January 21, 2023

Hope Todd
District of Columbia Bar
Rules of Professional Conduct Review Committee

By email: ethics@dcbar.org

Re: Comments In Opposition to Proposed Amendment to D.C. Rule 1.15

Dear Ms. Todd,

My name is Carolyn Elefant. I am a member in good standing of the bar of the District of Columbia, a law firm owner, and founder of MyShingle.com, an award-winning blog launched in 2002 that inspires, celebrates and advocates for solo and small firm lawyers. I write these comments in opposition to the proposed amendment to D.C. Rule 1.15 which unduly complicates the ability of lawyers to offer flat fees. As discussed, the D.C. Rule should either presumptively treat flat fees as earned on receipt, or allow a de minimis exception for cases with a value of $5000 or less. To do otherwise, will deter lawyers from adopting flat fees to the detriment of lawyers and their clients, and will place D.C. attorneys as a competitive disadvantage to their counterparts in other jurisdictions.

I. The Flat Fee Billing Model Benefits

Flat fee billing is a method of charging for legal services where the client pays a fixed, upfront fee for the entire matter, rather than being billed hourly. Flat fees are a win-win for lawyers and clients. They provide certainty and predictability for the client in terms of the cost of the legal services and most all, encourage lawyers to innovate to operate more efficiently which benefits clients.

Flat fees, when treated as earned on receipt, can make solo and small law firms more sustainable. Studies show that cash flow problems account for 82 percent of small business failures, and solo and small law firms are at their core, small businesses. When lawyers can

immediately transfer an advance flat fee payment into their operating account, they can scale their firm while reducing the cost of services offered, making the enterprise more sustainable.

II. Proposed Amendment to D.C. Rule 1.15

The proposed amendment to D.C. Rule 1.15 would codify the court's ruling in *In re: Mance* by clarifying that lawyers must treat advanced payment of flat fees as client property that goes into the trust account, unless the client, following a detailed and confusing five-part disclosure, agrees otherwise. This is a step backwards. Instead, flat fees should, without condition, be treated as earned on receipt (but subject to refund) in D.C. as they are in several other jurisdictions including Massachusetts, Georgia, Florida, North Carolina and others for the reasons discussed below.

First, Rules of Professional Responsibility are intended, above all, to protect clients - and there is no evidence whatsoever that clients are harmed when flat fees are treated as earned on receipt. As noted above, many other jurisdictions treat flat fees as earned on receipt, yet there is no indication that clients in North Carolina (where flat fees are earned on receipt) are taken advantage of by their attorneys more frequently than clients in Iowa where flat fees go into a trust account.

Second, trust accounts are increasingly becoming the most dangerous place for attorneys to house funds. A simple Google search turns up multiple instances of attorney trust accounts being breached by hackers - and incidents will only increase as hackers become more sophisticated.

Third, treating flat fees as advance payments that go into an operating account places D.C. lawyers at a disadvantage to lawyers in other jurisdictions. Many D.C. lawyers are engaged in federal practice like trademark, immigration or federal employment law and compete with attorneys in other jurisdictions. Under the proposed rule, D.C. attorneys are at a competitive disadvantage to those attorneys who can accept a flat fee without any added legal gobbledy-gook.

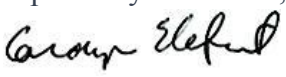
To be fair, proposed Rule 1.15 does not bar deposit of flat fees into an operating account entirely, but instead allows lawyers to do so after providing a complicated paragraph-long, five-part disclosure to clients. Most lawyers are unlikely to explain this lengthy provision to clients, and clients are unlikely to ever read it. The new requirement is at best theater; an empty formality designed to appear protective but that unnecessarily complicates the engagement agreement without any benefit to the client.

Moreover, for small matters, lengthy disclosures are overkill. Is it really necessary to add a five-part disclosure to a $1500 engagement agreement? At the very least, the new rule should simply exempt flat fee agreements with a value of less than $5000 from mandatory trust account deposit.

Flat fees are a win-win for both lawyers and clients. The D.C. Bar should use whatever means possible to make flat fees widely available and as simple as possible to implement. The proposed rule does not accomplish this goal.

Thank you for this opportunity to comment.

Respectfully submitted,



Carolyn Elefant
carolyn@carolynelefant.com
202-297-6100