ATTACHMENT 8

Request to Testify Regarding Opposition to Proposed Rule 1.5(e)-(f) Before the Board of Governors from Mr. Barry Tarlow

TARLOW & BERK PC

BARRY TARLOW*
BLAIR BERK
MARK O. HEANEY
MI KIM
DAVID HARRIS

*CERTIFIED SPECIALIST - CRIMINAL LAW
STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

9119 SUNSET BOULEVARD
LOS ANGELES, CALIFORNIA 90069

(310) 278-2111
FAX (310) 550-7055

July 8, 2010

Audrey Hollins
Office of Professional Competence,
Planning and Development
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Request to Testify Before the Board of Governors in Opposition to Proposed Rule 1.5(e)-(f) and for Public Comment

Dear Ms. Hollins:

On behalf of California Attorneys for Criminal Justice ("CACJ")[1], the National Association of Criminal Defense Lawyers ("NACDL")[2], the Criminal Defense Bar Association of San Diego ("CDBA"), and the Criminal Defense Lawyers Club of San Diego ("CDLC")[3], I

[1] CACJ is the state wide criminal defense bar association. Its purpose is to protect individual rights and liberties and improve the quality of the administration of the criminal justice system. Its membership consists of approximately 2,000 criminal defense lawyers working in both the public and private sector.

[2] NACDL is the preeminent national organization committed to advancing the criminal defense bar's mission to ensure justice and due process for persons accused of crimes. The organization is comprised of over 11,000 direct members in 28 countries, and affiliated with more than 350,000 attorneys in 90 states, provincial, local, and international organizations. In California alone, NACDL has over 900 members, including public defenders, private criminal defense lawyers, military defense counsel, law professors and judges dedicated to promoting a fair, rational, and humane criminal justice system.

[3] CDBA and CDLC of San Diego provide education, training and support to lawyers representing people accused of crime while advocating fair and effective criminal justice in the courts, the legislature, and wherever justice demands. As part of their educational mission, the organizations provide a constant exchange of information among lawyers pertaining to the defense of criminal cases through educational programs, membership meetings, special committees, publications, and articles.

request a meaningful amount of time to speak directly to the Board of Governors ("BOG") at the July meeting in opposition to the newest version of proposed Rule of Professional Conduct 1.5 and its seriously misguided approach to nonrefundable retainers and fees earned upon receipt.

During the recent public comment period that ended June 15, 2010, I and the organizations on whose behalf I write, as well as a host of other lawyers and attorney associations from a wide cross-section of the Bar, submitted comments in opposition to proposed Rule 1.5(e)(1)-(2) and its essentially banning of nonrefundable retainers. Presumably in response to this overwhelming criticism, the Commission for the Revision of the Rules of Professional Conduct ("Commission") has now apparently abandoned Rule 1.5(e)(1)-(2) and, after almost two decades of attempting to in essence abolish nonrefundable retainers, drafted yet another entirely new version of the Rule at the eleventh hour, that is just as, if not more, problematic than its previous incarnations.[4] At this late stage in the process of revising the Rules, it seems likely that the new but still deeply flawed Rule will be sent to the BOG for final action at its July 2010 meeting without any public comment period or hearings. Time for the opponents of the Rule to speak directly to the Board of Governors is necessary to ensure both that the Board members have all the material information to make a fully-informed and well-reasoned decision and that the process is fair in fact and appearance.

In 1992, the BOG approved the continuing use of the nonrefundable retainer "earned when paid" as a perfectly appropriate fee arrangement. It endorsed the continued use of "fixed fees," "flat fees," and "nonrefundable retainers", with ownership immediately transferring to the attorney so long as the written fee agreement provides that such fees paid in advance of legal services are "earned when paid."[5] Among the mountain of materials furnished by the Commission to the BOG prior to the submission of my public comment on April 29, 2010, I have not seen anything advising the current BOG that in 1992 the then sitting BOG authorized or approved nonrefundable retainers in a filing with the Supreme Court. Disregarding the Board's approval, the Commission and/or COPRAC have repeatedly attempted over the past two decades to introduce Rules of Professional Conduct that would limit, undermine, or altogether prohibit nonrefundable retainers. In each instance, these efforts have been soundly rejected by the Bar membership.

