Faulk, Camilla

From: Alison Holcomb [holcomb@hq.aclu-wa.org]
Sent: Wednesday, April 23, 2008 12:47 PM
To: Faulk, Camilla
Cc: teresa@wacdl.org; Kevin J. Curtis
Subject: WACDL Comment re: Proposed Changes to RPC 1.5 - Fees
Attachments: LCurtis - WSBA BOG - 071607.pdf

Hello. I served as the WACDL liaison to the WSBA Trust Account Responsibilities and Retainers Task Force and am writing to request that the attached letter from WACDL's President to the WSBA Board of Governors be submitted to the Court and posted on line with the other Comments on the proposed changes to RPC 1.5.

Thank you.

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WACDL Washington Association of Criminal Defense Lawyers

Kevin Curtis
President

Teresa Mathis
Executive Director

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Opinion 186 had yet to be withdrawn, and the prevailing understanding at the time was that a fee had to be characterized as "nonrefundable" and "earned upon receipt" if the intent of the client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,

Kevin Curtis
President

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

Faulk, Camilla

From: Alison Holcomb [holcomb@hq.aclu-wa.org]
Sent: Wednesday, April 23, 2008 1:18 PM
To: Faulk, Camilla
Cc: teresa@wacdl.org; Kevin J. Curtis
Subject: WACDL Comment - Enclosures to Mr. Curtis' Letter
Attachments: LLee - Johnson - 102006.pdf; LWACDL BOG - Seidel - 120603.pdf

Dear Ms. Faulk,

I just realized that it would probably be helpful for the Court to receive copies of the enclosures referenced in Mr. Curtis' letter, attached to my previous e-mail. I have attached both of those enclosures to this message.

If the enclosures could be posted along with Mr. Curtis' letter in the Comments to the proposed changes to RPC 1.5, we would greatly appreciate it.

Again, thank you.

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WACDL Washington Association of Criminal Defense Lawyers

Amanda E. Lee
President

Teresa Mathis
Executive Director

October 20, 2006

Sent Via E-mail, Fax, and U.S. Mail

Mark A. Johnson, Esq.
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701 Fifth Avenue, Suite 7200
Seattle, Washington 98104-7042

Re: *WSBA Trust Account Responsibilities and Retainers Task Force; Proposal for New RPC 1.5(f)*

Dear Mr. Johnson:

The Washington Association of Criminal Defense Lawyers thanks you for inviting a representative from our organization to participate in the important work of the WSBA Trust Account Responsibilities and Retainers Task Force (TARRTF).

We also appreciate your careful consideration of the issues presented and your proactive development of a proposal for addressing them. Your work greatly simplified ours. WACDL convened its own task force to advise our Board of Governors on the position the organization should take on the questions being considered by the TARRTF. After reviewing the TARRTF materials and soliciting input from our membership, our task force recommended that WACDL support the adoption of your Draft Amendment to Rule 1.5 [*Chair's Discussion Draft, June 5, 2006*] with some minor changes. Our Board unanimously agreed.

Proposed Changes

We propose the following amendments to your Discussion Draft:

- Subparagraph (1). Insert a comma between "client" and "and" in the second line.
- Subparagraph (2). Delete "fixed, flat or minimum" as it is not necessary to limit the world of possible fee arrangements to which this subparagraph might apply.
- Subparagraph (2). Insert a comma between "representation" and "with."

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- Subparagraph (2). Insert "the contemplated" between "with" and "services" for increased clarity.
- Subparagraph (2). Insert "the client and the lawyer may agree that" immediately before "the funds become the property of . . ."
- Subparagraph (2). Substitute "shall" for "need."
- Subparagraph (3). Insert a comma after "earned" and replace all of the language that follows with "subject to the requirements of RPC 1.15A(h)(3)."
- Subparagraph (5). Delete "fixed, flat or minimum," the comma after the first "fee," and "or a fee drawn from an advanced deposit." RPC 1.15A(g) establishes the lawyer's duties in the case of a fee dispute arising from a fee drawn from an advanced deposit, such deposit being client property held in trust.
- Subparagraph (5). Insert "for services to be performed in the future, that they agree is to be considered the lawyer's property immediately upon receipt," immediately after "fee."
- Subparagraph (5). Substitute "is to be refunded" for "to be unearned." A lawyer may agree to refund part or all of a fee, even when a reasonable person would conclude he had earned it, in order to resolve the matter quickly.
- Subparagraph (5). Substitute "an amount equal to" for "the amount representing" to clarify that it is understood that the funds being deposited into the trust account likely are not the same funds previously provided by the client.
- Subparagraph (6) [new]. "Any fee agreement providing that a client's prepaid fee for services to be rendered in the future becomes the lawyer's property immediately upon receipt, must be in writing."

