



WSBA

TRUST ACCOUNT RESPONSIBILITIES AND RETAINERS TASK FORCE

Meeting Minutes October 26, 2006

Task Force Chair Mark Johnson called the meeting to order at 9:05 a.m. Members present included: Randy Beitel, David Boerner, Liza Burke, Marc Christianson (by phone), Alison Holcomb, Marijean Moschetto, Art Lachman, Jody McCormick (by phone), and Nancy Pacharzina. Also attending the meeting: Jim Dixon (WSTLA), Ann Guinn (WSBA Solo & Small Practice Section), Douglas Ende (WSBA staff liaison), Anna Schmidt (WSBA paralegal).

Preliminary Matters: Mr. Johnson noted for the record that Peter Jarvis had submitted his resignation from the Task Force.

Outreach Efforts: Mr. Johnson reported that he had by letter contacted a number of previously identified stakeholder organizations* and invited them to make their views known to the Task Force, either in person or in writing. Mr. Johnson noted that WSTLA and the WSBA Solo and Small Practice Section had sent representatives, and the Chair of the WSBA Creditor-Debtor Section had sent an e-mail. Beyond that, the response was underwhelming. Discussion ensued concerning the need for further outreach. Ms. Moschetto pointed out that another constituency to be considered is rural lawyers, who may not have an official “voice” in the form of a section or committee. She suggested additional outreach via the smaller county bar associations. Mr. Johnson indicated that he would work with Brooke Taylor, who has contacts within those organizations, to send a letter and relevant documents for comment; he will also contact John Brangwin, the President of the Young Lawyers Division, to obtain the perspective of that group. Marc Christianson opined that further input ought to be obtained from the Access to Justice community. Mr. Johnson indicated that he would discuss with President Dial the possibility of holding public forums on the issue in other locations in Washington.

Review of Positions of Stakeholder Organizations:

- *Family Law Section:* Mr. Christianson reported that the WSBA Family Law Section has not yet formally taken a position. He expects the Section to address the issue at an upcoming retreat. He believes the Section will probably support a modified version of the Louisiana rule.
- *WACDL:* Ms. Holcomb reported that the WACDL Board of Governors had convened a new internal task force to address the issue. After obtaining input from the membership and reviewing the WSBA Task Force Chair’s Discussion Draft (June 5, 2006) [see July ’06 Task Force Materials p. 9], the WACDL task force recommended, and the WACDL

* Specifically, WSTLA, the Washington State Chapter of the American Immigration Lawyers Association, WSBA Criminal Law Section, WSBA Creditor-Debtor Section, WSBA Solo and Small Practice Section, WSBA Family Law Section, WSBA Young Lawyers Division, Washington Defense Trial Lawyers, and WSBA Labor and Employment Law Section.

Board unanimously supported, adoption of the Discussion Draft, with a number of suggested modifications. [See 10/20/06 Letter from Amanda Lee to Mark Johnson, in Oct. '06 Task Force Materials pp. 78-79]. The most significant modification suggested by WACDL is that these types of fee agreements must be in writing. WACDL is willing to discuss other issues relating to the content of such a written fee agreement.

- *WSTLA*: Jim Dixon reported that WSTLA's Rules Committee is still in the process of reviewing the issue. WSTLA hopes to have a formal position ready to transmit to the Task Force within a month. Mr. Dixon indicated that it appears likely that WSTLA will agree in substance with the WACDL position set forth in the Oct. 20 WACDL letter, including the written-fee-agreement component. There is concern among some WSTLA members about paragraph five of the proposed draft, which would require the lawyer to deposit any disputed amount into a trust account. This could be unreasonable in situations where the money is not immediately available to the lawyer.
- *WSBA Solo & Small Practice Section*: Ann Guinn reported there hasn't yet been time to fully circulate materials and obtain input from the section members. Ms. Guinn has informally circulated a copy of the Task Force's Statement of Issues, together with a survey designed to determine how solo practitioners and small offices handle retainers and other pre-paid fees. The 14 responses she received are summarized in a document distributed to the Task Force members. The Task Force members reviewed and discussed the responses. Ms. Guinn opined that creating clear definitions for the different terms used in this area may be a good first step. She hopes to form an internal section task force or committee to formulate an official position.
- *WSBA Debtor/Creditor Section*: The Task Force reviewed and discussed the e-mail from the Chair of the WSBA Debtor/Creditor Section, explaining the Section's position. [See 10/24/06 E-mail from Bill Hames to Mark Johnson, in Oct. '06 Supplemental Task Force Materials.] It was agreed that bankruptcy lawyers are in a unique position because if they do not take a fee prior to filing a bankruptcy petition, they become creditors in the bankruptcy. Also, if a proceeding is filed, the bankruptcy court regulates payments of attorney fees. There was some confusion as to why the section had taken the position that no refund of an advance fee would be required if the client decided not to file the bankruptcy. Art Lachman volunteered to research whether federal law will affect the issue as applied to bankruptcy lawyers.
- *Lawyers' Fund for Client Protection*: Mr. Johnson directed the Task Force's attention to Bob Welden's statistical analysis of Lawyers' Fund applications. [See Oct. '06 Materials at p. 73]. The analysis appears to show that in 2006, of 139 applications received, 27 of those approved for payment (with those payments totaling \$46,265) involved "nonrefundable fees." This does not indicate, however, that "nonrefundability" of the fee was the underlying problem in those matters.

