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

AGENDA

April 27, 2018 9:00 a.m.
2 East 14th Ave., Supreme Court Conference Room, 4th Floor
Call-in number: 720-625-5050 or (toll free) 1-888-604-0017
Access Code: 17611072#
WiFi Access Code: To be provided at the meeting

---

1. Approval of minutes for January 26, 2018 meeting [pp. 001-015]
2. Report on consideration of amendments based on *Pena-Rodriguez* by the CRE and CJI (Civ.) Committees [Judge Berger & Judge Webb]
3. Report from Rule 8.4(c) Subcommittee [Tom Downey]
4. Report from Contingent Fee Subcommittee [Alec Rothrock]
5. Report from Fee Subcommittee [Nancy Cohen & Jamie Sudler, pp. 016-26]
6. New Business
7. Administrative matters:
    a. Expiring terms on June 30, 2018 (Berger, Cohen, Coyle, Glenn, Lucero, Stanton, Stark, Sudler, Wald, Wayne, Webb)
    b. Select next meeting date
8. Adjournment (before noon)

Marcy G. Glenn, Chair
Holland & Hart LLP
(303) 295-8320
mglenn@hollandhart.com

These submitted minutes have not yet been approved by the Committee

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On January 26, 2018
(Forty-ninth Meeting of the Full Committee)

The forty-ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, January 26, 2013, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justices Nathan B. Coats and Monica M. Márquez, were Committee members Judge Michael H. Berger, Cynthia F. Covell, James C. Coyle, Thomas E. Downey, Jr., Judge William R. Lucero, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, Eli Wald, Judge John R. Webb, and Frederick R. Yarger. Present by conference telephone were members John M. Haried, Jacqueline Cooper Melmed, Henry R. Reeve, and E. Tuck Young. Excused from attendance were members Federico C. Alvarez, Gary B. Blum, Nancy L. Cohen, Margaret B. Funk, and Boston H. Stanton, Jr. Absent were members David C. Little and Lisa M. Wayne. Also present was Court staff attorney Jennifer J. Wallace.

I. *Meeting Materials; Minutes of October 27, 2017 Meeting, the Forty-eighth Meeting of the Committee.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the forty-eighth meeting of the Committee, held on October 27, 2017. Those minutes were approved as submitted.

II. *Report from Contingent Fee Subcommittee.*

Deviating from the agenda that she had provided in advance of the meeting, the Chair asked member Alexander R. Rothrock to report to the Committee on behalf of the subcommittee that is considering the implications of a move of Colorado's rules governing contingent fee agreements from Chapter 23.3 of the Rules of Civil Procedure to the Rules of Professional Conduct.[1]

Rothrock named the members of the subcommittee as himself, the Chair, and members Thomas N. Downey, James S. Sudler III, and Eli Wald.

---

1. *See* Item VIII of the minutes of the forty-fourth meeting of the Committee, on October 27, 2017, regarding member Judge Michael H. Berger's report to the Committee that the Court had approved transfer of jurisdiction of the contingency fee rules from the Standing Committee on the Rules of Civil Procedure, which is chaired by Berger, to this Committee on the Rules of Professional Conduct, giving this Committee authority to consider such matters as the proper placement of the contingency fee rules among the various classifications and categorizations of the Court's rules, their coordination with various provisions contained within the Rules of Professional Conduct, and the like.

—*Secretary*

Rothrock noted that the fact that the contingency fee rules properly lie within reach of the Rules of Professional Conduct rather than in the Rules of Civil Procedure is well-evidenced by the references in Rule 1.5(c) and elsewhere in the Rules of Professional Conduct to contingency fee agreements, making violation of those rules a matter for discipline as well as a basis for a lawyer's liability to the client.

He pointed out that Colorado's rules governing contingent fee agreements can be traced back to a report from an *ad hoc* committee of the Colorado Bar Association printed in the August 1978 issue of *The Colorado Lawyer*,[2] and he added that some of the wording in the current rules is now antiquated or no longer germane to contingency fee agreements — in his word, the rules are of a hybrid nature. So, he said, it is time to update the contingency fee rules and to make them more easily found within the Court's rules.

The subcommittee had first considered some large-scale changes of the contingency fee rules, including moving them into the Rules of Professional Conduct as additional provisions of Rule 1.5(c) as is done in the American Bar Association's Model Rules of Professional Conduct. Such a move would dovetail with discussions within the Colorado Supreme Court Advisory Committee. But, while considering whether the contingency fee rules become a part of Rule 1.5(c) or are moved to another place where they could be readily found, the subcommittee has been mindful of existing cases from the Supreme Court interpreting those rules and of the adverse impacts that a restructuring of the rules could have on the continued application of that valuable case law to the use of contingency fee agreements by lawyers in the future and to client/lawyer disputes and disciplinary cases arising with regard to those agreements, whether the agreements themselves predate or follow such restructuring.

But the subcommittee sees areas in which the contingent fee rules can be made more consistent with other rules that are implicated in contingency fee cases and, further, sees ways in which the substance of existing Supreme Court case law regarding contingent fee agreements can be reflected in a revision of the rules governing those agreements. Modification of the rules could also be an opportunity to incorporate concepts expressed in Opinion 100 of the Colorado Ethics Committee[3] regarding the conversion of a contingency fee agreement to an alternate fee arrangement in advance of the occurrence of the contemplated contingency.