We have enclosed a revised draft RPC 1.5(f) that incorporates these proposed changes.

Reasoning

The reasons underlying WACDL's position are set forth in the December 6, 2003 letter our Board submitted to the Ethics 2003 Fees Subcommittee ("WACDL Letter"), a copy of which is included in the TARRTF materials at pp. 283-89. In reviewing that letter, it is important to remember that it was written before the WSBA BOG withdrew Formal Opinion 186, at a time when our members, along with the rest of the Washington State Bar, believed that fee payments had to be labeled 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. Our 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."

> 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.

WACDL Letter at 5 (p. 287 of the TARRTF materials).

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 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, or simply fails, 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.

We thank you and the other members of the Trust Account Responsibilities and Retainers Task Force for your consideration of our recommendation.

Sincerely,

Amanda Lee
President

Enclosure
Cc: Douglas J. Ende, Esq.

Rule 1.5. Fees

(f) In addition to being subject to the provisions of Rule 1.5 (a)-(e), payment of fees in advance of services shall be subject to the following rules:

(1) When the client pays the lawyer a fee to retain the lawyer's general availability to the client, and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer's operating account.

(2) When the client pays the lawyer all or part of a fee for particular representation, with the contemplated services to be rendered in the future, the client and the lawyer may agree that the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds shall not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.

(3) When the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may transfer these funds as fees are earned, subject to the requirements of RPC 1.15A(h)(3).

(4) When the client pays the lawyer an advance deposit to be used for costs and expenses, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may expend these funds as costs and expenses accrue, without further authorization from the client for each expenditure, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(5) When the client pays the lawyer a fee for services to be performed in the future, that they agree is to be considered the lawyer's property immediately upon receipt, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client that portion of the fee, if any, that the lawyer and the client agree is to be refunded. The lawyer shall deposit into his or her trust account an amount equal to that portion of the fee that a reasonably prudent lawyer would consider to be reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer's contentions. As in any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Washington State Bar Association Fee Arbitration Program.

(6) Any fee agreement providing that a client's prepaid fee for services to be rendered in the future becomes the lawyer's property immediately upon receipt, must be in writing.

WACDL Washington Association of Criminal Defense Lawyers

Roger A. Hunko
President

Teresa Mathis
cutive Director

December 6, 2003

Sent Via Facsimile
and U.S. Mail

Anne I. Seidel, Esq.
Senior Disciplinary Counsel
Washington State Bar Association
2101 Fourth Avenue, Suite 400
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Re: *Ethics 2003 Fees Subcommittee – Nonrefundable fees*

Dear Anne:

Thank you again for inviting the comments of the Washington Association of Criminal Defense Lawyers for consideration by the Ethics 2003 Fees Subcommittee before it makes its recommendations to the full WSBA Ethics 2003 Committee. Because this issue is of great importance to our members, WACDL formed a task force to evaluate and respond to your proposal on nonrefundable fees. The final report of the WACDL task force, endorsed by the WACDL Board of Governors, is set forth below. On behalf of its membership, the WACDL Board of Governors thanks you and the other members of the Fee Subcommittee for your careful consideration of our concerns.

Should Washington Deviate from the ABA Model Rules of Professional Conduct on This Issue?

Preliminarily, we note that the Ethics 2000 Amendments to Model Rule of Professional Conduct 1.5 do not include the Delaware approach of banning nonrefundable fees as a practical matter. Because of the wide use of nonrefundable fees, not only in Washington, but in other jurisdictions' criminal practices, and the laudable goal of the Ethics 2003 Committee in seeking to make Washington Rules consistent with the Model Rules wherever possible, WACDL strongly urges the Committee to reject the Delaware deviation from the ABA Model Rules and instead to retain the ABA Rule as written, which is silent as to the question of nonrefundable fees.

