

Resolution 2

**RESOLUTION PROPOSED BY THE
RULES OF PROFESSIONAL CONDUCT COMMITTEE
OF THE LOUISIANA STATE BAR ASSOCIATION**

WHEREAS, the LSBA Rules of Professional Conduct Committee (“Committee”) is charged as part of its mission, to monitor and evaluate developments in legal ethics and when appropriate to recommend changes to the Louisiana Rules of Professional Conduct; and

WHEREAS, the Committee is comprised of LSBA members from all geographic areas of the state and practice groups;

WHEREAS, the Committee was approached by the Louisiana Client Assistance Foundation, (“Foundation”) with a request to study the issues dealing with Rule 1.5(f)(2) and flat/fixed fees. See February 27th, 2015 letter from Frank X. Neuner, Jr., President Client Assistance Foundation, attached as Exhibit A.

WHEREAS, the Foundation and the affiliated Client Assistance Fund Committee’s mission is to protect the public and to maintain the integrity of the legal profession by reimbursing losses caused by the dishonest conduct of Louisiana lawyers practicing in the state.

WHEREAS, according to the Foundation, the Client Assistance Fund Committee has seen a marked increase in the claims concerning deceased attorneys and flat fees.

WHEREAS, the Foundation has paid claims equaling \$47,750.00 on 14 claims in 2015 on flat fee cases involving deceased attorneys.

WHEREAS, Rule of Professional Conduct 1.5(f)(2) states:

“When the client pays the lawyer all or part of a fixed fee or of a minimum fee for a particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer’s trust account, but may be placed in the lawyer’s operating account.”

WHEREAS, the Foundation has stated that it believes a number of these claims are the result of Rule 1.5(f)(2) which allows lawyers to accept fees for legal work and deposit them into their operating account rather than completely safeguard the funds in the trust account until earned.

WHEREAS, the Committee, in response to the Client Assistance Foundation request, appointed a “Flat Fee Subcommittee”, (Subcommittee) to review and study the issue of fixed/flat fees.

WHEREAS, the Subcommittee met on a number of occasions to study the issues involving flat fees in Louisiana and studied how flat fees are handled in all 50 states.

WHEREAS, the Subcommittee met with representatives of the LSBA Solo and Small Firm Section, the Criminal Law Section, and the Louisiana Association of Criminal Law

Attorneys Subcommittee on Flat Fees, as well as the LSBA President, Mark Cunningham (2015-2016) who all testified to the importance of flat/fixed fees to Louisiana lawyers.

WHEREAS, the Subcommittee, through its review process, understands the benefits of flat fees to both clients and attorneys in Louisiana and appreciates that requiring attorneys to place all flat fees in their trust account may be burdensome to both attorneys and clients in some respects.

WHEREAS the Subcommittee understands that there will be issues that may evolve concerning the aging of the LSBA attorney population, deceased attorneys with a predominantly flat fee practice, and a potential rise in claims to the LSBA Client Assistance Fund which has limited funding to respond to these claims.

WHEREAS, the Subcommittee elected not to require that all flat fees be placed into the attorney trust account until earned.

WHEREAS, the Subcommittee found that both attorneys and clients benefit from a written understanding of their fees, what account those fees will be placed and the scope of representation in flat fee matters.

WHEREAS, the Subcommittee believes, that in flat fee matters, that clients should be furnished a written fee agreement, with informed consent signed by the client, and that any such fee agreement should contain: (i) the scope of services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the funds will be used by the lawyer when paid and will not be placed in a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

WHEREAS, the Subcommittee believes that such written fee agreements would curtail attorney disciplinary complaints and assist clients in understanding that all fees must be reasonable, earned, and subject to refund if the fees are unearned.

WHEREAS, the Subcommittee believes the language in current Rule 1.5(f)2 indicating that "the funds become the property of the lawyer when paid" is confusing and misleading to both attorneys and clients.

WHEREAS, the Flat Fee Subcommittee furnished its recommendations to the Committee. After careful consideration, the Rules of Professional Committee recommends the following changes:

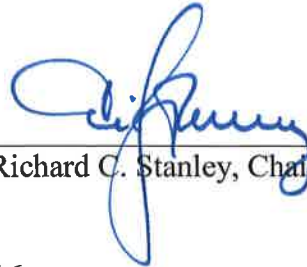
Rule 1.5(F)(2) – Adopt the Subcommittee change contained in "Exhibit B".

Attached and labeled "Exhibit C" is a redline version of the proposed rule change.

NOW THEREFORE BE IT RESOLVED THAT the LSBA House of Delegates approve the recommendations of the LSBA Rules of Professional Conduct Committee as set forth above.

NOW THEREFORE BE IT FURTHER RESOLVED THAT the LSBA House of Delegates respectfully refers these recommendations of the LSBA Rules of Professional Conduct Committee to the Supreme Court of Louisiana and recommends approval of same by the Court.

Respectfully submitted,
LSBA Rules of Professional Conduct Committee



Richard C. Stanley, Chair

This 6th day of May, 2016.