In short, Rothrock said, the subcommittee is looking at a number of ambitious possibilities and seeks guidance from the full Committee about the direction it should take.

In response to the Chair's request for comments from the Committee about the direction the subcommittee should take, member James C. Coyle, Colorado's Attorney Regulation Counsel, said that the Office of Attorney Regulation Counsel has always thought it unusual that the contingency fee rules — Chapter 23.3 — are found amidst the Rules of Civil Procedure, especially as they deal with client-lawyer agreements as to fees rather than to procedures in judicial processes. The OARC is, Coyle noted, proposing revisions to other rules to make them more user-friendly and easier to find; this proffered move of the contingency fee rules to the Rules of Professional Conduct is timely and sensible, he said.

---

2. *See* 7 *The Colorado Lawyer* 1353 (August, 1978) for "Proposed Regulation of Lawyer Contingent Fees: A Report From the CBA Ad Hoc Committee".

—*Secretary*

3. Opinion 100, "Use of Conversion Clauses in Contingent Fee Agreements," adopted June 21, 1997, by the Colorado Bar Association Ethics Committee.

—*Secretary*

Member Judge Michael Berger added his view that the proposal to move the rules into the Rules of Professional Conduct makes sense, noting that he has previously served on other, *ad hoc* committees that have considered the contingency fees rules without having a proper focus and without success.

Another member with experience in the regulation of contingency fees agreements added that this will be a huge project, quite unlike the "simple" flat fee addition that the Committee has been considering and will consider later in this meeting. It is, he stressed, important for the Committee to understand that this will be a major undertaking.

The Chair proposed that the membership of the existing subcommittee be expanded to include other members of the Committee who are interested in the matter of contingent fees, as well as to include other stakeholders who are not members of the Committee. A member added that it would be appropriate to include nonlawyers as members, to gain clients' perspectives.

A member commented that, in the past, the contingent fee agreement was most frequently thought of as an arrangement to be used in personal injury litigation. But now, he said, the contingent fee agreement is being used even in large commercial litigation involving corporate parties. Such entities are now among the stakeholders in regulation of the contingent fee agreement.

The Chair asked for an expression of the negatives of such an undertaking by this Committee. Rothrock offered that it will entail a lot of work; some might say, "Leave well enough alone; we have a tab in our books to find the existing rule and have a body of case law." Would the potential for improvement in the Colorado law governing contingent fee agreements outweigh such disruption? Rothrock thought that it would but could understand that others might question that view.

The Chair noted that the Committee need not this day impose any limitations on the direction the subcommittee might take; if it simply approves of the subcommittee going forward as the subcommittee may determine, the details can come later. The question today is simply whether the Committee undertakes to invest time in the matter.

In answer to a member's question whether violation of the contingent fee rules is presently a matter for discipline, Rothrock said that it is, pointing to Rule 1.5(c), which specifies, as a rule of conduct, that a "contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, 'Rules Governing Contingent Fees.'"

The Chair concluded the discussion by noting that no opposition had been expressed. Rothrock noted the significance of that absence.

III. *Subcommittee on Lawful Investigative Activities Under Rule 8.4(c).*

The Chair invited member Thomas N. Downey to give a report to the Committee on behalf of the subcommittee that has been considering the issue of "pretexting" in lawful investigations under the strictures of honesty imposed upon lawyers by Rule 8.4(c). The subcommittee had been established at the Committee's forty-eighth meeting, on October 27, 2017, to propose a comment for Rule 8.4(c) that would assist in determining the meaning of "lawful investigative activities," which is the phrase that the Court used in its recent amendment to that paragraph to provide an exception to that paragraph's general proscription against "conduct involving dishonesty, fraud, deceit or misrepresentation" — the added

exception permits "a lawyer [to] advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities."[4]

Downey said that the pretexting subcommittee to which the Chair referred in her introduction includes members of this Committee and others who had participated in the earlier consideration of Rule 8.4 as it applies to pretexting. He commented that one could write law review articles or, indeed, textbooks about the exception that the Court has added to Rule 8.4(c) but added that the subcommittee has considered the narrower question of whether a comment about the exception is warranted; he pointed out that the Court itself had not seen a need for a comment when it added the exception to the rule. A straw poll among the subcommittee participants at its first meeting had indicated a prevailing view that no comment was needed. But the subcommittee has continued work on developing a comment nonetheless, in response to this Committee's request that it do so. The subcommittee had a long discussion at its second meeting, narrowing the choice for text of a comment to two versions, neither of which was yet ready for presentation to this Committee at this meeting. But, Downey said, the subcommittee is making progress toward a "minimalist" comment. It will meet next on February 13, 2018, to "re-tinker" the two versions, with a view toward presenting text for a comment to the next meeting of this Committee.