While fee agreements may vary substantially from one part of the country to another, there is no reason for Washington to be one of a very small number of states to outlaw nonrefundable fees in criminal practice. The ABA model form of RPC 1.5 is more than sufficient to set out the disciplinary limits to fee arrangements. The ABA has intentionally chosen to leave substantial aspects of the details of fee practice to the general requirements of MRPC 1.5, leaving lawyers and clients free to determine the form of fees and methods of payment which are most convenient to the attorney and the client. The market place is more than adequate to address form and method of payment, particularly with respect to a practice that is as widespread as is the nonrefundable fee in criminal cases.

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Before Washington abandons its laudable policy of uniformity with the Model Rules, the Committee should carefully consider whether there is a compelling need to deviate from the majority position across the country by adopting the Delaware Rule, which is virtually unique in its approach to nonrefundable fees. Rather than simply embrace this minority position, Washington should adopt the ABA Model Rule as written while also exploring whether the minority of jurisdictions that have attempted to regulate nonrefundable fee agreements have experienced a substantial diminution in Bar grievances arising from fee disputes. WACDL suspects that the number of such grievances is small to begin with and that banning nonrefundable fees will not, over a period of years, result in a drop in the complaints about fees generally in Delaware and other minority jurisdictions. There will always be complaints about whether the fee is reasonable or earned regardless of whether the fee is nonrefundable.

The Subcommittee's Proposed RPC 1.5(f) is Especially Problematic for Criminal Defense Practitioners

Disallowing nonrefundable fees outright would require attorneys to place fees in trust accounts and draw against them as they are "earned." The comments accompanying Delaware's rule clearly contemplate that whether a fee has been "earned" should be determined according to time spent on the case (hourly billing) or tasks accomplished (event billing). However, many criminal defense lawyers employ a flat fee billing system. Flat fee billing is advantageous to our clients because it gives them certainty – when literally just about everything else in their lives is uncertain – about the cost of their representation, regardless of the hours, court appearances, or motions practice required. It also eliminates the arbitrary differences in fees that arise under an hourly billing system from crowded court dockets and having a last name that begins with a "Z" rather than an "A." Since criminal defense clients and attorneys are likely to spend more time in courtrooms than their civil counterparts, the increases in hourly fees caused by our crowded courtrooms impacts our clients more heavily. Furthermore, most criminal defense attorneys are solo or small firm practitioners, and the flat fee system simplifies billing administration and reduces overhead expense, resulting in additional savings for our clients who tend not to have the financial resources of corporate clients.

More importantly, the flat fee billing system allows criminal defense attorneys to provide the essential right of counsel to scores of clients who do not qualify for appointed counsel but cannot afford the real cost of defending their cases that hourly billing would reflect. An informal survey of our members confirmed what many of us already knew personally to be true: most flat fees charged by criminal defense attorneys are well below the market value of their services when billed at an hourly rate. Moreover, criminal defense lawyers, unlike civil practitioners, cannot withdraw from representation without the court's consent once a trial date has been set (CrR 3.1(e), CrRLJ 3.1(e)) or a Notice of Appearance has been entered on an appeal (RAP 18.3(a)). Many jurisdictions set the trial date at the client's arraignment, and many courts will not allow an attorney to withdraw on the basis of unpaid fees, especially when the client is in custody and on a shortened trial calendar. The flat fee agreement generally will compensate counsel adequately for the work necessary to resolve the case consistently with the desires of the client, while providing the client with a level of certainty about the cost of defense. In this fashion, highly skilled, talented and experienced criminal defense lawyers are able to continue providing excellent representation to the criminally accused who are not indigent but are by no means wealthy. For these reasons and others, we feel it is important to exercise extreme caution in adopting any new ethics rules relating to fees that might discourage the use of flat fee billing.

