



# WSBA

## TRUST ACCOUNT RESPONSIBILITIES AND RETAINERS TASK FORCE

### Meeting Minutes September 7, 2006

Task Force Chair Mark Johnson called the meeting to order at 1:05 p.m. Members present included: Randy Beitel, David Boerner, Liza Burke, Marc Christianson (by phone), Alison Holcomb, Marijean Moschetto, Art Lachman, Jody McCormick (by phone), Nancy Pacharzina, and Judge Mary Alice Theiler. Members not present included: David Heller and Peter Jarvis. Also attending the meeting were: Douglas Ende (WSBA staff liaison), Jason Holman (law student intern), Robert Welden (WSBA General Counsel), Ann Guinn (WSBA Solo and Small Practice Section), Pete Roberts (WSBA LOMAP Advisor), and Jim Dixon (WSTLA).

Call to Order: Mr. Johnson welcomed the members and invited the guests in attendance to introduce themselves.

Stakeholder Input: Mr. Johnson advised the Committee that in response to the Task Force's August 22 letter to stakeholder organizations, Amanda Lee, WACDL's president, had indicated that WACDL had formed its own internal task force to solicit member input, and that Alison Holcomb would be representing WACDL's interests on the WSBA Task Force. Mr. Johnson asked Ms. Holcomb whether WACDL had formulated an official position. Ms. Holcomb indicated that it had not yet done so, but that she would relate WACDL's position to the Task Force in advance of the date the Task Force submitted its report to the Board of Governors.

Mr. Johnson next acknowledged that Mr. Beitel has pointed out the desirability of having a nonlawyer/consumer representative included in the process. Mr. Johnson observed that there would be a problem in obtaining a balanced consumer viewpoint if the views solicited were only those of disgruntled clients.

James Dixon, attending on behalf of the Washington State Trial Lawyers Association, then addressed the Task Force. Mr. Dixon explained that WSTLA had not yet adopted a formal position. Mr. Dixon noted that WSTLA has concerns about the Task Force impinging on existing law by attempting to regulate reasonableness of contingent fees. He also mentioned that WSTLA's criminal defense constituency believes that flat fees offer many significant advantages to lawyer and clients, and WSTLA has concerns that any attempt to regulate such fee structures will not adequately compensate for a lawyer's experience, reputation, and ability. He indicated that WSTLA would be in a better position to articulate a formal position when it knew of the deadline for reporting to the Board of Governors. After some follow-up questions were answered by Mr. Dixon, discussion ensued about the advantages and disadvantages of benchmark billing and the definition of the term "earned" as applied to trust account regulations.

Next, Ann Guinn, a law practice management consultant, addressed the Task Force on behalf of the WSBA Solo & Small Practice Section. After seeking clarification about the Task Force's objectives, Ms. Guinn noted that she was not authorized to speak for the Section but would only

express her own opinions, Ms. Guinn opined that criminal defense lawyers of her acquaintance believe that if they do not get the entire fee in advance, they will never get paid. She believes that taking away the ability to charge advance fees could affect the ability of small criminal defense practitioners to do business because they require the ability to access client funds quickly. Drawing on her experience as a consultant, she provided anecdotal information about the flat fee structures used by certain criminal defense lawyers, bankruptcy lawyers, and domestic relations lawyers.

WSBA General Counsel Bob Welden then presented the Task Force with information about the work of the Lawyers Fund for Client Protection, which exists for the purpose of relieving or mitigating a pecuniary loss sustained by any client by reason of the dishonesty of, or failure to account for money or property entrusted to, any member of the WSBA in connection with the member's practice of law, or while acting as a fiduciary in a matter related to the member's practice of law. Mr. Welden adverted to the difficulties encountered by the Fund when lawyers take an "earned upon receipt"/nonrefundable advance fee and then fail to complete the work and/or abandon clients; the Fund is then obliged to determine whether all or part of the fee was "reasonable." Mr. Welden urged the Task Force to endeavor to clarify the issue of reasonableness as applied to various advance fee structures. He also opined that the existing voluntary fee arbitration program is inadequate (because most lawyers won't agree to it), and suggested consideration of mandatory fee arbitration. Members asked whether there were any statistics to quantify the size of the problem arising from fee issues. Mr. Welden agreed to compile available information and provide it to the Task Force.

