

WACDL

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July 16, 2007

Sent Via E-mail and U.S. Mail

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Re: *WSBA Trust Account Responsibilities and Retainers Task Force;
Recommendation to the Board of Governors*

Dear President Dial, Officers, Governors, and Executive Director Littlewood:

The Washington Association of Criminal Defense Lawyers (WACDL) thanks Mark Johnson, Chair of the Trust Account Responsibilities and Retainers Task Force (TARRTF) for inviting a representative from our organization to participate in its important work. We also thank the Washington State Bar Association Board of Governors for its careful consideration of the TARRTF's report and recommendation. The WACDL Board of Governors concurs, unanimously, in that recommendation.

WACDL has been actively involved in the WSBA's consideration of the ethical dilemmas posed by "nonrefundable" fees and the advance payment of flat fees since 2003. Enclosed is a copy of our letter to Anne Seidel, Chair of the Ethics 2003 Fees Subcommittee, in which we first set forth our position regarding the important benefits conveyed to clients by the use of flat fees and the impracticability and inadvisability of requiring attorneys to maintain an entire flat fee in trust until completion of all agreed services. In that letter, we defended the use of the "nonrefundable" fee, but our use of that term must be viewed in light of the fact that Formal

Opinion 186 had yet to be withdrawn, and the prevailing understanding at the time was that a fee had to be characterized as "nonrefundable" and "earned upon receipt" if the intent of the client and lawyer was that the lawyer would be able to deposit the fee directly into her operating account at the commencement of the representation. As we explained in our October 20, 2006 letter to Mr. Johnson, a copy of which is enclosed, "[o]ur defense of the 'nonrefundable fee' was not, in actuality, a defense of the untenable position that an attorney can invoke an absolute right to refuse to refund a fee simply by calling it 'nonrefundable.'" As we stated in 2003:

All fees must be reasonable, whether they are based upon hourly billing, event billing, a contingent basis, flat fee, or some other creative arrangement agreed to by the client and his counsel. Characterizing them as nonrefundable simply allows the attorney to deposit them into her business account immediately – whether the attorney will have to refund all or part of a fee to a client to comply with the Rules of Professional Conduct depends on the reasonableness of the fee when viewed in light of the work ultimately accomplished, taking into consideration the factors delineated at RPC 1.5(a), not solely on whether the fee has been characterized as nonrefundable in the agreement signed by the parties at the commencement of the relationship.

We clarified our position further in our letter to Mr. Johnson:

We understand that the primary question the TARRTF must answer is whether Washington lawyers and their clients can agree that a fee paid in advance of the lawyer's performance of the contracted services shall become the lawyer's property immediately upon receipt, subject to the reasonableness requirement that may result in the lawyer having to refund a portion or all of the fee if, for example, the lawyer fails to perform the services for which she was retained or the client elects to terminate the relationship before completion of the agreed scope of the representation. It is WACDL's position that such an agreement does not inherently violate the lawyer's ethical and fiduciary obligations to her client. In exchange for the consideration paid in advance to the lawyer, the client receives the benefit of the lawyer's promise to perform the agreed-upon services. If the lawyer becomes unable, for whatever reason, to perform the services to completion and in accordance with reasonable standards, she will be deemed to have breached the contract, and the client will be entitled to a refund.

Additional refinements of our position are reflected in our Board's unanimous support of the TARRTF proposal. We believe that prohibiting lawyers from characterizing fees as "nonrefundable," "minimum," or "earned upon receipt" promotes the objective of eliminating confusion that may contribute to improper handling of flat fees. We also believe the requirement of written fee agreements that include the recommended disclosures would provide further clarity for the attorney and additional protection for the client.

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The submitted proposal is a well-considered solution to the ethical dilemmas presented to the TARRTF, and one that ensures that clients and lawyers remain free to negotiate fee arrangements beneficial to each, while reinforcing the attorney's fiduciary duty to the client. For these reasons, we encourage the Board of Governors to adopt the proposal as written.

Sincerely,

A handwritten signature in black ink that reads "Kevin J. Curtis". The signature is written in a cursive style with a large, stylized initial "K".

Kevin Curtis
President

Enclosures

cc: Mark Johnson, Chair, Trust Account Responsibilities and Retainers Task Force