The draft RPC 1.5(f) under consideration by the Fee Subcommittee threatens the ability of an attorney to employ flat fee billing because it does not allow the attorney to place the fee in his or her general business account, to finance representation throughout the duration of the case, at the commencement of representation. If the fee truly is a single flat fee, the proposed rule seems to suggest that the attorney would not be able to collect it until representation concludes (and the entire fee has been earned). This is financially unworkable for many attorneys, especially when some cases may be continued several times, over several months, before concluding. Furthermore, withholding payment until the conclusion of the case creates a conflict of interest between attorney and client by giving the attorney a financial incentive to resolve the case as soon as possible. Though it may be in the client's interest to proceed to trial or to request a continuance, to do so under your proposal would delay payment of the entire fee, often for a significant period of time. Attorneys should never have a financial incentive to encourage a guilty plea or rush a case to trial without adequate preparation.

The Delaware Comments Unnecessarily and Inappropriately Micromanage the Relationship Between the Attorney and Client

The comments to Delaware RPC 1.5(f) applicable to advance fees should not be adopted by the Washington State Bar Association. The commentary reflects an unrealistic understanding of how legal work typically is performed by criminal defense lawyers. It imposes an unnecessary requirement that funds be held in an attorney's trust account in all instances until advance fees are earned. It places an undue emphasis on the hourly rate as a reference point, which often is an unworkable mechanism in criminal cases, particularly state court cases, which involve an uneven flow of events. The commentary sets forth benchmarks (fees greater than or less than $2,500.00), which are arbitrary and unworkable. In suggesting a method of determining fees based upon given events in a period of representation, the commentary invites an awkward measurement system that often bears no relationship to the flow of a particular case. Finally, in implying that flat fees cannot be "earned" and therefore transferred from a trust account to an office account until all work is completed, the commentary ignores the reality that in many criminal cases, the client runs out of money before the trial or sentencing, measured at an hourly rate for legal work, can be completed. In short, the proposed commentary to the Delaware RPC 1.5 is unrealistic, unreasonably bureaucratic and should be rejected.

WACDL recognizes that any fees charged by a criminal defense lawyer must be reasonable when considered in light of the factors set forth in RPC 1.5(a). A lawyer who takes an advance fee and does not perform reasonable services for a client in return for that fee acts at his or her peril.

Some criminal defense lawyers do receive money in trust and only transfer it to their general account after fees have been earned according to a pre-determined basis—either an hourly rate or some other benchmark mutually determined between client and lawyer. But not all clients prefer these methods. Many clients desire the certainty of paying a flat fee, with the knowledge that whatever work is required to be done by the lawyer, will be performed for that fee regardless of the time and effort involved.

While many lawyers do use internal benchmarks unique to a particular case or jurisdiction to measure the reasonableness of fees for particular stages of work, this is

often largely the function of a particular lawyer's style and practice or the idiosyncrasies of local courts. Some lawyers, for example, file few motions, but achieve great results for their clients, either through negotiation or trial preparation that does not require generation of motions. To include benchmarks, for example, that would include motions or be pegged to motions' deadlines, would only invite lawyers to perform work simply to justify their fees or to take reach the next benchmark.

Some aspects of criminal practice are very difficult to value, for example, matters relating to securing a client's release on bail. Almost all criminal lawyers would agree that more effective representation can occur if a client is released from custody, yet bail hearings are often inefficiently conducted proceedings and involve periods of waiting time and other aspects that are difficult to roll into an hourly rate calculated bill. It is unworkable to build in gauges for particular stages of work that may vary widely in time and sophistication of effort required by the lawyer. Many criminal defense lawyers and clients prefer the certainty of a fee structure where the fee is measured against the overall project to be performed.

Imposing a benchmark keyed to whether or not a client proceeds to trial adds greater pressure and additional potential ethical conflicts in an area that is already difficult for both client and criminal defense lawyer. Both client and lawyer need to have a high degree of confidence in the pre-trial negotiation stage that the lawyer will serve the client's best interests regardless of whether or not the decision is to go to trial or plead guilty. But mandating that a lawyer can only receive the remaining balance of a lump sum advance deposit fee if the client goes to trial complicates the situation greatly.

WACDL understands that in Washington State very few bar complaints relating to advance fees involve criminal defense lawyers. We believe that most criminal defense lawyers act responsibly and only charge fees that are understood to be reasonable and subject to the requirement of reasonableness. We believe that the commentary that accompanies the Delaware RPC 1.5 is unworkable, would be unduly bureaucratic, would greatly complicate the practice of criminal law in this state, and is simply not needed.