Task Force Discussion: At Mr. Lachman's behest, the Task Force continued to discuss the bearing that terminology has on the issues to be decided. Mr. Beitel opined that the terminological culprit is the word "earned," which, when included in former Formal Opinion No. 186 (in the phrase "earned on receipt"), was not being used according to its common meaning. Mr. Beitel emphasized that neither he nor the Office of Disciplinary Counsel have an objection to flat fees. In his view, the issue is the type of account that the money is deposited into. That issue is unrelated to the type of fee structure being used. The trust account question turns on when the money was earned by the lawyer, and the Office of Disciplinary Counsel has traditionally taken a conservative approach to that question. Mr. Beitel inquired whether there would be any objection to a proposal requiring written agreements for all advance fees not kept in the trust account.

Ms. Holcomb disagreed about the importance of the definition of "earned," pointing out that the "earned on receipt" concept was used in former Formal Opinion No. 186 only in describing availability retainers, as to which there is little dispute. The opinion did not deal with advance payments for services to be performed in the future. This type of agreement involves client payment for the lawyer's promise to perform certain services in the future, and the question is whether the money can be characterized as the lawyer's property at that point.

Mr. Dixon, on behalf of WSTLA, and Ms. Holcomb, on behalf of WACDL, indicated that there is a consensus that these sorts of fee agreements ought to be in writing. Ms. Guinn also supports the use of fee agreements in all instances. Mr. Johnson asked Mr. Beitel whether, if a writing requirement were in place, the Office of Disciplinary Counsel would agree that such fees could initially be placed in the operating account. Mr. Beitel indicated that a writing would not change

the character of the funds—they still would not be the lawyer’s property until earned. Under existing rules the money would have to go into the trust account. He indicated that a change to that principle could only be effected by court rule.

Mr. Lachman explained that he shared Mr. Beitel’s view about ambiguous use of the term “earned” (which he noted appears in RPC 1.16(d)), but he pointed out that this would not preclude a lawyer and a client from creating a property right to the funds by contract, with appropriate disclosures.

Ms. Moschetto asked for greater clarity about the issues that need to be resolved in addressing the Task Force objectives.

Mr. Johnson noted that by adoption of Comment [10] to RPC 1.5, the Court has made it clear that “earned upon receipt” and “nonrefundable” type fee arrangements are permissible. Thus, the issue to be addressed by the Task Force is whether such fees can be placed directly into a lawyer’s operating account, or whether they must go into a trust account. Mr. Johnson touted the wisdom of the Louisiana rule, modified with an objective standard to direct the lawyer’s decisionmaking about how much to place into the trust account in the event of a dispute over the fee.

Mr. Lachman observed that Comment [10] was created and proposed before Opinion 186 was withdrawn. Mr. Beitel observed further that it was drafted prior to issuance of the Supreme Court’s DeRuiz opinion.

Judge Theiler reiterated that the issues to be addressed by the Task Force ought to be defined. She led a discussion that culminated in the following issues list:

- (1) What types of advance fees are in use by Washington lawyers, and when must the funds be deposited into a trust account?
  - a) Engagement or availability retainers (can be placed in operating account)
  - b) Advance fee deposits (must be placed in trust account)
  - c) Prepaid fees for services to be performed, sometimes (perhaps incorrectly) characterized as flat fees, nonrefundable fees, or earned-upon-receipt retainers (Task Force to make recommendation about how such fees must be handled and denominated)
- (2) If the Task Force concludes that a client and lawyer may agree that prepaid fees for services to be performed may be considered the lawyer’s property on receipt, should it be a requirement that all such fee arrangements be in writing? If so, what disclosures or other information must be in the written agreement? Is there any terminology that should be prohibited?
- (3) If the Task Force concludes that a client and lawyer may agree that prepaid fees for services to be performed may be considered the lawyer’s property on receipt, what is a lawyer required to do in the event there is a dispute about whether the lawyer is entitled to keep all or part of the fee?

Mr. Ende was asked to refine the issues statement and draft a letter to interested stakeholders that requests input specifically pertaining to the issues as articulated in the above issues statement.

Members suggested that the Young Lawyers Division, employment lawyers, and the Washington Defense Trial Lawyers Association be included in the stakeholders list.

Planning: Mr. Johnson canceled the meeting scheduled for September 26 to allow more time to obtain stakeholder feedback. The next meeting will be scheduled for mid or late October. He asked for suggestions about how best to obtain information from consumer groups that would not reflect only those consumers who are dissatisfied with the services they received from lawyers.

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

Prepared by  
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