IV. *Housekeeping Change.*

The Chair invited member Anthony van Westrum to discuss his suggestion that the words "that is" be added to the introductory clause of Rule 5.4(d) — which clause the Committee had agreed, at its forty-eighth meeting, on October 27, 2017, should be corrected to read as follows:

> A lawyer shall not practice with or in the form of a professional company *authorized to practice law for profit*, if . . . .[5]

---

4. The Committee had previously considered the application of Rule 8.4(c) to "pretexting" as a tool for determining violation of trademarks and service marks and in other matters involving the investigation of wrongful conduct by third parties That consideration began at its twenty-ninth meeting, on January 21, 2011, (*see* Part V of the minutes of that meeting) and continued at its thirtieth meeting, on May 6, 2011, (*see* Part V of those minutes), its thirty-first meeting, on January 6, 2012, (*see* Part IV of those minutes), its thirty-second meeting, on July 13, 2012, (*see* Part III of those minutes), and its thirty-third meeting, on November 16, 2012, (*see* Part II of those minutes). Part III of the minutes of the thirty-fourth meeting, on February 1, 2013, contains the Chair's report to the Committee about her letter to the Court, dated November 19, 2012, advising the Justices that the Committee had determined against recommending a modification of Rule 8.4(c) to deal with pretexting but providing to the Court the Committee's extensive work product on that matter. As Downey explained to the Committee at its forty-seventh meeting, on June 16, 2017, the votes taken by the Committee in its deliberations on the pretexting matter had been close ones; at that forty-seventh meeting, the application of Rule 8.4(c) to investigative conduct was back before the Committee upon the Court's own proposal to add this exception to Rule 8.4(c): "except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities"; the Committee then directed the Chair to advise the Court (1) that the Committee did not believe that it could add more to the Court's deliberation than what it had previously provided and (2) that, if the Court added the anticipated exception, it should consider the addition of commentary to Rule 8.4 to give guidance to lawyers in the application of the exception. The Court adopted that exception on September 28, 2017, without providing commentary.

—*Secretary*

5. That addition had been made to correct a defective alteration in the text of the Rules to utilize the defined term "professional company"; without the correction, lawyers were ostensibly prohibited from serving as lawyers in nonprofit entities, such as legal aid organizations, that have interest-holders who are not lawyers.

—*Secretary*

Van Westrum noted that the style used throughout the Rules is to preface an adjectival phrase such as this "authorized to practice law for profit" with the words "that is": With that change, the clause would read as follows:

> A lawyer shall not practice with or in the form of a professional company *that is* authorized to practice law for profit, if . . . .

Rothrock noted that the terminology that the Committee had approved at its forty-eighth meeting is that which is used in the American Bar Association's Model Rules of Professional Conduct, but he agreed that the change proposed by van Westrum should be adopted for consistency in the style used in the Colorado Rules.

The Committee unanimously approved the change.

V. *Lawyer's Self-Assessment Program, from OARC.*

At the Chair's invitation, member Coyle reviewed the Colorado Lawyer Self-Assessment Program that the Office of Attorney Regulation Counsel now makes available on its website.[6]

Coyle reported that each of the ten sections of the program takes about fifteen minutes to complete; he suggested that a lawyer might complete a section of the program before lunch and then take a nice walk to review it in the lawyer's mind. Coyle stressed that the program can be particularly valuable for sole practitioners, who are not practicing from within law firms that may have established their own procedures and protocols that affect the conduct of their lawyers.

Coyle said that Committee member David W. Stark, who is chair of the Colorado Supreme Court Advisory Committee, chaired the subcommittee that developed the program.[7] He added that the program is the first of its kind in the nation and is getting a "good response" nationwide. Coyle will give a presentation about the program at the Conference of Chief Justices in Henderson, Nevada, and Chief Deputy Attorney Regulation Counsel — and Committee member — Margaret B. Funk will give a presentation about it before the California Bar Association Board of Trustees in Los Angeles, over the coming weekend; it will be considered at the midyear meeting of the American Bar Association in Vancouver, British Columbia, that will commence in a few days after this meeting of the Committee.

---

6. The program introduction is found at http://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp, from which the program itself may be accessed online. The program is available as a pdf file at http://www.coloradosupremecourt.com/PDF/PMBR/PMBR%20check%20list%20final.pdf.

–Secretary

7. The OARC website — http://www.coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2017%20Annual%20Report.pdf — names the members of the Proactive Management-Based Program Subcommittee as follows:

> David Stark (Chair), Suzann Bacon, Zak Bratton, Barbara Brown, Brett Corporon, Jim Coyle, Katy Donnelly, Barbara Ezyk, Jay Fernandez, Jill Fernandez, Mark Fogg, Heather Folker, Marci Fulton, Margaret Funk, Charles Garcia, Marcy Glenn, Karen Hammer, Jack Hanley, Melinda Harper, Karen Hester, Kim Ikeler, Steve Jacobson, Patricia Jarzobski, Genet T. Johnson, Josh Junevicus, Mark Lyda, Greg Martin, Dawn McKnight, April McMurrey, Scott Meiklejohn, Michael Mihm, Justin Moore, Geanne Moroye, Cecil Morris, Chris Murray, Reba Nance, Chris Newbold, William Ojile, Tim O'Neill, Margrit Parker, Cori Peterson, Ryann Peyton, Leni Plimpton, Katrin Rothgery, Matthew Samuelson, Catherine Shea, Jamie Sudler, Sara Van Deusen, Tom Werge, Jonathan White, James Wilder, and David H. Wollins

–Secretary

One working group (Coyle, Donnelly, Glenn, Fogg, Mihm, Stark, and Jonathan P. White) within the program development subcommittee is now developing a confidentiality rule for the assessment, so that a lawyer's results cannot be utilized in disciplinary action against that lawyer, and is also considering a statutory privilege for the program.

Coyle concluded his remarks by saying that the assessment tool, as it is currently available, is just "Version 1.0"; the OARC intends to use feedback that it receives from lawyers to improve the tool, with a view toward making it a "working tool" for lawyers. One particular goal in its development is to make it useful to young lawyers — to get them thinking early in their careers about the topics it covers – and useful to sole practitioners.