If the Fee Subcommittee Feels It Must Adopt a New RPC 1.5(f), We Propose Some Changes

We urge the Fee Subcommittee to adopt the ABA Model RPC 1.5 rather than Delaware's minority position. If, however, the Subcommittee ultimately decides that subparagraph (f) is a desirable addition to our RPC 1.5, we strongly urge some changes, both to the rule being considered by the Subcommittee and the proposed commentary. We understand the wording of the proposed RPC 1.5(f) to be as follows:

> (f) A lawyer may require a client to pay all or part of the fee in advance of the lawyer undertaking or completing the representation, but only if
>
> (1) the lawyer provides the client with a written statement that the fee is refundable if it is not earned;
>
> (2) the written statement states the basis under which fees are considered to have been be earned, whether in whole or in part; and
>
> (3) the fee is refunded if it is not reasonable under paragraph (a).

As a preliminary matter, we agree wholeheartedly that written statements explaining the basis for a fee are always a good idea. However, we believe that prohibiting the use of nonrefundable fees altogether is unnecessary. 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. Accordingly, we would propose the following alternative language if the Subcommittee finds the addition of a subparagraph (f) necessary:

> A lawyer may require a client to pay a fee in advance of the lawyer undertaking or completing the representation. Such a fee may be characterized as nonrefundable only if
>
> (1) the lawyer provides the client with a written statement that the fee is not refundable; and
>
> (2) the fee is reasonable under paragraph (a).

We would also urge that the Subcommittee adopt the following commentary in lieu of the Delaware comments:

> [1] A nonrefundable fee is a flat fee for representation on a legal matter or some portion of a legal matter. Flat fees are based upon factors independent of the actual number of hours involved in a representation. Flat fees provide certainty to clients with regard to costs of legal services while allowing attorneys to be paid a fair amount for their services. Such a fee may properly be characterized as nonrefundable if, at the time the fee is agreed upon, it is the expectation of both the lawyer and client that the fee will not be refunded regardless of outcome or time spent on the matter. As with all matters, the lawyer is required to provide diligent and competent representation. If the lawyer fails to act with the diligence and competence required by these rules, the lawyer should return the entire fee or a portion thereof to the client even though the fee was characterized as nonrefundable.
>
> [2] The fact that a given fee is not refundable must be clearly communicated to the client in writing.
>
> [3] Although a lawyer and client may agree on a nonrefundable fee, the fee must still be reasonable under RPC 1.5(a). A lawyer should evaluate the reasonableness of a nonrefundable fee not only at the time the fee agreement is made but also at the conclusion of the matter. If a fee was reasonable at the outset of the representation but becomes unreasonable due to subsequent developments in the representation, a lawyer should return the fee or a portion thereof as necessary to bring the fee charged into compliance with RPC 1.5(a).

It was our specific purpose to clarify that a nonrefundable fee may need to be refunded regardless of its characterization if the quality of the representation ultimately renders the fee unreasonable. While we believe that the current RPC 1.5(a) already establishes this rule, it seems appropriate to add this specific language if a new RPC 1.5(f) that tracks our proposed language is adopted.

Again, thank you for your consideration of our concerns. We welcome any questions you or other members of the Fee Subcommittee may have about the issues we have raised.

Sincerely,

Roger Hunko
President

Absent
Scott Engelhard
President Elect

Dan Fessler
Vice-President East

Amanda Lee
Vice-President West

Bill Bowman
Secretary

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WACDL Washington Association of Criminal Defense Lawyers

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December 6, 2003

Sent Via Facsimile
and U.S. Mail

Anne I. Seidel, Esq.
Senior Disciplinary Counsel
Washington State Bar Association
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Re: *Ethics 2003 Fees Subcommittee – Nonrefundable fees*

Dear Anne:

Thank you again for inviting the comments of the Washington Association of Criminal Defense Lawyers for consideration by the Ethics 2003 Fees Subcommittee before it makes its recommendations to the full WSBA Ethics 2003 Committee. Because this issue is of great importance to our members, WACDL formed a task force to evaluate and respond to your proposal on nonrefundable fees. The final report of the WACDL task force, endorsed by the WACDL Board of Governors, is set forth below. On behalf of its membership, the WACDL Board of Governors thanks you and the other members of the Fee Subcommittee for your careful consideration of our concerns.

