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THORNTON & ALFORD, LLC

RICHARD C. STANLEY

OUR FILE NO.  
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November 21, 2017

Honorable Bernette Joshua Johnson  
Chief Justice, Louisiana Supreme Court  
400 Royal St., Suite 1190  
New Orleans, LA 70130-8101

Dear Chief Justice Johnson:

On May 19, 2017, you sent me a letter in my capacity as Chair of the Rules of Professional Conduct Committee advising that the Court did not believe that the then-proposed amendment to Rule 1.5(f)(2) presented an adequate solution to the ethical and practical problems noted by the Court. A copy of your letter of May 19, 2017 is attached hereto as Appendix A for your ready reference. In response to the Court's correspondence, I appointed a Subcommittee comprised of William M. Ross (Chair), Bobby J. Delise, Dennis W. Hennen, Charles B. Plattsmier, Joseph P. Raspanti, and Lauren McHugh Rocha, to consider further changes to Rule 1.5(f)(2). After extensive work, the Subcommittee presented the Rules of Professional Conduct Committee with four proposed draft rules to consider.

At its meeting on October 30, 2017, the Rules of Professional Conduct Committee debated the various proposals at length and voted to recommend a modified Rule 1.5 to the Court for its consideration. This modified rule is attached hereto as Appendix B, and presents our recommendation both in the form of a redline to existing Rule 1.5 and a clean copy of the new proposed rule. In general terms, the revisions sought to accomplish the following objectives:

- (1) Include a specific reference in the rule that any fee agreement by a lawyer that attempts to designate or treat a fee as "non-refundable" is expressly prohibited;
- (2) Include a requirement that both the scope of the representation and the basis or rate of the fee and expenses shall be set forth in a writing "approved" by the client (including work to be done on an hourly basis), and also requiring that any change in the basis or rate of the fee or the expenses shall be communicated to the client in writing within a reasonable time; and,
- (3) Include language that requires a fixed or minimum fee to be placed in the lawyer's trust account until the fee is earned, and requiring that such fixed or minimum fee agreement be set forth "with specificity in a writing signed by the client." (The proposed rule also contains language permitting the lawyer to, with the informed consent of the client, set "reasonable milestones occurring

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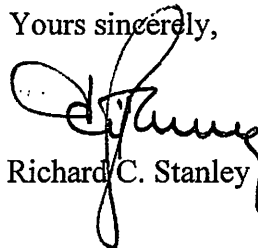
during the representation” to allow these funds to be transferred from the trust account to the operating account of the lawyer as the fees are “earned.”)

We acknowledge that our proposed revisions to Rule 1.5 include items that are beyond the specific directive of the Court in your correspondence of May 19, 2017. It was the consensus of the Committee, however, that the additional revisions proposed in Appendix B will achieve the Court’s overall objective of better protecting clients in connection with their fee agreements with their lawyers.

If you have any questions or concerns, please do not hesitate to contact me.

With kindest regards, I am

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R. Stanley', with a large, stylized flourish extending from the bottom of the signature.

Richard C. Stanley

RCS:pfl  
Enclosures

cc: Rules of Professional Conduct Committee Members  
Lauren McHugh Rocha  
Charles B. Plattsmier



# Supreme Court

STATE OF LOUISIANA  
400 ROYAL STREET  
SUITE 1190

New Orleans  
70130-8101

CHIEF JUSTICE  
BERNETTE JOSHUA JOHNSON  
JUDICIAL ADMINISTRATOR  
SANDRA A. VUJNOVICH

TELEPHONE (504) 310-2550  
FAX: (504) 310-2587

May 19, 2017

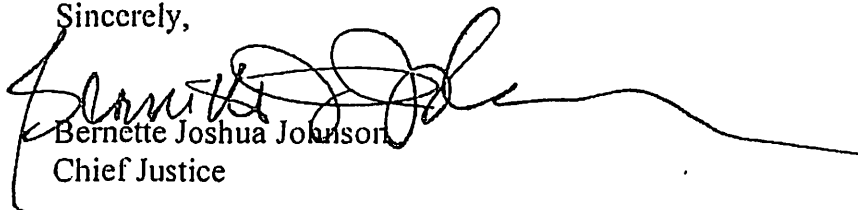
Mr. Richard C. Stanley  
Stanley, Reuter, Ross, Thornton & Alford, L.L.C.  
909 Poydras Street, Suite 2500  
New Orleans, LA 70112-4011

Dear Rick,

The Court recently considered a proposed amendment to Rule of Professional Conduct 1.5(f)(2), which was approved at the House of Delegates in Sandestin last year following input from the LSBA's Rules of Professional Conduct Committee. The proposed amendment was suggested to address the problems that arise when attorneys who charge flat fees immediately place the entirety of the fee in an operating account, rather than a trust account until fully earned. As you are aware, Rule 1.5(f)(2) currently permits this course of action, but clients are harmed in the unfortunate event that an attorney passes away prior to the completion of the matter. Many times, there are no funds available in the deceased attorney's estate to reimburse the client for the incomplete work.

While the Court appreciates the hard work the Rules of Professional Conduct Committee has done in proposing this amendment, we do not believe it presents an adequate solution to the problem presented. The Court is aware of the fact that many attorneys finance their practices through flat fees and the financial arrangement permitted by Rule 1.5(f)(2). We would like, however, for the Committee to continue its work on this issue and propose a solution that will better protect clients in the event the attorney is unable to complete the matter contracted for. The Justices and I would like the Committee to report directly to us regarding this matter.

Sincerely,



Bernette Joshua Johnson  
Chief Justice

**“Flat Fee Subcommittee – October 3 2017 - Version 3 – Redline” (as modified by RPCC 10-30/2017):**

**Rule 1.5. Fees**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. Any fee or amount for expenses that is designated or treated as “nonrefundable” is prohibited. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be ~~communicated to the client, preferably in a writing approved by the client,~~ before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client in writing within a reasonable time.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The contingency fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
- (2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

- (1) the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive;
- (2) the total fee is reasonable; and
- (3) each lawyer renders meaningful legal services for the client in the matter.

(f) Payment of fees, including 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 fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds ~~become~~ remain the property of the lawyer client and must, when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account until earned, but may be placed in the lawyer's operating account. A fixed fee or minimum fee agreement shall be set forth with specificity in a writing signed by the client. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The lawyer may, with the informed consent of the client, set reasonable milestones occurring during the representation to allow these funds to be transferred from the trust account to the operating account as fees are earned, without further authorization from the client for each transfer, but must render a periodic accounting in writing to the client for these funds as is reasonable under the circumstances.

(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 until earned. The lawyer may transfer these funds ~~as fees are earned~~ from the trust account to the operating account as fees are earned, without further authorization from the client for each transfer, but must render a periodic accounting in writing to the client for these funds as is reasonable under the circumstances.

(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 until costs and expenses are incurred. 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 in writing to the client for these funds as is reasonable under the circumstances.

(5) When the client pays the lawyer a ~~fixed fee, a minimum fee or a fee drawn from an advanced deposit~~, 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 the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion 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 to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.

**“Flat Fee Subcommittee – October 3 2017 - Version 3 – Redline” (as modified by RPCC 10-30/2017):**

**Rule 1.5. Fees**

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. Any fee or amount for expenses that is designated or treated as “nonrefundable” is prohibited. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;  
and
- (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be in a writing approved by the client, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client in writing within a reasonable time.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The contingency fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

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(5) When the client pays the lawyer a fee 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 the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion 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 to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.