The Chair followed Coyle's remarks with the observation that this program puts Colorado in the forefront of developing good tools for lawyers' practice.

VI. Flat Fees.

The Chair invited member James S. Sudler III to report to the Committee on the progress of the subcommittee that is considering Rules text to deal with lawyers' undertakings to provide legal services to clients for "flat fees."

Sudler referred the Committee to the materials that the Chair had provided for the meeting, commencing at page 17 thereof. The text to which Sudler directed the Committee's attention — with one correction that Sudler explained to the Committee — reads as follows—

C.R.P.C. 1.5

(a) through (g) [no changes]

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

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

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

(ii) A statement of the amount to be paid to the lawyer for the services to be performed;

(iii) If all or any portion of a flat fee is to be earned by the lawyer upon the completion of specific tasks or the occurrence of specific events in the representation, a description of the amount to be earned upon the completion of each specified task or the occurrence of each specified event; and

(iv) The amount of any of the fees the lawyer is entitled to keep upon termination of the representation before all the legal services have been performed.

(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.

The change that Sudler referred to was the substitution of the word "specified" for the word "specific" that had been used with the words "legal services" in Paragraph (h) as it was stated in the meeting materials; Sudler commented that the purpose of that word is to require that, to qualify as a permissible "flat fee" arrangement under the proposal, the contemplated legal services would have to be *specified* with respect to the arrangement.

Sudler explained the genesis of this text as follows: Following the forty-eighth meeting of the Committee, on October 27, 2017,[8] member Funk went to the drafting board and drafted the bulk of this proposed text, following which the subcommittee met on December 8, 2017, to review it with the purpose of preparing a draft for consideration by the Committee at this meeting. Sudler said the subcommittee believed that the proposal addresses the comments made at the Committee's forty-eighth meeting.

As had been requested at the forty-eighth meeting, this proposal encompasses all of the flat fee rule within one paragraph — ¶ (h) — of Rule 1.5, including, at the beginning of the provision, a definition of the "flat fee" that is encompassed by the paragraph. And the proposal applies to a flat fee that is to be paid after completion of the specified services as well as to one that is to be received and held by the lawyer in advance of performance of the services. The inclusion, within the provision, of flat fees that are to be paid only after completion of the services had been resisted initially by some members of the subcommittee, Sudler said, but concurrence on the point had ultimately been obtained.

Sudler explained that ¶ (h)(1)(iii) of the rule requires that, if portions of the flat fee are to be earned "upon the completion of specific tasks or the occurrence of specific events in the representation," the tying of each such amount earned to the specific task or event upon which it is earned must be described in the arrangement — a requirement that is not applicable if none of the fee will be deemed earned until all of the specified legal services have been performed or events have occurred.

Sudler added that the proposal is to be applicable to a single engagement and, as well, to an undertaking to perform the specified legal services in a series of engagements, such as an undertaking to perform all of the client's real estate foreclosures for a stated flat fee applicable to each such engagement.

Upon conclusion of Sudler's remarks, the Chair asked van Westrum to review the alternative text that he had offered to the subcommittee and which the Chair had included in the materials for this meeting, beginning at page 18 of those materials.[9]

---

8. *See* Part II of the minutes of the forty-eighth meeting of the Committee, on October 27, 2017, for the Committee's discussion of flat fees at that meeting.

—*Secretary*

9. Van Westrum's proposal differed from the proposal submitted by the flat fee subcommittee as follows:

> (a) through (g) [no changes]
>
> (h) A "flat fee" is a fee for specified legal services by a lawyer for which the client agrees to pay a fixed amount, regardless of the time or effort involved.
>
> (1) The basis ~~**or rate**~~ of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and shall contain the following:
>
> (i) A ~~**description**~~ ***statement*** of the ***specified legal*** services the lawyer agrees to perform;
>
> (ii) A statement of the amount ***of fee*** to be paid to the lawyer for the services to be performed;
>
> (iii) If ***less than*** all ~~**or any portion of a**~~ ***of the entire*** flat fee is to be earned by the lawyer upon the completion of specific tasks or the occurrence of specific events in the representation~~**, a description of the amount**~~ ***but before completion of all of the services the lawyer agrees to perform, a statement of each specified task or event and of the amount of fee*** to be earned upon the completion ~~**of each specified**~~

Ignoring van Westrum's opening comment that his proposal was on its face brilliant and coherent and should be adopted in full, the Chair asked him to explain the differences between that proposal and the subcommittee's proposal.

Van Westrum began by identifying his deletion of the words "or rate" from the phrase "The basis or rate" that begins ¶ (h)(1) of the subcommittee's proposal, explaining that a flat fee is conceptually the antithesis of a rate of fee, such as $X per hour. To that, a member suggested that a fee arrangement might encompass both a flat fee for certain specified services and an hourly or other "basis" for a fee applicable to other services. And, to that, van Westrum responded that the concept of a flat fee should not be clouded by blending it with other arrangements; those other arrangements should be analyzed under the remainder of Rule 1.5 and not under ¶ (h) of the rule.

A member expressed concern that the remaining term — the "basis" of the flat fee — was not precise and suggested that the rule should "drill down" on the matter. Concurring, Van Westrum replied that a statement of the "basis" for a flat fee could well turn out to be a treatise; but he pointed out that the word exists in the current rule in opposition to the alternative of a "rate" and thus probably is an adequate expression of what is contemplated by ¶ (h)(1). Another member suggested substitution of the word "terms," so that ¶ (h)(1) would open with the requirement that "[t]he terms of a flat fee shall be communicated . . . and shall contain" what is then listed in ¶ (h)(1)(i) through ¶ (h)(1)(iv).