Should Washington Deviate from the ABA Model Rules of Professional Conduct on This Issue?

Preliminarily, we note that the Ethics 2000 Amendments to Model Rule of Professional Conduct 1.5 do not include the Delaware approach of banning nonrefundable fees as a practical matter. Because of the wide use of nonrefundable fees, not only in Washington, but in other jurisdictions' criminal practices, and the laudable goal of the Ethics 2003 Committee in seeking to make Washington Rules consistent with the Model Rules wherever possible, WACDL strongly urges the Committee to reject the Delaware deviation from the ABA Model Rules and instead to retain the ABA Rule as written, which is silent as to the question of nonrefundable fees.

While fee agreements may vary substantially from one part of the country to another, there is no reason for Washington to be one of a very small number of states to outlaw nonrefundable fees in criminal practice. The ABA model form of RPC 1.5 is more than sufficient to set out the disciplinary limits to fee arrangements. The ABA has intentionally chosen to leave substantial aspects of the details of fee practice to the general requirements of MRPC 1.5, leaving lawyers and clients free to determine the form of fees and methods of payment which are most convenient to the attorney and the client. The market place is more than adequate to address form and method of payment, particularly with respect to a practice that is as widespread as is the nonrefundable fee in criminal cases.

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Before Washington abandons its laudable policy of uniformity with the Model Rules, the Committee should carefully consider whether there is a compelling need to deviate from the majority position across the country by adopting the Delaware Rule, which is virtually unique in its approach to nonrefundable fees. Rather than simply embrace this minority position, Washington should adopt the ABA Model Rule as written while also exploring whether the minority of jurisdictions that have attempted to regulate nonrefundable fee agreements have experienced a substantial diminution in Bar grievances arising from fee disputes. WACDL suspects that the number of such grievances is small to begin with and that banning nonrefundable fees will not, over a period of years, result in a drop in the complaints about fees generally in Delaware and other minority jurisdictions. There will always be complaints about whether the fee is reasonable or earned regardless of whether the fee is nonrefundable.

The Subcommittee's Proposed RPC 1.5(f) Is Especially Problematic for Criminal Defense Practitioners

Disallowing nonrefundable fees outright would require attorneys to place fees in trust accounts and draw against them as they are "earned." The comments accompanying Delaware's rule clearly contemplate that whether a fee has been "earned" should be determined according to time spent on the case (hourly billing) or tasks accomplished (event billing). However, many criminal defense lawyers employ a flat fee billing system. Flat fee billing is advantageous to our clients because it gives them certainty – when literally just about everything else in their lives is uncertain – about the cost of their representation, regardless of the hours, court appearances, or motions practice required. It also eliminates the arbitrary differences in fees that arise under an hourly billing system from crowded court dockets and having a last name that begins with a "Z" rather than an "A." Since criminal defense clients and attorneys are likely to spend more time in courtrooms than their civil counterparts, the increases in hourly fees caused by our crowded courtrooms impacts our clients more heavily. Furthermore, most criminal defense attorneys are solo or small firm practitioners, and the flat fee system simplifies billing administration and reduces overhead expense, resulting in additional savings for our clients who tend not to have the financial resources of corporate clients.

More importantly, the flat fee billing system allows criminal defense attorneys to provide the essential right of counsel to scores of clients who do not qualify for appointed counsel but cannot afford the real cost of defending their cases that hourly billing would reflect. An informal survey of our members confirmed what many of us already knew personally to be true: most flat fees charged by criminal defense attorneys are well below the market value of their services when billed at an hourly rate. Moreover, criminal defense lawyers, unlike civil practitioners, cannot withdraw from representation without the court's consent once a trial date has been set (CrR 3.1(e), CrRLJ 3.1(e)) or a Notice of Appearance has been entered on an appeal (RAP 18.3(a)). Many jurisdictions set the trial date at the client's arraignment, and many courts will not allow an attorney to withdraw on the basis of unpaid fees, especially when the client is in custody and on a shortened trial calendar. The flat fee agreement generally will compensate counsel adequately for the work necessary to resolve the case consistently with the desires of the client, while providing the client with a level of certainty about the cost of defense. In this fashion, highly skilled, talented and experienced criminal defense lawyers are able to continue providing excellent representation to the criminally accused who are not indigent but are by no means wealthy. For these reasons and others, we feel it is important to exercise extreme caution in adopting any new ethics rules relating to fees that might discourage the use of flat fee billing.