Further Task Force Discussion: The Task Force discussed the access-to-justice implications of permitting advance fees to be deposited into an account other than a trust account. Ms. Pacharzina volunteered to make further inquiry of the ATJ community, as well as to try to develop a strategy for obtaining a consumer perspective. She recommended also contacting the

Washington Supreme Court Task Force on Civil Equal Justice Funding, if it is still operational, and volunteered to do so. Mr. Johnson pointed out that restricting the ability of lawyers to deposit paid-in-advance fees into the general account may have an adverse effect on access to justice by reducing the number of private practitioners willing to take on certain types of cases.

Mr. Johnson inquired about the position of the Office of Disciplinary Counsel, and whether ODC would support an amendment to the rule or an ethics opinion allowing lawyers to deposit pre-paid fees directly into their operating accounts. Randy Beitel responded that ODC's role is very specific: to protect the public. Given that perspective, ODC is unlikely to support a rule that would permit unearned funds to be treated as lawyer property. The Office of Disciplinary Counsel is prepared to review a modified Louisiana rule and articulate its specific concerns if that is the likely approach of the Task Force. Randy suggested that the Task Force also obtain input from the WSBA auditors who regularly deal with the accounting aspects of all types of fee structures.

Mr. Lachman pointed out that the key issue involves identifying the party that is required to assume the risk of a lawyer being unable to refund an already collected fee when required to do so. Discussion ensued about various mechanisms to address the handling of fee disputes, including depositing funds into the registry of the court, mandatory fee arbitration, bonding, requiring lawyers to certify financial responsibility, and expanding the funding and authority of the Lawyers' Fund for Client Protection. Mr. Johnson counseled against recommending that the Board of Governors fund a major new program.

Formation of Subcommittees:

Mr. Johnson requested that Professor Boerner chair a subcommittee, to include Mr. Lachman and possibly others to be named, that will focus on defining significant terms. There was a clear consensus that the term "nonrefundable" is misleading and should be prohibited. Ms. Pacharzina noted that at present there are many different terms used to describe the type of fee at issue and suggested that the goal should be to simplify the terminology, perhaps reducing the options to a single word or phrase. The subcommittee will also evaluate the terms "fixed, flat, or minimum" fee used in paragraph two of the Discussion Draft. Mr. Beitel and Ms. Pacharzina noted that it is important to define precisely the circumstances in which a lawyer can treat an advance fee payment as lawyer property; otherwise, the rule could be used by virtually any lawyer as a means to opt out of the trust account requirement altogether.

Mr. Johnson next requested that Ms. Moschetto chair a subcommittee, to include Mr. Ende and Mr. Beitel, that will focus on the dispute resolution mechanism to be used in the event of a client-lawyer dispute about the reasonableness of a paid-in-advance fee. Suggestions included use of a "reasonably prudent lawyer" standard, arbitration, and inclusion of the RPC 1.5(a) reasonableness standards in written fee agreements. Some discussion ensued about the possibility of recommending an amendment to RPC 1.5 to require that all fee agreements of every type be in writing. Concern was expressed that such a recommendation would be so controversial that it might overshadow the assigned mission of the Task Force.

Mr. Johnson will chair a third subcommittee, to include Alison Holcomb, Jody McCormick, and Mark Christianson, that will focus on the need for amendments to the trust account rules, i.e.,

this subcommittee will ensure that the recommendation of the Task Force functions appropriately with the current trust account rules.

Other Matters: In light of Peter Jarvis's resignation, Mr. Johnson suggested appointment of Ann Guinn as a non-lawyer member of the Task Force. He will request approval from the WSBA President.

Approval of Minutes: Ms. Holcomb moved to approve the minutes of the September 7, 2006 meeting as submitted. Ms. Pacharzina seconded the motion. The motion was approved by consensus.

The next meeting will be scheduled for January 2007 on a date to be determined.

The meeting was adjourned at 11:30 a.m.

Prepared by

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and

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