---

[4] The draft of the newest version of Rule 1.5 I have obtained is from the Commission's June 25-26, 2010 meeting. As far as I am aware, the draft to be submitted to the BOG is not yet publically available.

[5] *See* October 1992 State Bar Memorandum and attachments (prepared by the Office of Professional Competence, Planning and Development on behalf of the BOG in connection with a "Request that the Supreme Court of California Approve Amendments . . . to Rules of Professional Conduct"), p. 9. The copy of this document I located was copied incorrectly from a double-sided document, and is missing every other page.

Rather than abandon the issue, the Commission has continued to unsuccessfully pursue the matter, drafting and redrafting Rules, often without notice, process, or a meaningful opportunity for the opponents of the Rules to be heard. In fact, this process has frequently and appropriately been characterized as a solution in search of a problem. Now it appears the Commission has drafted yet another new Rule at the very close of the process when no further required public comment period or hearings before the BOG are scheduled.

In 1991 and 1997, first the Commission and then COPRAC proposed Rules that would have effectively barred nonrefundable retainers by requiring such fees to be placed in client trust accounts. In both instances, the attempts were ultimately abandoned in the face of vigorous opposition from a wide cross-section of the Bar membership. In 2008, the Commission proposed Rule 1.5(f), which consisted of a single sentence that would have banned all nonrefundable retainers aside from so-called true retainers. As detailed more thoroughly in my April 29, 2010 Opposition to Proposed New Rule of Professional Conduct 1.5(e) (4-200) (Fees for Legal Services) Abolishing Nonrefundable Retainers ("Opposition"), pp. 7-9, this 2008 Rule was not properly or meaningfully noticed or publicized. However, a small number of attorneys still managed to learn of the Rule in time to submit opposition comments shortly before the public comment period ended.

The Commission thereafter abandoned the 2008 Rule and drafted a second version in 2009, adding paragraph (e) and multiple Comments, which, taken together, created a complicated and novel scheme that once again essentially banned nonrefundable retainers. *See* Opposition, pp. 16-21. This 2009 version, Rule 1.5(e)(1)-(2), was then forwarded to the BOG without notice, public comment, or hearing, but with written assurances from the Commission to the BOG that the new Rule had resolved the concerns voiced by attorneys about the 2008 Rule, including the attorney fee forfeiture and restraint issues that were the subject of widespread negative comments.[6] On November 14, 2009, the BOG adopted Rule 1.5(e)(1)-(2) subject to further public comment.

Despite the Commission's assurances that the new 2009 version of the Rule had resolved the concerns voiced by attorneys about the 2008 Rule, a wide cross-section of attorneys and attorney associations whose membership practices, criminal, tax, SEC, matrimonial, forfeiture, appellate law and civil litigation submitted comments opposing Rule 1.5(e)(1)-(2) during the public comment period that followed the BOG's adoption of the Rule and that ended June 15, 2010.[7] Indeed, according to the Commission's Agenda for its June 25-26, 2010 meeting, no less than 64 comments were received about the Rule during the public comment period — far

---

[6] *See, e.g.*, Agenda Item re: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2, and 3 – Return from Public Comment, Attachment 1, pp. 94-130 (October 23, 2009).

[7] These public comments are available on the Bar's website at the following address: http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=Lgbj74kduKQ%3d&tabid=2161

more than any of the approximately 68 other proposed Rules of Professional Conduct.[8] Not a single lawyer or attorney association wrote to support the Rule.[9] Included among the opponents were the Los Angeles County Bar Association, the Orange County Bar Association, the Beverly Hills Bar Association, the San Diego Bar Association, and a host of other attorney associations as well as experienced and knowledgeable attorneys from a wide variety of backgrounds.