The draft RPC 1.5(f) under consideration by the Fee Subcommittee threatens the ability of an attorney to employ flat fee billing because it does not allow the attorney to place the fee in his or her general business account, to finance representation throughout the duration of the case, at the commencement of representation. If the fee truly is a single flat fee, the proposed rule seems to suggest that the attorney would not be able to collect it until representation concludes (and the entire fee has been earned). This is financially unworkable for many attorneys, especially when some cases may be continued several times, over several months, before concluding. Furthermore, withholding payment until the conclusion of the case creates a conflict of interest between attorney and client by giving the attorney a financial incentive to resolve the case as soon as possible. Though it may be in the client's interest to proceed to trial or to request a continuance, to do so under your proposal would delay payment of the entire fee, often for a significant period of time. Attorneys should never have a financial incentive to encourage a guilty plea or rush a case to trial without adequate preparation.

The Delaware Comments Unnecessarily and Inappropriately Micromanage the Relationship Between the Attorney and Client

The comments to Delaware RPC 1.5(f) applicable to advance fees should not be adopted by the Washington State Bar Association. The commentary reflects an unrealistic understanding of how legal work typically is performed by criminal defense lawyers. It imposes an unnecessary requirement that funds be held in an attorney's trust account in all instances until advance fees are earned. It places an undue emphasis on the hourly rate as a reference point, which often is an unworkable mechanism in criminal cases, particularly state court cases, which involve an uneven flow of events. The commentary sets forth benchmarks (fees greater than or less than $2,500.00), which are arbitrary and unworkable. In suggesting a method of determining fees based upon given events in a period of representation, the commentary invites an awkward measurement system that often bears no relationship to the flow of a particular case. Finally, in implying that flat fees cannot be "earned" and therefore transferred from a trust account to an office account until all work is completed, the commentary ignores the reality that in many criminal cases, the client runs out of money before the trial or sentencing, measured at an hourly rate for legal work, can be completed. In short, the proposed commentary to the Delaware RPC 1.5 is unrealistic, unreasonably bureaucratic and should be rejected.

WACDL recognizes that any fees charged by a criminal defense lawyer must be reasonable when considered in light of the factors set forth in RPC 1.5(a). A lawyer who takes an advance fee and does not perform reasonable services for a client in return for that fee acts at his or her peril.

Some criminal defense lawyers do receive money in trust and only transfer it to their general account after fees have been earned according to a pre-determined basis—either an hourly rate or some other benchmark mutually determined between client and lawyer. But not all clients prefer these methods. Many clients desire the certainty of paying a flat fee, with the knowledge that whatever work is required to be done by the lawyer, will be performed for that fee regardless of the time and effort involved.

While many lawyers do use internal benchmarks unique to a particular case or jurisdiction to measure the reasonableness of fees for particular stages of work, this is.

often largely the function of a particular lawyer's style and practice or the idiosyncrasies of local courts. Some lawyers, for example, file few motions, but achieve great results for their clients, either through negotiation or trial preparation that does not require generation of motions. To include benchmarks, for example, that would include motions or be pegged to motions' deadlines, would only invite lawyers to perform work simply to justify their fees or to take reach the next benchmark.

Some aspects of criminal practice are very difficult to value, for example, matters relating to securing a client's release on bail. Almost all criminal lawyers would agree that more effective representation can occur if a client is released from custody, yet bail hearings are often inefficiently conducted proceedings and involve periods of waiting time and other aspects that are difficult to roll into an hourly rate calculated bill. It is unworkable to build in gauges for particular stages of work that may vary widely in time and sophistication of effort required by the lawyer. Many criminal defense lawyers and clients prefer the certainty of a fee structure where the fee is measured against the overall project to be performed.