APPROVED
HOUSE OF DELEGATES
JUNE 9, 2016
DESTIN, FL

APPROVED
BOARD OF GOVERNORS
JUNE 10, 2016
DESTIN, FL

Exhibit A – February 27th, 2015, Frank X Neuner, Jr., Letter



Louisiana
State Bar
Association

Serving the Public. Serving the Profession.

Louisiana Client
Assistance Foundation

February 27, 2015

Mr. Joseph L. Shea, Jr.
President, Louisiana State Bar Association
401 Edwards Street, Suite 1000
Shreveport, LA 71101-5529

RE: LSBA Rule of Professional Conduct 1.5

Dear Larry:

I am writing on behalf of the Louisiana Client Assistance Foundation (LCAF) to request that the LSBA Rules of Professional Conduct Committee review and provide comment about RPC 1.5(f)(2) regarding flat/minimum fees going directly into the operating account as opposed to the trust account.

As you know, the LSBA Client Assistance Committee as well as the Louisiana Client Assistance Foundation's mission is to protect the public and to maintain the integrity of the legal profession by reimbursing, to the extent deemed appropriate, losses caused by the dishonest conduct of any licensed Louisiana lawyer practicing in this state. Unfortunately, the wording of Rule 1.5(f)(2) leads to difficulties when assessing the claims regarding deceased attorneys. The rule reads:

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 the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(2). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.

The LCAF has received a rash of claims recently from former clients of deceased lawyers who had taken flat fee assignments from those clients, but had failed to finish the work prior to their untimely death. At the current time the LCAF and the LSBA Client Assistance Fund Committee have 16 claims pending from former clients' of deceased lawyers and this constitutes 31% of the total claims pending with a potential claim value of \$103,150.00. Four claims were recently paid totaling \$5,200.00. In those cases there is a question as to whether or not the estate is solvent and can pay the clients, and in one particular case the heirs of the estate have told the clients they do not have any money to pay them and the client should look elsewhere for legal services. The Committee believes that these cases arise because of Rule of Professional Conduct 1.5(f)(2) which allows lawyers to accept flat fees for legal work and deposit them into their operating account rather than safeguard the funds in the trust account until earned.

February 27, 2015
Page 2

There is a question among the Client Assistance Fund Committee members as well the Board members of the LCAF as to whether this constitutes a defalcation or an ethical issue since the problem only arose after the lawyer's death. There was also discussion at the January meeting that changing the rule could be a hardship on attorneys trying to make a reasonable living.

I would be happy to attend the next Rules meeting to provide input on this issue. Please let me know about referring this matter to the Rules Committee for consideration at its next meeting.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Frank X. Neuner, Jr.", written in a cursive style.

Frank X. Neuner, Jr.
President/Client Assistance Foundation

FXN,JR/cs

March 2, 2015

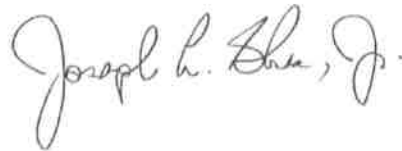
Richard C. Stanley
Stanley, Reuter, Ross, Thornton and Alford
909 Poydras Street
Suite 2500
New Orleans, LA 70112-4011

RE: Review of Rule of Professional Conduct 1.5

Dear Rick,

Attached is a copy of a letter received from Frank X. Neuner, Jr. on behalf of the La. Client Assistance Foundation (LCAF). As per Frank's letter, I am referring this matter to the Rules of Professional Conduct Committee. Many thanks for your consideration of this matter and for all that you do for the Bar.

Kind regards,



Joseph L. Shea, Jr.
2014-2015 President
Louisiana State Bar Association

JLSJR/cg

cc: Frank X. Neuner, Jr. (w/out enclosure)

Exhibit B. Proposed Rule 1.5(f). Clean Copy

(f) 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) A lawyer may charge a fixed or minimum fee for specified legal services, which fee may be paid in whole or in part in advance of the lawyer providing the services. With the informed consent of the client in a writing signed by the client, and subject to the provisions of Rule 1.5(f)(5), the funds may be used by the lawyer when paid and need not be placed in the lawyer's trust account. The written fee agreement shall include the following: (i) the scope of services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the funds will be used by the lawyer when paid and will not be placed in a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

(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 from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting 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. 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 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.

EXHIBIT C - Proposed Rule 1.5(f)2. Redline

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. 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 writing, 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.

(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 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 may charge all or part of a fixed or minimum fee or of a minimum fee for specified legal particular representation with services, which fee may be paid in whole or in part in advance of the lawyer providing the services. With the informed consent of the client in a writing signed by the client, and subject to the provisions of Rule 1.5(f)(5), to be rendered in the future, the funds may be used by become the property of the lawyer when paid and, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account. The written fee agreement shall include the following: (i) the scope of services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the funds will be used by the lawyer when paid and will not be placed in a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

(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 from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting 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. 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 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.