

**COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO
RULES OF PROFESSIONAL CONDUCT**

AGENDA

July 27, 2018 9:00 a.m.

2 East 14th Ave., Court of Appeals Full Conference Room, 3rd Floor

Call-in number: 720-625-5050 or (toll free) 1-888-604-0017

Access Code: 28650668#

WiFi Access Code: To be provided at the meeting

1. Welcome to new members (Judge Adam J. Espinosa, Lino S. Lipinsky de Orlov, and Attorney Regulation Counsel Jessica E. Yates) and new liaison Justice William W. Hood, III
2. Approval of minutes for April 27, 2018 meeting [to be distributed separately]
3. Report from Rule 8.4(c) Subcommittee [Tom Downey]
4. Report from Contingent Fee Subcommittee [Marcy Glenn, for Alec Rothrock]
5. Report from Fee Subcommittee [Jamie Sudler, pp. 001-015]
6. New Business
7. Administrative matters:
 - a. Reappointed members, through June 30 2021 (Berger, Cohen, Glenn, Lucero, Stanton, Stark, Sudler, Wald, Wayne, Webb)
 - b. Select next meeting date
8. Adjournment (before noon)

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Memo

To; Rules of Professional Conduct Standing Committee
From: Jamie Sudler, Co-Chair Flat Fee Subcommittee
Date: July 16, 2018
Re: Proposed Flat Fee Rule, Comments, and Form of Flat Fee Agreement

The subcommittee met to discuss the issues raised at the full Standing Committee at its April 27, 2018 meeting about the proposed Flat Fee Rule, 1.5(h), Comments, and a Form Flat Fee Agreement that. The Proposed Flat Fee Rule, Comments and Form Agreement are included.

The following matters were discussed with corresponding changes to the comments and the form agreement where necessary. There were no changes made by the subcommittee to the Proposed Rule; although a change to the rule was discussed.

1) In April the full committee had discussed Proposed Rule 1.5(h)(3) which states:

(3) The [following form] [form appearing in Appendix ___] may be used for flat fees and shall be sufficient. The authorization of this form shall not prevent use of other forms consistent with this Rule.

At the full committee meeting there were concerns about the phrase, “. . . and shall be sufficient.” However, there was no consensus on whether to take that language out. The language comes from the Rules Governing Contingent Fees, C.R.C.P. 23.3, Rule 7, Forms. That rule says, “The following forms may be used and shall be sufficient.”

The subcommittee has reached consensus that the language, “. . . and shall be sufficient” should remain. Keeping the language is consistent with the existing contingent fee rule and form. If there were an inconsistency, it could lead to questions of interpretation.

2) **Comments to the Proposed Rule** (See redlined version).

The subcommittee approved the recommended changes to the comments by the full committee without any modifications. The full committee’s changes suggested at the last meeting are in Comments [2] and [13].

3) **Form Flat Fee Agreement.**

Our entire discussion of the form agreement centered on Section V, about termination. We are suggesting changes to that Section as follows (changes underlined):

V. Right to Terminate Representation and Fees on Termination.

Client has the right to terminate the representation at an time and for any reason, and Lawyer [or firm] may terminate the representation in accordance with Rule 1.16 of the Colorado Rules of Professional Conduct. In the event the representation is terminated by Client without wrongful conduct by the Lawyer [or Firm] which would cause the Lawyer [or Firm] to forfeit any fee, or the Lawyer [or Firm] justifiably withdraws in accordance with Rule 1.16 from representing Client, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned by Lawyer [or Firm] as described in Section I, above, up to the time of termination. In a litigation matter, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned up to the time when the court grants Lawyer's motion for withdrawal. If the representation is terminated between the completion of increments described in Section III above, Client shall pay a fee based on [an hourly rate of \$ _____] [the percentage of the task completed] [*other specified method*]. However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the increment, and in any event all fees shall be reasonable.

The earlier version said that Lawyer could terminate for any reason. The change in the first sentence makes it clear that Lawyer must comply with Rule 1.16.

There was discussion of the word "justifiably" in the second sentence. The subcommittee noted that this word also comes directly from the form Contingent Fee Agreement in C.R.C.P. Chapter 23.3. Therefore the subcommittee recommends keeping it.

The subcommittee added the phrase, ". . . withdraws in accordance with Rule 1.16 . . ." after "justifiably." The added phrase emphasizes again that Lawyer must follow Rule 1.16.

Lastly, the subcommittee added the phrase, ". . . and in any event all fees shall be reasonable." to the end of the section. The thinking of the subcommittee was influenced by our non-lawyer member who was concerned that Lawyer could take advantage of Client by doing work that was of no benefit to the client. The added language to the form emphasizes Lawyer's obligations under Rule 1.5(a).

Proposed Flat Fee Rule

Colo. RPC 1.5

[Post Standing Rules Committee Meeting 4-27-2018

Reviewed 7-16-2018 by Subcommittee]

(a) through (g) [no changes]

(h) A “flat fee” is a fee for specified legal services for which the client agrees to pay a fixed amount, regardless of the time or effort involved.

(1) The terms of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and shall include the following information:

(i) A description of the services the lawyer agrees to perform;

(ii) The amount to be paid to the lawyer and the timing of payment for the services to be performed;

(iii) If any portion of the flat fee is to be earned by the lawyer before conclusion of the representation, the amount to be earned upon the completion of specified tasks or the occurrence of specified events; and

(iv) The amount or the method of calculating the fees the lawyer earns, if any, should the representation terminate before completion of the specified tasks or the occurrence of specified events.

(2) If all or any portion of a flat fee is paid in advance of being earned and a dispute arises about whether the lawyer has earned all or part of the flat fee, the lawyer shall comply with Rule 1.15(A)(c) with respect to any portion of the flat fee that is in dispute.

(3) The [following form] [form appearing in Appendix ___] may be used for flat fees and shall be sufficient. The authorization of this form shall not prevent use of other forms consistent with this Rule.

COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible, but when there has been a change from their previous understanding the basis or rate of the fee should be promptly communicated in writing. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client, but the communication need not take the form of a formal engagement letter or agreement and it need not be signed by the client. ~~When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. All flat fee arrangements must be in writing and comply with paragraph (h) of this Rule. All contingent fee~~

~~arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1. Arrangements other than contingent or flat fees require a written communication that discloses the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client.~~ Moreover, it is not

necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier disclosure substantially inaccurate, a revised written disclosure should be provided to the client. All flat fee arrangements must be in writing and comply with paragraph (h) of this Rule. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[3A] Repealed.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] A fee agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] [No Colorado comment.]

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and

most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (d) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (d) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Advances of Unearned Fees and Engagement Retainer Fees

[10] The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

[11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b) or (h), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Rule 1.5(a).

[12] Advances of unearned fees, including advances of all or a portion of a flat fee are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b) or (h). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

[13] A lawyer and client ~~can~~ may agree that a flat fee or a portion of a flat fee is earned in various ways. For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.

[14] Alternatively, the lawyer and client may agree to an advanced flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. See Rule 1.5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

[16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement

retainer must be distinguished from a lump-sum fee [i.e. a flat fee] constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

[18] It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client-

lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

Form Flat Fee Agreement

The client _____ (“Client”) retains _____ (“Lawyer” [or “Firm”]) to perform the legal services specified in Section I, below, for a flat fee as described below.

I. Legal Services to be Performed.

In exchange for the fee described in this Agreement, Lawyer will perform the following legal services (“Services”): [Insert specific description of the scope and/or objective of the representation. Example: representation in DUI criminal case in Jefferson County, or prepare a Will, or Power of Attorney, or a contract.]

II. Flat Fee.

This is a flat fee agreement. Client will pay Lawyer [or Firm] \$ _____ for Lawyer’s [or Firm’s] performance of the Services described in Section I, above, plus costs as described in Section VI, below. Client understands that Client is NOT entering into an hourly fee arrangement. This means that Lawyer [or Firm] will devote such time to the representation as is necessary, but the Lawyer’s [or Firm’s] fee will not be increased or decreased based upon the number of hours spent.

III. When Fee Is Earned.

The flat fee will be earned in increments, as follows:

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned _____

[Alternatively: The flat fee will be earned when the Lawyer [or Firm] provides Client with (the Will), (the Power of Attorney), (the contract), (etc.) [INSERT]].

IV. When Fee is Payable.

Client shall pay Lawyer [or Firm] [select one: in advance, or as billed, or as the services are completed]. Fees paid in advance shall be placed in the Lawyer's [or Firm's] trust account and shall remain the property of Client until they are earned. When the fee or part of the fee is earned pursuant to this Agreement, it becomes the property of Lawyer [or Firm].

V. Right to Terminate Representation and Fees on Termination.

Client has the right to terminate the representation at an time and for any reason, and Lawyer [or firm] may terminate the representation in accordance with Rule 1.16 of the Colorado Rules of Professional Conduct. ~~and Lawyer [or Firm] each have the right to terminate the representation at any time and for any reason.~~ In the event the representation is terminated by Client without wrongful conduct by the Lawyer [or Firm] which would cause the Lawyer [or Firm] to forfeit any fee, or the Lawyer [or Firm] justifiably withdraws in accordance with Rule 1.16 from representing Client, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned by Lawyer [or Firm] as described in Section I, above, up to the time of termination. In a litigation matter, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned up to the time when the court grants Lawyer's motion for withdrawal. If the representation is terminated between the completion of increments described in Section III above, Client shall pay a fee based on [an hourly rate of \$_____] [the percentage of the task completed] [*other specified method*]. However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the increment, and in any event all fees shall be reasonable.

VI. Costs.

Client is liable to Lawyer [or Firm] for reasonable expenses and disbursements. Examples of such expenses and disbursements are fees payable to the Court and expenses

involved in preparing exhibits. Such expenses and disbursements are estimated to be \$_____.
Client authorizes Lawyer [or Firm] to incur expenses and disbursements up to a maximum of
\$_____, which limitation will not be exceeded without Client's further written authorization.
Client shall reimburse Lawyer for such expenditures (upon receipt of a billing), (in specified
installments), (upon completion of the Services), (etc.) **[INDICATE WHICH]**.

Dated: _____

CLIENT:

ATTORNEY [FIRM]:

Signature

Signature