Imposing a benchmark keyed to whether or not a client proceeds to trial adds greater pressure and additional potential ethical conflicts in an area that is already difficult for both client and criminal defense lawyer. Both client and lawyer need to have a high degree of confidence in the pre-trial negotiation stage that the lawyer will serve the client's best interests regardless of whether or not the decision is to go to trial or plead guilty. But mandating that a lawyer can only receive the remaining balance of a lump sum advance deposit fee if the client goes to trial complicates the situation greatly.

WACDL understands that in Washington State very few bar complaints relating to advance fees involve criminal defense lawyers. We believe that most criminal defense lawyers act responsibly and only charge fees that are understood to be reasonable and subject to the requirement of reasonableness. We believe that the commentary that accompanies the Delaware RPC 1.5 is unworkable, would be unduly bureaucratic, would greatly complicate the practice of criminal law in this state, and is simply not needed.

If the Fee Subcommittee Feels It Must Adopt a New RPC 1.5(f), We Propose Some Changes

We urge the Fee Subcommittee to adopt the ABA Model RPC 1.5 rather than Delaware's minority position. If, however, the Subcommittee ultimately decides that subparagraph (f) is a desirable addition to our RPC 1.5, we strongly urge some changes, both to the rule being considered by the Subcommittee and the proposed commentary. We understand the wording of the proposed RPC 1.5(f) to be as follows:

> (f) A lawyer may require a client to pay all or part of the fee in advance of the lawyer undertaking or completing the representation, but only if
>
> (1) the lawyer provides the client with a written statement that the fee is refundable if it is not earned;
>
> (2) the written statement states the basis under which fees are considered to have been be earned, whether in whole or in part; and
>
> (3) the fee is refunded if it is not reasonable under paragraph (a).

As a preliminary matter, we agree wholeheartedly that written statements explaining the basis for a fee are always a good idea. However, we believe that prohibiting the use of nonrefundable fees altogether is unnecessary. 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. Accordingly, we would propose the following alternative language if the Subcommittee finds the addition of a subparagraph (f) necessary:

> A lawyer may require a client to pay a fee in advance of the lawyer undertaking or completing the representation. Such a fee may be characterized as nonrefundable only if
>
> (1) the lawyer provides the client with a written statement that the fee is not refundable; and
>
> (2) the fee is reasonable under paragraph (a).

We would also urge that the Subcommittee adopt the following commentary in lieu of the Delaware comments:

> [1] A nonrefundable fee is a flat fee for representation on a legal matter or some portion of a legal matter. Flat fees are based upon factors independent of the actual number of hours involved in a representation. Flat fees provide certainty to clients with regard to costs of legal services while allowing attorneys to be paid a fair amount for their services. Such a fee may properly be characterized as nonrefundable if, at the time the fee is agreed upon, it is the expectation of both the lawyer and client that the fee will not be refunded regardless of outcome or time spent on the matter. As with all matters, the lawyer is required to provide diligent and competent representation. If the lawyer fails to act with the diligence and competence required by these rules, the lawyer should return the entire fee or a portion thereof to the client even though the fee was characterized as nonrefundable.
>
> [2] The fact that a given fee is not refundable must be clearly communicated to the client in writing.
>
> [3] Although a lawyer and client may agree on a nonrefundable fee, the fee must still be reasonable under RPC 1.5(a). A lawyer should evaluate the reasonableness of a nonrefundable fee not only at the time the fee agreement is made but also at the conclusion of the matter. If a fee was reasonable at the outset of the representation but becomes unreasonable due to subsequent developments in the representation, a lawyer should return the fee or a portion thereof as necessary to bring the fee charged into compliance with RPC 1.5(a).

It was our specific purpose to clarify that a nonrefundable fee may need to be refunded regardless of its characterization if the quality of the representation ultimately renders the fee unreasonable. While we believe that the current RPC 1.5(a) already establishes this rule, it seems appropriate to add this specific language if a new RPC 1.5(f) that tracks our proposed language is adopted.

Again, thank you for your consideration of our concerns. We welcome any questions you or other members of the Fee Subcommittee may have about the issues we have raised.

Sincerely,

Roger Hunko
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President Elect

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Vice-President East

Amanda Lee
Vice-President West

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