In response to the overwhelming number of negative public comments, the Commission has now apparently withdrawn its 2009 attempt to essentially abolish nonrefundable retainers just as it did with the 2008 Rule, and drafted yet another Rule. This new 2010 version of Rule 1.5(e)-(f), including its associated Comments, represents a substantial change from prior drafts, removing over 200 words from the previous 2009 version of the Rule and Comments while adding nearly 600 new words. The new 2010 Rule permits a fee that is denominated as (1) "non-refundable" or (2) "earned on receipt" "only if the client is advised in writing that the client may discharge the lawyer at any time and may or may not be entitled to a refund of all or part of the fees charged." *See* Proposed Rule 1.5(e)-(f). Time and space prevent a detailed analysis of the multiple problems with this newest version of the Rule, but both in theory and practice it is just as flawed, if not more so, than all of its previous incarnations.

The new Rule and its associated Comments follow Arizona's approach to nonrefundable retainers. As far as I am aware, this is the first time any of the Commission's versions of Rule 1.5 or the Comments have mentioned or quoted the Arizona position, and probably for good reason. Although the Arizona Rule became effective on December 1, 2003, no other state appears to have followed suit and adopted such a Rule of Professional Conduct in the intervening seven years. Indeed, a preliminary search reveals that Arizona stands alone as the only state requiring agreements for nonrefundable retainers and fees earned on receipt to explicitly declare that the client may fire an attorney apparently without cause at any time and seek a refund. As such, the Commission is now exchanging a Rule that applies in many states across the country and that has been relied on in the practice of law in California for more than a hundred years for a Rule of Professional Conduct that is unheard of anywhere but Arizona. In doing so, the Commission is undermining any sort of a national standard and running afoul of its own charter.

Moreover, the Commission is seeking to make these drastic changes and depart from the national standard for no demonstrable reason. To date, the Commission has not offered any

---

[8] Indeed, with the exception of proposed Rule 6.1, which received 44 comments, Rule 1.5 received at least ten times as many comments as any other single Rule. *See* Commission's Agenda for its June 25-26, 2010 meeting.

[9] Of the 64 comments received about Rule 1.5, 58 disagreed with the Rule, 4 wanted the Rule modified, and 2 were apparently unclassified. *See* Commission's Agenda for its June 25-26, 2010 meeting. These comments should be evaluated within the context that most Rules received less than six comments.

persuasive rationale for limiting nonrefundable retainers or fees earned on receipt, let alone for relying on Arizona's novel position. In spite of specific request for almost two decades, it has not identified a pattern of abuse by California lawyers that would justify the proposed Rule. In fact, there appears to be no logical reason to apply the newest 2010 version of the Rule to nonrefundable retainers or fees earned on receipt but not to other types of agreements, such as advance fee, contingency or hourly fee agreements. The entire Rule continues to be a solution in search of a problem. *See* Opposition, pp. 21-26. Of course, this "solution" creates far more problems than it theoretically solves.

Most disconcerting is that the new 2010 version of the Rule, probably even more so than the 2009 version, would facilitate jeopardy tax assessments, attorney fee forfeiture and/or restraint by government agencies and/or creditors, and endanger the accused's constitutional right to retain counsel of their choosing as well as civil clients' ability to obtain counsel they can afford. Two years ago, I and several other attorneys, wrote in opposition to the 2008 version of the Rule, highlighting, among other things, that the Rule would increase the likelihood of fee forfeiture and restraint of attorney fees. In response, the Commission abandoned the 2008 Rule, then drafted Rule 1.5(e)(1)-(2), and forwarded this new Rule to the BOG in November of 2009 with written assurances that the forfeiture problem had been resolved. According to a chart of public comments about the 2008 Rule prepared by the Commission for the BOG, paragraph (e)(2) had been added to the Rule "[t]o address the commenter's concerns."[10] Ironically, much of the language of (e)(2) that no doubt was relied on by the BOG has now been substantially changed and/or removed.

