Faulk, Camilla

From: Joel Green [j.g.green@comcast.net]
Sent: Monday, April 28, 2008 11:12 PM
To: Faulk, Camilla
Subject: Comment re Proposed Rules RPC 1.5 and 1.15

To: The Clerk of the Washington State Supreme Court

The proposed changes to Rules 1.5 and 1.15A are unnecessary and go far beyond what is required under the *DeRuiz* decision. In fact, no change in the Rules is required. *DeRuiz* clarified that a "flat fee" for legal services to be performed in the future is not a "retainer", which is earned upon receipt. Therefore, a flat fee for future work is an "advance fee deposit", which must be placed in the lawyer's general account. DeRuiz's fee agreement was an effort to flout the requirement to place an unearned fee into the lawyer's trust account, through the use of language in the fee agreement applicable only to a true retainer. The *DeRuiz* decision did not call into question the right of a lawyer to have a true retainer be deemed nonrefundable, but simply negated the right of a lawyer to call a flat fee for future services deemed earned upon receipt and nonrefundable because a flat fee is really an advance fee deposit and not a true retainer, and, therefore, is subject to refund under RPC 1.16(d).

Nothing could be simpler. Yet, the proposed Rule changes needlessly create an unworkable fiction regarding a lawyer's "right" to deposit a portion of an unearned flat fee into the general account, when the current Rules simply do not allow that. The proposed Rule changes also create a new species of "fee" in an attempt to find some middle ground between a retainer and an advance fee deposit for the flat fee. However, no such middle ground exists and none should be created. A fee paid in advance of any work is either a true retainer, which must be placed in the general account because it is earned upon receipt and if reasonable at the time of the agreement is also nonrefundable, or else the fee paid is an advance fee deposit, which must be placed in the trust account and can only be earned through completion of some work.

Nothing as complicated as the proposed Rule changes is required. If an attorney wants a portion of a flat fee to be a true retainer, then two fee agreements should be required, so that the true retainer is placed in the general account, and the unearned flat fee is place in the trust account.

Despite the length of time and effort that the committee put into the proposed Rule changes, the entire proposal is nothing more than a kneejerk reaction to a situation that does not require a remedy. The proposal addresses issues that the *DeRuiz* decision never contemplated, such as requiring a written fee agreement for a retainer or a flat fee. The proposed Rule changes also negate the long-standing right of an attorney to charge a nonrefundable retainer, which this Court has previously recognized as being permitted under the Rules of Professional Conduct and well as under the predecessor Code of Professional Responsibility.

The proposed Rule also makes retainers subject to refund, which is a new twist and negates the meaning of "earned upon receipt". RPC 1.5(a) already subjects a retainer to a reasonableness standard. A client either binds an attorney for future services or does not. The retainer is negotiated between the parties, and should only be subject to a reasonableness standard at the time of the agreement, but not at some later point in time. Once agreed to and paid, the retainer should never be refunded or subject to a later reasonableness standard. Otherwise, it is simply another specie of an advance fee deposit. A client who changes his or her mind after negotiating a retainer has already had the full benefit of the bargain, and the attorney need only make him or herself available for the period of time that the retainer was intended to cover, regardless of whether or not the client ever uses the attorney's services.

The conclusion of the TARRTF was that the proposed amendments would provide "clear guidance on the trust account treatment of advance fee payments", yet the proposal does nothing of the sort and creates a potential nightmare. The existing rules and this Court have already given sufficient guidance to attorneys, which obviates the need for any Rule changes: (1) A **retainer** is a fee, which a client pays when he retains an attorney to act for him, and thereby prevents him from acting for his adversary. Black's Law Dictionary 1479 (4th rev. ed. 1968); see Right of attorney to retaining fee, Annot., 21 A.L.R. 1442. This payment is earned upon receipt and is nonrefundable. (2) A flat fee that is intended to cover future work is simply an advance fee deposit, must be placed in the lawyer's trust account until earned, and any unearned portion must be returned to the client, under RPC 1.16(d), which applies only to advance payments and not to retainers. (3) An attorney should carefully and clearly construct fee agreements to adequately disclose the nature of the fee and the client's responsibility regarding payment. (4) Written fee agreements are not required. (5) Fee disputes concerning the reasonableness of an advance fee and whether the attorney earned the fee, in the absence of misconduct, are properly resolved in civil proceedings under a theory of *quantum meruit*, where the court hears expert witnesses on both sides to determine, by a preponderance of the evidence, the services performed by the attorney and the reasonable value of the services.

In conclusion, I cannot help but think that the acronym TARRTF must be pronounced the same as Moliere's character, Tartuffe: full of zeal and fervor, the committee has created a proposal that is contradictory, unworkable, changes long-standing law, does nothing to protect the public, makes a simple case overly complex, and is "evil through and through".

Thank you,

Joel Green

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