A member concurred with van Westrum's observation that use of the word "basis" in the existing text of ¶ 1.5(b) — where the phrase "basis or rate" was seemingly intended to encompass both time-based and flat fees — indicates its sufficiency for its purpose in this ¶ (h)(1).

But another member suggested that ¶ (h)(1) open with the words "The flat fee arrangement shall be communicated . . . ." Van Westrum responded that such wording was quite acceptable to him, for he has been in favor of text that would recognize that what is being dealt with by the provision is in fact an "arrangement" or, more specifically, an agreement — wording that has been avoided throughout the discussion. To that, another member concurred, wondering why the provision does not expressly recognize that it is dealing with an agreement between the lawyer and the client. And, to that, Sudler explained that the subcommittee had purposely avoided use of the word "agreement" or "contract," just as those words had been avoided in the drafting of the current text of Rule 1.5. The subcommittee retained "basis or rate" from the existing rule, and van Westrum narrowed that to "basis" but neither referred to an "agreement." And, to that, a member expressed her understanding that the text had been drafted to avoid reference to an agreement or a contract in order to avoid an implication that the client

---

~~**task or the occurrence of each specified event; and**~~ ***or occurrence thereof; and***

(iv) ~~**The amount of any of the fees**~~ ***A statement of the amount of fee, if any, that*** the lawyer is entitled to keep upon termination of the representation before ***completion of*** all the ~~**legal**~~ services ~~**have been performed**~~ ***the lawyer agrees to perform.***

(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**~~ ***is entitled to retain any*** of the ~~**flat fee**~~ ***amount so paid***, the lawyer shall comply with Rule 1.15(A)(c) with respect to ~~**any portion of**~~ the ~~**flat fee**~~ ***amount*** that is in dispute.

(3) The other provisions of this Rule apply to a flat fee agreement and to the lawyer's flat fee under such an agreement; without limiting the generality of the foregoing, paragraph (a), paragraph (f), and paragraph (g) of this Rule apply to a flat fee.

–Secretary

had to "sign off" on the matter in some fashion that could become cumbersome when the lawyer was responding rapidly to a sudden need for the lawyer's services.

Another member reiterated the suggested substitution of "terms" for "basis," leaving until later in the rule the matter of dealing with the amount that the lawyer will charge for the specified legal services. Van Westrum concurred in that suggestion, commenting that the purpose of this text in ¶ (h)(1) is to set up the following subparagraphs that flesh out the requirements for a flat fee arrangement, including specifically requiring, in ¶ (h)(1)(ii), a "statement of the amount [of fee] to be paid to the lawyer for the services to be performed" — an amount that will be known because the fee is "flat."

A member concurred with the suggestion that the term be "terms," noting that there will usually be details regarding the structure of the flat fee arrangement, including, for example, the establishment of milestones to mark the performance of the specified legal services.

The Chair asked whether there was a consensus behind substitution of the phrase "The terms of a flat fee shall be communicated" for "The basis or rate of a flat fee shall be communicated" in ¶ (h)(1), and the Committee responded affirmatively. Additionally, the Committee was in agreement that ¶ (h)(1)(i) should begin with "A statement of the specified legal services" rather than "A description of the services."

But Sudler then stated opposition to the switch from "description" to "statement" in that text; he began to explain why he took that position but admitted that it just felt better to him, though he could not say why.

And with that the Committee determined not to make either of the changes it had just agreed upon, choosing instead to leave the initial words of ¶ (h(1)(i) as proposed by the subcommittee: "A description of the services."

The Chair then directed the Committee's attention to van Westrum's suggestion that the word "fee" be added to ¶ (h(1)(ii), so that it would begin, "A statement of the amount of fee to be paid to the lawyer," thereby distinguishing the fee from expenses or other amounts that the client might also be obligated to pay.

A member responded by wondering whether the timing of the payment of the amount was important, and another member clarified that the issue really was when the fee was to be *paid*, as distinguished from when it was *earned*; that, he pointed out, was not addressed in either proposal.

Sudler pointed the Committee to the following sentence in existing Comment [14] to Rule 1.5: "[T]he lawyer and client may agree to an advance lump-sum or 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." But the member who had spoken about the importance of the timing of the payment responded that the cited comment referred to the activities — the "tasks" — that constitute the legal services, not to the timing of payment for those services. He suggested that ¶ (h)(1)(ii) read in full, "A statement of the amount to be paid to the lawyer for the services to be performed *and the timing of payment*."

A member who had not previously spoken wondered what in fact is the payment to which this text referred. He noted that timing is provided for both in ¶ (h)(1)(iii) — fee earned "upon the completion of specific tasks or the occurrence of specific events" — and in ¶ (h)(1)(iv) — keeping some portion of fee "upon termination of the representation before all the legal services have been performed." In his view that emphasis was appropriate: The rule should focus on clarity about what the lawyer is to

do and when he has earned payment for doing it; it need not focus on the timing of the client's payment obligation.

The member who had earlier expressed her understanding that there had been a specific avoidance of reference to an agreement or a contract in Rule 1.5 now commented that, if a dispute develops between client and lawyer, it will be over how and how much fees are earned and for what services or upon what events they are earned, not about the timing of payment. She would resolve the current question by having ¶ (h)(1)(ii) read, "A statement of the amount to be paid, and the timing of the payment, to the lawyer for the services to be performed."

