STATE OF VERMONT
VERMONT SUPREME COURT
MARCH TERM, 2016

Order Amending the Vermont Rules of Professional Conduct

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rules 1.0(o) and (p) of the Vermont Rules of Professional Conduct be added to read as follows:

RULE 1.0. TERMINOLOGY

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(o) "Advance," "advance payment of fees," or "retainer" means a payment by a client in anticipation of the future rendition of services that is not earned until such services are rendered and that is to be credited toward the fees earned when such future services are rendered.

(p) "Nonrefundable fee" means a fee paid to an attorney and earned by the attorney before professional services are rendered. Such a nonrefundable fee may be in exchange for retaining the attorney's availability alone or may be in exchange also for the right to receive specified services in the future for no additional fee, or for a stated fee.

Reporter's Notes—2016 Amendment

Rules 1.0(o) and (p) are added to define terms used in the simultaneous amendments adding Rules 1.5(f) and (g).

2. That Rules 1.5(f) and (g) of the Vermont Rules of Professional Conduct be added to read as follows:

RULE 1.5. FEES

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(f) A lawyer may enter into an agreement for a client to pay a nonrefundable fee that is earned before any legal services are rendered. The amount of such an earned fee must be reasonable, like any fee, in light of all relevant circumstances. A lawyer cannot accept a nonrefundable fee, or characterize a fee as nonrefundable, unless the lawyer complies with the following conditions:

(1) The lawyer confirms to the client in writing before or within a reasonable time after commencing representation (i) that the funds will not be refundable, and (ii) the scope of availability and/or services the client is entitled to receive in exchange for the nonrefundable fee.

(2) A lawyer shall not solicit or make any agreement with a client that prospectively waives the client's right to challenge the reasonableness of a nonrefundable fee, except that a lawyer can enter into an agreement with a client that resolves an existing dispute over the reasonableness of a nonrefundable fee, if the client is separately represented or if the lawyer advises the client in writing of the desirability of seeking independent counsel and the client is given a reasonable opportunity to seek such independent counsel.

(3) Where it accurately reflects the terms of the parties' agreement, and where such an arrangement is reasonable under all of the relevant circumstances and otherwise complies with this rule, a fee agreement may describe a fee as "nonrefundable," "earned on receipt," a "guaranteed minimum," "payable in guaranteed installments," or other similar description indicating that the funds will be deemed earned regardless of whether the client terminates the representation.

(g) A nonrefundable fee that complies with the requirements of (f)(l)-(2) above constitutes property of the lawyer that should not be commingled with client funds in the lawyer's trust account. Any funds received in advance of rendering services that do not meet the requirements of (f)(1)-(3) constitute an advance that must be deposited in the lawyer's trust account in accordance with Rule 1.15(c) until such funds are earned by rendering services.

Reporter's Notes—2016 Amendment

Rules 1.5(f) and (g) are added to clarify the conditions that apply to a lawyer's acceptance of a nonrefundable fee. The provisions are based on Maine Rule of Professional Conduct Rule 1.5(h)-(i), adopted in June 2014.

Rule 1.5(f) provides that nonrefundable fees are permissible, subject to the requirement of reasonableness that applies to all fees pursuant to Rule 1.5(a). Paragraph (f)(1) requires certain safeguards to ensure the client's informed consent in order to avoid a client's confusing a nonrefundable fee with an advance. Paragraph (f)(2) prohibits a lawyer from securing a client's advance waiver of the right to challenge the reasonableness of a fee. A client's written agreement to a fee is a factor in the determination of its reasonableness under Rule 1.5(a). A lawyer should not press further and request or require the client to waive the client's right to have the reasonableness of a nonrefundable fee determined in accordance with law. Paragraph (f)(3) provides examples of terminology in the agreement that will indicate that the conditions of the rule are satisfied.

Rule 1.5(g) provides that, without the client's informed consent to nonrefundability in accordance with Rule 1.5(f)(1), the lawyer must treat the funds as an advance to be credited against future bills for services, must keep such funds in a trust account in accordance with Rule l.15A until future services are rendered, and must refund the unearned portion of any such funds upon termination of representation pursuant to Rule 1.16. Subdivision (g) also provides that if conditions

(f)(1) and (f)(2) are met, nonrefundable fees cannot be deposited in the lawyer's trust account as those nonrefundable fees are not the property of the client.

