prudent lawyer" standard, by a vote of 7-4 the Task Force favored the modified bright-line rule. With regard to whether there should be a specified, obligatory dispute resolution forum (such as arbitration or court action), the Task Force, by consensus, favored not specifying a forum. On the issue of whether and when lawyers should be required to advise clients of the existence of a dispute resolution mechanism, and the content of such an advisement, the Task Force reached no definite conclusion. Finally, by consensus, the Task Force agreed that there should be no attempt to create a bonding or insurance mechanism to guarantee the security of this type of fee.

Ms. Moschetto suggested that the Task Force schedule up to three meeting prior to the June Board of Governors meeting, at which the Chair will present the Task Force's interim report.

The meeting was adjourned at 4:35 p.m.

Minutes prepared by:

Douglas J. Ende, WSBA Staff Liaison & Anna Schmidt, Paralegal