But another member responded to that by saying that the textual proposals have not dealt with the difference that might exist between dates for payment and events triggering payment. She would, however, leave dealing with that distinction to later in the rule; she would leave ¶ (h)(1)(ii) to deal only with the amount to be paid for the specified services, whenever that amount is to be paid. She would add an additional subparagraph to deal with the timing of payments, structured in parallel to ¶ (h)(1)(iii) as it requires a description of "each specific task or . . . occurrence of specific events" generating an entitlement to payment.

And a member responded to that by noting that the points upon which fees are earned may not necessarily parallel the timing of the services performed to those points. Payment could be due upon completion of particular services — or upon some other trigger.

Another member summarized by noting that a statement of when the client is to make payment is an important part of the arrangement and the rule should require that it be specified, that the timing of each payment should be specified.

A member noted that the discussion has identified a nuance: That there is both the matter of earning a fee and the matter of when it is to be paid, and that the lawyer should express both elements when stating the flat fee arrangement to the client.

Another member reverted to the prior suggestion that ¶ (h)(1)(ii) read, "A statement of the amount to be paid to the lawyer for the services to be performed and the timing of payment."

But Sudler asked why the matter of timing of payment needed to be called out in the text of the rule — wasn't it encompassed in the requirement that the lawyer state the "terms" of the arrangement? If the lawyer wants to provide for partial payments in advance of completion of all the specified services or anticipated events, the lawyer may include the details in the "terms of a flat fee" that are to be communicated to the client pursuant to ¶ (h)(1)(i).

Another member, however, suggested that the Committee has tackled the flat fee in part because lawyers are getting the details of advance payment wrong — they have focused on the need to put advances of fees into their trust accounts pursuant to Rule 1.15, as they are reminded to do by Comment [12] to Rule 1.5, and have not well-documented the timing of payments that are to be made in advance of completion of all the specified legal services.

A member who had not previously spoken suggested that the timing matter could be placed in its own subparagraph under ¶ (h)(1): "A schedule of the payments to be made to the lawyer." Another member concurred, saying she often sees arrangements by which the client agrees to pay $XXX in fees to arraignment and disposition of the case but $YYY if the case goes to trial.

A member pointed out that the question of timing of payment is relevant whether or not payment is to be made in advance of services (an unearned payment) or after completion of a stated portion or all of the services. The details about the payment obligation need to be stated to the client.

A member said that one of the comments that had just been made had triggered in his mind this additional question: Should this ¶ (h) make it clear that its listing of the terms that are to be communicated to the client is not an exclusive listing? To that, another member replied that that could create a trap for the lawyer who communicated all that the Court has thought to specify in its rule on flat fees but who might nevertheless face discipline for having failed to communicate some other element that is later thought to be important to the lawyer's particular engagement. The two members then compared usage of the words "include" and "contain" — the latter word being the verb that now closes the preamble of ¶ (h)(1) before the colon that sets up the statement of the four items that required by the paragraph; they concluded that the word used — "contain — is to be read as setting up an exclusive listing of required provisions, the provision of which in an engagement suffices for compliance with the flat fee rule.[10]

A member suggested that the Court should provide a form for flat fee arrangements similar to its provision of a form, in Rule 7 of C.R.C.P. Rule 23.3, for contingent fee agreements the use of which is sufficient for compliance with Rule 23.3. Another member rejected that idea as not getting to the concern that the proposed list of requirements in ¶ (h)(1) — which is designed to accommodate many different flavors of flat fee arrangements — may not be inclusive of all that should be included to make a particular flat fee arrangement sufficiently clear to the client and hence, in her view, should not be exclusive.

A member interjected that he, too, had concluded that the listing of requirements in ¶ (h)(1) should not be exclusive of what should be contained in a lawyer's communication about a particular flat fee arrangement in order to avoid discipline: He would end the preamble of ¶ (h)(1) with the words, "and shall *include* the following." Additionally, he suggested, a comment could clarify that payments need not be timed to match the events upon which they are earned, a comment that could speak to "timing" and flesh out the matters that the Committee has been discussing.

A member reverted to the prior suggestion that ¶ (h)(1)(ii) read, "A statement of the amount to be paid to the lawyer for the services to be performed and the timing thereof." To that, another member suggested that it read, "A statement of the amount *of fee* to be paid to the lawyer for the services to be performed and the timing thereof"; but a third member pointed out that the client may be obligated to make payments of other amounts in addition to fees, and those amounts should also be identified appropriately, even if their amounts and timing cannot be predetermined. Another member responded with the suggestion that the provision read, "A statement of the amount*s* to be paid to the lawyer *and the timing thereof* for the services to be performed and the timing thereof." And another refined that by deleting the word "thereof," so that ¶ (h)(1)(ii) would read, "A statement of the amounts to be paid to the lawyer and the timing of those payments for the services to be performed."

The Chair asked Sudler whether a comment could encompass these matters, as a member had previously suggested; Sudler replied affirmatively.

---

10. The question of whether "contains" sets up an exclusive listing was not further considered at the meeting. It is instructive that Comment [7] to Rule 3.6 attaches "only" to "contain" to indicate exclusivity: "Such responsive statements should be limited to *contain only* such information as is necessary to mitigate undue prejudice created by the statements made by others"; that shows how exclusivity can be expressed in the Rules when it is intended.