3. That Rule 1.15(b) and (c) of the Vermont Rules of Professional Conduct be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 1.15. SAFEKEEPING PROPERTY

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(b) A lawyer may deposit the lawyer's own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount reasonably necessary for that purpose.

(c) Unless a lawyer has entered into a nonrefundable fee agreement that complies with Rule 1.5(f), ~~A~~ a lawyer shall deposit legal fees and expenses that have been paid in advance into an account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship. Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Reporter's Notes—2016 Amendment

Rule 1.15(b) is amended to provide that the funds that a lawyer may keep in a client trust account to cover service charges is that amount "reasonably" necessary for that purpose, making clear that the rules do not provide a fixed amount or percentage but will be applied on a case-by-case basis.

Rule 1.15(c) is amended for consistency with the simultaneous addition of Rules 1.5(f) and (g).

4. That Rule 1.15A(a) of the Vermont Rules of Professional Conduct be amended to read as follows (new matter underlined):

RULE 1.15A. TRUST ACCOUNTING SYSTEM

(a) Every lawyer or law firm holding funds of clients or third persons in connection with a representation as defined in Rule 1.15(a)(2) shall hold such funds in one or more accounts in a financial institution or, in appropriate circumstances, a pooled interest-bearing trust account pursuant to Rule 1.15B. An account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship or a fiduciary relationship shall be clearly identified as a ''trust'' account or shall be identified as a fiduciary account, such as an estate, trust, or escrow account, to distinguish such funds from the lawyer's own funds. An account in which funds are held that are in the lawyer's possession as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment shall be clearly identified as a ''fiduciary'' account. The lawyer shall take all steps necessary to inform the financial institution of the purpose and identity of all accounts

maintained as required in this rule. The lawyer or law firm shall maintain an accounting system for all such accounts that shall include, at a minimum, the following features:

(1) a system showing all receipts and disbursements from the account or accounts with appropriate entries identifying the source of the receipts and the nature of the disbursements;

(2) a record for each client or person for whom property is held, which shall show all receipts and disbursements and carry a running account balance;

(3) records documenting timely notice to each client or person of all receipts and disbursements from the account or accounts; and

(4) records documenting timely reconciliation of all accounts maintained as required by this rule and a single source for identification of all accounts maintained as required in this rule. "Timely reconciliation" means, at a minimum, monthly reconciliation of such accounts.

Reporter's Notes—2016 Amendment

Rule 1.15A(a) is amended to make clear that funds held by a lawyer in a "fiduciary account" as further defined by the amendment may be held in an IOLTA account created pursuant to Rule 1.15B "in appropriate circumstances"—that is, when the funds meet the standard of Rule 1.15B(a)(1) that they "are not reasonably expected to earn net interest or dividends" as defined in Rule 1.15B(a)(2)(i). The amendment benefits both the lawyer through saving management costs and the beneficiaries of the interest distributed to the Vermont Bar Foundation pursuant to Rule 1.15B(b)-(c).

Rule 1.15A(a)(4) is amended to require a lawyer to maintain records documenting at least monthly reconciliation of all accounts maintained pursuant to Rule 1.15A. The rule is intended to establish a bright-line meaning for "timely reconciliation."

5. That Rule 8.3(c) of the Vermont Rules of Professional Conduct be amended to read as follows (new matter underlined):

RULE 8.3. REPORTING PROFESSIONAL MISCONDUCT

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(c) This rule does not require disclosure of information gained by Bar Counsel in responding to an inquiry or by a lawyer while participating in a lawyer assistance program approved by the Vermont Bar Association or as a member of the Professional Responsibility Committee of the Vermont Bar Association or of information otherwise protected by Rule 1.6.

Reporter's Notes—2016 Amendment

Rule 8.3(c) is amended to exempt Bar Counsel from the requirement of disclosure of information about misconduct otherwise required by Rule 8.3(a) when Bar Counsel is responding to an inquiry from an attorney pursuant to A.O. 9, Rules 3(B)(1) and 9. The purpose of the amendment is to maintain the integrity of the inquiry process.

6. That these rules, as amended or added are prescribed and promulgated effective May 9, 2016. The Reporter's Notes are advisory.

7. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 7th day of March, 2016.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice