



The Law Office of
Robert G. Bernhoft, S.C.

207 East Buffalo Street, Suite 600 • Milwaukee, Wisconsin 53202
(414) 276-3333 telephone • (414) 276-2822 facsimile • rgbernhof@bernhoflaw.com
www.bernhoflaw.com

Wisconsin Supreme Court
Attn: Carrie
110 E. Main Street, Suite 215
Madison, Wisconsin 53701-1688
(608) 267-0640 facsimile

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CLERK OF SUPREME COURT
OF WISCONSIN

Via Facsimile Only

Re: *In the matter of the Amendment of SCR 20:1.15 Safekeeping Property; SCR 20:1.0 Definitions; SCR 21.16 Discipline; SCR 12.04 Wisconsin Lawyers Fund for Client Protection, Rule No. 06-04. Comments of Robert E. Barnes*

To the Honorable Justices of the Wisconsin Supreme Court:

Buried back in the appendix, the recommended rule changes would dramatically alter the structure of fees for small firms and the criminal defense bar. The rule changes would only allow a nonrefundable retainer when the value conferred on the client is solely the benefit of promised availability. The benefit of guaranteed representation at a capped cost, capped often at a reduction of total fee costs of 80% to 90% of the fee, would no longer be worthy of a non-refundable fee, effectively barring attorneys from ever offering such a benefit to a client. This radical departure from existing Wisconsin practice (see Wis. Ethics Op. No. 93-4) and radical remake of the contractual fee landscape in an area of national discussion, requires more consideration than has been expressly given to date. *See In re Connelly*, 55 P.3d 756 (Ariz. 2002) (one of many recent cases and ethics opinions affirming non-refundable fees where risk sharing and discounted retainers confers benefits on the clients); *see also Kentucky Bar Association Opinion E-380*, 1995).



This is the shared opinion of the distinguished Professor Geoffrey C. Hazard, in his seminal treatise, *The Law Of Lawyering*. As Professor Hazard noted, non-refundable flat fees benefit lawyers and clients alike by allowing lawyers to lower the cost of legal access to clients with capped, guaranteed costs in exchange for certainty of full payment regardless of outcome or premature termination. See Geoffrey C. Hazard, *The Law of Lawyering* Vol. I, § 8.15 at 8-34 (2001) (the lawyer's "ability to judge the cost of providing specific legal services" to commence and complete a representation is the benefit to the lawyer while real benefits accrue to the clients who "appreciate . . . definite costs for legal services . . . that are . . . capped.)

Under the rule changes, the traditional value conferred in non-refundable contracts is that the lawyer agrees to a dramatically lower fee (capping costs at a discounted rate) for the client in exchange for guaranteed minimum payment of a set amount, with the client benefiting from this risk sharing in the benefits of fee certainty and capped costs (critical to insuring truly voluntary plea negotiation without the coercive effect of fee consideration) and the attorney benefiting from the risk sharing if there is a premature termination of the representation (early disposition without extensive legal work or a no-cause termination of the attorney-client relationship). The value conferred on the client for the benefit of guaranteed representation in a legal matter at capped cost (with the capped cost often 50% to 90% lower than the fee for the service that is guaranteed if the client had to pay for the service on an hourly basis) – the traditional economic rationale for the agreement with risk-sharing between client and attorney akin to the revolution of legal access contingency fees brought about for clients – would be eliminated. If every attorney can only recover an hourly fee upon termination, then no attorney has any incentive to offer anything but an hourly fee retainer to clients. The consequence would be clients lose the benefit of capped costs with guaranteed representation for the entire scope of representation in a



matter, and those clients unfortunate enough to be unable to afford trial representation must consider the cost of defense rather than guilt in plea negotiation and many with no option but trial would be without the means to have counsel of their choice, the counsel they have confidence in.

The rule change is not mentioned in the key comments in the petition, nor in any public discussion counsel is aware of. Instead, it is buried in the definitional changes found in Appendix B, where all non-refundable fees will be henceforth treated as advanced refundable fees regardless of what the client wants or asks for in the attorney client written contract. The SCR 20:1.0(a) would now treat a non-refundable fee as an “advanced fee regardless of how the fee is characterized” and even for fees that are upon a basis of “flat or another basis,” when advanced fees are typically conceived of as fees against future billable hours. See Appendix B, page 1, changes to SCR 20.10(a), changes to SCR 20.10(f), and changes to SCR 20.10(p). The non-refundable retainer is now limited to those least in need of fee structures that insure maximum legal access: lawyers for the affluent and corporations, who are the only persons who pay a fee “solely” to secure lawyer availability.

This august body should either provide a non-refundable flat fee exception to the current rule construction, or take comparable action before prohibiting Wisconsin attorneys and all attorneys who appear pro hac vice in Wisconsin, especially in criminal cases, from allowing their clients the option of non-refundable flat fees which guarantee fees to attorneys in exchange for those attorneys lowering costs through guaranteed representation with capped costs for clients. Thank you for considering my comments.



Jan 16, 2007, at 03:59: M



Robert G. Bernhoft, J.



414-276-2822

Sincerely,

Robert E. Barnes
Attorney and Counselor at Law