—*Secretary*

But the Committee expressed a consensus that the word "contain" should be changed to "include" so that the preamble of ¶ (h)(1) would end with the words, "and shall *include* the following."

The Chair then asked that the Committee turn its attention back to the first line of ¶ (h) and strike from there the words "by a lawyer," so that it would read, "A 'flat fee' is a fee for specified legal services for which the client agrees to pay . . . ." The change would recognize that a lawyer may charge a client not only for the lawyer's services but also for those of paralegals and other nonlawyers. The Committee agreed with that suggestion.

A member then suggested that the word "scheduling" be substituted for "timing" in the text the Committee had reached consensus upon for ¶ (h)(1)(ii), which was "A statement of the amounts to be paid to the lawyer and the timing of those payments for the services to be performed." But another member objected that the concept of a schedule of payments was too rigid. An informal polling of five of the members who had spoken in the preceding discussion of that subrule indicated that a majority preferred "timing" to "scheduling."

The Committee then considered van Westrum's suggestions for ¶ (h)(1)(iii), which would read—

> (iii) If ***less than*** all ~~**or any portion of a**~~ ***of the entire*** flat fee is to be earned by the lawyer upon the completion of specific tasks or the occurrence of specific events in the representation~~**, a description of the amount**~~ ***but before completion of all of the services the lawyer agrees to perform, a statement of each specified task or event and of the amount of fee*** to be earned upon the completion ~~**of each specified task or the occurrence of each specified event; and**~~

In his introductory remarks, van Westrum had characterized the changes that he proposed as "self-explanatory"; the Chair now asked him why he thought so.

As to the suggestion that the provision begin with "If less than all," rather than with "If all or any portion," van Westrum explained that, if the arrangement provided that *all* of the flat fee was earned "upon the completion of specific tasks or the occurrence of specific events in the representation," then logically there would be no need for a description by which portions of that unitary flat fee were to be earned. The preceding requirements of ¶ (h)(1)(ii) — a statement of the services to be performed — and ¶ (h)(1)(iii) — a statement of the fee to be paid for those services — established all that need be said for the case of a unitary fee.

A member suggested this alternative: "If any portion of the flat fee is to be earned by the lawyer before completion of the representation, a description of the amount to be earned upon the completion of specific tasks or the occurrence of specific events . . . ."[11] In response to a member's inquiry, this member noted that an engagement agreement might fix earnings points by date: By May 30th Lawyer shall have completed Task XXX and thereupon will be entitled to $YYY.

---

11. The suggestion differed from van Westrum's proposal as follows:

> If ~~**less than all**~~ ***any portion*** of the ~~**entire**~~ flat fee is to be earned by the lawyer ***before completion of the representation, a description of the amount to be earned*** upon the completion of specific tasks or the occurrence of specific events

—*Secretary*

A member expressed concern about the references to the *lawyer's* accomplishing tasks, noting that in many cases billable tasks may be completed by the lawyer's paralegal or a properly-chargeable consultant.

To that concern, van Westrum suggested substitution of "legal services to be provided" for "services the lawyer agrees to perform" in the two places the later phrase appears in his proposal.

A member took that suggestion as the basis for his suggestion that the phrase be changed to "completion of all of the specified legal services" in a revision of ¶ (h)(1)(iii).

Another member suggested that the references to the "amount of fee" be expanded to refer both to the amount and to the alternative of a calculation: "the amount or method of calculating the fee."

That same member asserted that van Westrum's reference to the retention of fees "upon termination of the representation before completion of all the services" was to an event that was always possible. Accordingly, she would change the wording of ¶ (h)(1)(iv) to, "A statement of the amount of fee, if any, that the lawyer is entitled to retain if the representation is terminated before the completion of all the specified legal services the lawyer has agreed to perform." In answer to van Westrum's question about that proposal, the member said the proposal was to deal with an early-termination fee that was fixed without reference to the nature or quantity of service rendered to the point of termination. To that, Sudler commented that such an early-termination fee would not be "for specified legal services" and thus could be charged separately and apart from all of the provisions of proposed ¶ (h). Sudler stressed that that fact — that an early-termination fee that is not tied to the completion of specified legal services may be charged under the lawyer's engagement with the client without regard to the existence of a flat fee in that engagement — should be clearly stated in the minutes of the meeting.

Several members urged that ¶ (h)(1)(iv) use the word "earns," in place of a reference to the lawyer's "entitlement" to some amount, noting that we are discussing between-the-milestone terminations and that a lawyer may not withdraw from an advanced deposit of funds contained in the lawyer's trust account under Rule 1.15 unless and until the amount withdrawn has been "earned."[12] Other members balked at the switch from entitlement to earning, and a member noted that, if the wording is changed from "is entitled" to "earns" in this clause (iv), a parallel change should be made to ¶ (h)(2).

Yet another member expressed dislike for the words "to keep" in the phrase of ¶ (h)(1)(iv) then under discussion — "is entitled to keep" — "arguing that it begged the question of where that keeping must be done.

The Committee chose to use "earned" to comport with the terminology of Rule 1.15, so that the phrase would read, "fees the lawyer earns . . . ."