The newest 2010 version of Rule 1.5 and its requirement that nonrefundable retainers or fees earned when received can be agreed to only if the client is informed in writing that he or she may fire the attorney, apparently with or without cause at any time, and seek a refund would significantly undermine any claim the attorney may have to that fee. This in turn would drastically increase the risk of forfeiture or restraint and, by extension, would ultimately undermine the ability of civil or criminal clients to retain counsel. Worse yet, the Rule now, for the first time, explicitly applies even to fees designated as "earned upon receipt" – the exact type of fee that together with nonrefundable retainers was approved by the then sitting BOG in a 1992 submission prepared on its behalf and sent to the Supreme Court.

Attorneys with a wealth of experience in this area, including the former Assistant Director of the Enforcement Division of the Securities and Exchange Commission, Michael Perlis,[11] a prominent tax lawyer and former senior trial attorney with the IRS, Kenneth

---

[10] *See, e.g.*, Agenda Item re: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2, and 3 – Return from Public Comment, Attachment 1, pp. 94-130 (October 23, 2009).

[11] *See* Michael Perlis's public comment submission, Re: Proposed New Rules of Professional Conduct, Rule 1.5(e)(4-200) (Fees for Legal Services, Abolishing Non-refundable Retainers,

Gordon,[12] and one of the leading California experts in fee forfeiture and asset restraint, Paul Gabbert,[13] objected to the 2009 version of the Rule on the grounds that it would create forfeiture and restraint problems. The new 2010 version only exacerbates these problems.

There are many other problems created by the vague and confusing language of the new 2010 version of Rule 1.5 and its associated lengthy Comments, which only work to further complicate the Rule and confound the membership of the California Bar. For example, it will subject lawyers acting in good faith to disciplinary charges, fee arbitration and civil litigation. Although I cannot be certain, my understanding of the intended process going forward is that there are no further public comment periods or hearings scheduled at which these problems could be addressed. Instead, the entire set of proposed Rules of Professional Conduct, including the new 2010 version of Rule 1.5, will be sent to the BOG for a final vote at its July 2010 meeting.[14] Voting on this drastically revised 2010 version of Rule 1.5 without any opportunity for the Bar membership to voice their concerns would violate State Bar Rule 1.10(a), which requires all new Rules to be sent out for public comment prior to adoption.[15] More importantly, voting on the Rule in such a fashion would deprive the membership of the process that is due.

---

p. 1, submitted on April 2, 2010 (noting that Rule 1.5(e) would "deprive the people of the ability to secure legal representation"); *see also* fn. 6.

[12] *See* Kenneth Gordon's public comment submission, Re: Proposed Rule 1.5, p. 3, submitted April 8, 2010 (warning that "if the client has a right to a refund of fees attributable to services not completed then the client has a property interest that can be seized by a taxing agency"); *see also* fn. 6.

[13] *See* Paul Gabbert' public comment submission, Opposition to Proposed Rules of Professional Conduct 1.5(e)(4-200) (Fees for Legal Services) [Abolishing Nonrefundable Retainers], p. 4, submitted on June 3, 2010 (concluding that "Rule 1.5(e)(2) not only substantially increases the risk of attorney fee seizure and forfeiture, it will deprive many criminal defendants of their Sixth Amendment right to the retained lawyer of their choice and prohibit many civil clients facing state and federal regulatory civil penalty actions from retaining counsel"); *see also* fn. 6.

[14] The Meeting Notice for the Rules Revision Commission's June 25 & 26, 2010 Meeting sent out via email to interested persons by Lauren McCurdy on June 21, 2010, noted that the meeting "may be the last time the Commission considers these rules prior to final action by the Board of Governors in July."

[15] State Bar Rule 1.10(a)-(b) requires public comment except:

> (1) to correct clerical errors; clarify grammar; improve organization; conform to specific changes in a law; update references or citations; or make similar editorial changes;
> (2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the

First, it would deprive the BOG of information necessary to make a fully-informed and well-reasoned final decision about the Rule. The problems created by the newest 2010 version, including the forfeiture and restraint issues, are particularly complicated. The knowledge and expertise of the wider Bar membership and those attorneys who have in fact actually relied on nonrefundable retainers and fees earned on receipt is invaluable in truly understanding these issues and evaluating the Rule. It appears that lawyers with this type of extensive experience do not sit on the Commission even though its members have substantial ethics knowledge and have devoted endless hours to this project.

Second, it would undermine the fairness of the process. As detailed above, each time the Commission has proposed a new Rule to limit, restrict, or prohibit nonrefundable fees, the Bar membership has overwhelmingly opposed the Rule, submitting comments and speaking at hearings, and ultimately compelling the Rule to be withdrawn. If the newest 2010 version of the Rule is voted on without ever having been subjected to public comment and hearing, it would create the appearance that the process had been abbreviated to effectively bypass the Bar membership's opposition. For these reasons, a representative of the opponents of the 2010 version of Rule 1.5 should be afforded a meaningful opportunity to address the BOG directly about the Rule's many flaws and to answer any questions the members of the BOG may have.

Allowing a representative of the opponents of the Rule a meaningful opportunity to speak directly to the Board of Governors is necessary not merely to identify these problems and bring them to the attention of the Board members in a timely fashion, but also to ensure that the opposition is presented in a manner that is balanced and unbiased. Throughout this process, many if not most of the materials provided to the BOG, even those documenting the oral and written comments and legal arguments submitted by attorneys and associations opposing particular Rules, have been written by and/or filtered through the major proponent of the proposed Rules, the Commission. For example, a few weeks prior to the BOG's November 14, 2009 meeting, the Commission provided the Board with approximately 2,000 pages of materials about the proposed Rules, including the 2009 version of Rule 1.5.[16] Within these thousands of

---

proposal; or
(3) to add or modify an appendix to these rules.

As noted on p. 5, the 2010 version of Rule 1.5(e)-(f) and its associated Comments remove 200 words from the 2009 version of the Rule, while adding nearly 600 new words. This cannot properly be considered a fix for a clerical error, non-substantive change, or a modification that is "reasonably implicit" in the older Rule. As such, the Rule should be sent out for public comment.

[16] *See* Agenda Item re: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2, and 3 – Return from Public Comment and Accompanying Attachments (October 23, 2009).

pages of materials were charts purporting to summarize the comments and factual and legal arguments submitted by members of the Bar about the proposed Rules.[17]

Of course, as noted above, because the 2009 version of Rule 1.5 had not been circulated for public comment prior to its submission to the BOG, the charts did not include any comments specifically aimed at the version of the Rule the BOG was actually considering. That being said, it did list and evaluate the comments and arguments the Commission received about the previously rejected 2008 version of Rule 1.5. However, the chart minimized the merits of the opposition's arguments, failed to detail much of the reasoning behind those arguments, and even omitted significant factual and legal arguments. At the very least, the chart significantly undermined the appearance of fairness by permitting the drafters and proponents of the Rule to summarize, evaluate, misinterpret, and at times omit significant factual and legal arguments of their opponents. Indeed, a number of attorneys who have opposed proposed Rules have expressed serious concerns about the fairness of this unique process. For its June 4, 2010 meeting, the Commission apparently prepared a new chart purporting to summarize and evaluate the comments it received regarding the now abandoned 2009 Rule, and it seems likely that a similar chart may again be sent to the BOG for its July 2010 meeting.

Although I recognize that the process for revising the Rules is not a court proceeding, everyone involved probably agrees that the process should nevertheless be conducted in a manner that is both fair in fact and in appearance, and that will lead to the best result. Considering the unique circumstances surrounding Rule 1.5 and its multiple incarnations, permitting a representative of the opponents a meaningful opportunity to present their case and respond directly to questions raised by the BOG is now necessary to ensure that the process carries with it the indicia of fairness it deserves.

Thank you for taking the time to consider this letter. I would appreciate notification of the decision as early as is practicable consistent with the Board of Governors' many other obligations and responsibilities.

Sincerely,

TARLOW & BERK, PC

Barry Tarlow

Barry Tarlow

cc: Board of Governors

[17] *See Id.*, Attachment 1, at pp. 94-130.