And a number of members disagreed with van Westrum's position that the phrase he used, "before completion of all the services the lawyer agrees to perform," could not logically include the circumstance in which the lawyer had completed some milestones but had not yet completed all the

---

12. *See, e.g.*, Rule 1.15B(a)(1) (emphasis added):

> A trust account or accounts, separate from any business and personal accounts and from any other fiduciary accounts that the lawyer or the law firm may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit all funds entrusted to the lawyer's care and any advance payment of fees that have not been *earned* or advance payment of expenses that have not been *incurred*.

—*Secretary*

milestones encompassed by the engagement. That is, they rejected Van Westrum's view that "completion of all the services" could not occur until all of the services contemplated to be provided under the engagement had in fact been provided.

That concluded the Committee's exercise in collective drafting. The Committee had rejected most, if not all, of van Westrum's suggestions, and the Committee's resulting version of Rule 1.4 now compared to the proposal that had been submitted by the subcommittee for the meeting read as follows:

> (a) through (g) [no changes]
>
> (h) A "flat fee" is a fee for specified legal services ~~by a lawyer~~ for which the client agrees to pay a fixed amount, regardless of the time or effort involved.
>
> (1) The ~~basis or rate~~ ***terms*** of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and ~~shall contain~~ ***must include*** the following ***information***:
>
> (i) A description of the services the lawyer agrees to perform;
>
> (ii) ~~A statement of the~~ ***The*** amount to be paid to the lawyer ***and the timing of payment*** for the services to be performed;
>
> (iii) If ~~all or~~ any portion of ~~a~~ ***the*** flat fee is to be earned by the lawyer ~~upon the completion of specific tasks or the occurrence of specific events in the representation, a description of~~ ***before completion of the representation,*** the amount to be earned upon the completion of ~~each~~ specified ~~task~~ ***tasks*** or the occurrence of ~~each~~ specified ~~event~~ ***events***; and
>
> (iv) The amount ~~of,~~ ***if*** any, ***or the method*** of ~~the~~ ***calculation, of*** fees the lawyer ~~is entitled to keep upon termination of~~ ***earns, if*** the representation ***terminates*** before ~~all~~ ***completion of*** the ***specified*** legal services ~~have been performed~~.
>
> (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. The authorization of this form shall not prevent use of other forms consistent with this Rule.***

The Committee applauded its own efforts at that task and determined that its work product at this meeting should be circulated as a further draft to the members to be sure that it correctly reflects the changes made at this meeting, with the understanding that the subcommittee would then turn its attention to a comment dealing specifically with ¶ (h).

At a member's suggestion that the subcommittee look to the form that is provided in C.R.C.P. Rule 23.3 for contingent fee arrangements, Sudler replied that the subcommittee will prepare a draft of a form for flat fees for the Committee to consider at its next meeting.

The Chair summarized by pronouncing that the Committee had, in substance, approved the text of the language in the rule and would turn to the comment at its next meeting.

VII. *Conjunction / Disjunction in Rule 8.4(c)*

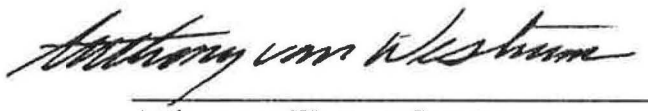
Member Downey noted that, at its forty-eighth meeting, on October 27, 2017, the Committee had considered whether the disjunction "or" used by the Court in its addition of the investigation exception to Rule 8.4(c), in the phrase "a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators," should instead be the conjunction "and." The Committee had, at that meeting, referred that burning question to the pretexting subcommittee. Downey now reported that the subcommittee had then looked at the question, and at usage throughout the Rules, and determined that the conjunction "and"should be used; and now Downey suggested that it would be appropriate for the Chair to propose that housekeeping change to the Court. The Committee approved that action.

VIII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:25 a.m. Following the meeting, the Chair advised the Committee that its next scheduled meeting would be on Friday, April 27, 2018, beginning at 9:00 a.m., in the Supreme Court Conference Room.

The Chair noted that at least one topic for that next meeting will be a continued discussion of pretexting under Rule 8.4 under member Downey's direction.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These submitted minutes have not yet been approved by the Committee.]

Proposed Flat Fee Rule

Colo. RPC 1.5

[Post Standing Rules Committee Meeting 1-26-18

And revised 3-28-18 by Subcommitee]

(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 ~~must~~ shall include the following in formation:

(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 represention, the amount to be earned upon the completion of specified tasks or the occurrence of specified events; and

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

(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. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to 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~~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. Arrangments other than contingent or flat fees require ~~A~~a written communication ~~must~~ 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 take 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.

[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 feen 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).

~~*Rule 1.5(f) Does Not Prohibit Lump-sum Fees or Flat Fees*~~

[12] Advances of unearned fees, including advances of all or a portion of a ~~"lump-sum" fees and "flat fees,"~~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 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 ~~lump-sum or~~ 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 ~~advance lump-sum or~~ 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 ~~lump-sum or~~ 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 ~~lump sum or~~ 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 ~~deseribed~~ specified in Section I, below, for a flat fee as described ~~in Sections II and VI,~~ 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.]

Formatted: Font color: Text 1

II. Flat Fee.

This is a flat fee ~~arrangement~~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.

Formatted: Indent: First line: 0.5", Space After: 12 pt, Line spacing: At least 22 pt

Formatted: Font: Not Italic

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.

Formatted: Indent: First line: 0.5"

Client 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 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*] ~~reasonable value of the Lawyer's services provided between those increments~~. However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the ~~next~~ increment.

Formatted: Font: Italic

Formatted: Font: Not Italic

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