

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

**AGENDA**

April 29, 2016 9:00 a.m.

Supreme Court Conference Room4244

Ralph Carr Colorado Judicial Center, 4th Floor

2 East 14th Avenue, Denver

**Call-in numbers: 720-625-5050 – Access Code: 52033621#**

**WiFi Access Code: @cce\$\$0123**

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1. Approval of minutes of January 29, 2016 meeting [to be distributed separately]
2. Report re: ABA Ethics 20/20 and other amendments approved on April 7, 2016, and discussion of potential educational outreach [Marcy Glenn, April 8, 2016 email to Committee]
3. Report from Fee Subcommittee [Nancy Cohen and Jamie Sudler, pages 1-42]
4. Report from Orphaned COLTAF Funds Subcommittee [Alec Rothrock, pages 43-45]
5. New Business:
  - a. Proposed amendment to Rule 1.6 comments [Marcy Glenn, pages 46-53]
  - b. Proposed amendment to ABA Model Rule 8.4 and Comment [3] [Marcy Glenn, pages 54-67]
6. Administrative matters: Select next meeting date
7. Adjournment (before noon)

Chair

Marcy G. Glenn

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**Memo**

To: Standing Rules Committee  
From: Jamie Sudler, Chief Deputy Regulation Counsel  
Re: Proposed Flat Fee Rule  
Date: April 7, 2016

**I. Introduction**

This memo outlines issues about flat fees and addresses some of the matters that the Office of Attorney Regulation Counsel handles on a regular basis. As discussed below, the current state of the law is not clear about what a lawyer can do if the lawyer has drafted an ambiguous flat fee agreement, or has not communicated the basis or rate of a flat fee in writing.<sup>1</sup>

At the last Standing Rules Committee meeting on January 29, 2016, several drafts of a rule about flat fee arrangements were discussed.<sup>2</sup> After that meeting it was apparent that some of the problems reviewed in this area by OARC may not be fully understood.

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<sup>1</sup> See Colo. RPC 1.5(b) which provides in pertinent part that a lawyer who has not regularly represented the client shall communicate in writing the basis or rate of the fee and expenses before or within a reasonable time after commencing the representation.

<sup>2</sup> See Memo to Standing Rules Committee, January 22, 2016, **Exhibit A** hereto.

The most difficult issue that the subcommittee and the full committee has discussed is what should happen when the attorney-client arrangement is terminated before the goal of the representation is accomplished. Should the lawyer who has drafted an ambiguous agreement, or who has no agreement be allowed to determine unilaterally what she has earned and keep those funds? Or should the lawyer have to return funds and seek determination by a court of the amount the lawyer might be entitled to recover based upon an equitable theory. As discussed below, the recent case of *Matter of Gilbert*, 346 P.3d 1018 (Colo. 2015) does not answer these questions definitively.

## **II. Flat Fee Matters Addressed by OARC**

Some of the major areas in which we see complaints against lawyers involve advanced fees, fee agreements, and fees they claim they earned. Many of these concern flat fees. A portion of these cases result in discipline, and some of them result in diversion out of the discipline process.<sup>3</sup> We also handle less serious cases by dismissing them, and providing guidance to the lawyer about fee issues. Sometimes we will dismiss a case upon the lawyer's agreement to attend Ethics School or Trust Account School.

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<sup>3</sup> C.R.C.P. 251.13 Alternatives to Discipline.

In comparison to other areas of attorney misconduct, those relating to fees and fee agreements are near the top of the list both in the number of requests for investigation and the number of rule violations.

Here are some statistics from 2015: at the Intake<sup>4</sup> stage of the process, Fee Issues represented 11% of all the requests for investigation we received. *See Exhibit B.* This category was second in number only to requests for investigation about the strategy or tactics of an opposing counsel. At the Intake stage, complaints about fees were slightly higher in number than those about lack of communication or lack of diligence.

A number of those requests for investigation were dismissed, or handled through a diversion agreement at the Intake Division. However, some of them were processed to the Trial Division for more investigation.<sup>5</sup> At that stage, our data shows that in 2015 there were 45 violations of Colo. RPC 1.5 either admitted by the lawyer, found by a Hearing Board, or implicated in a diversion agreement. *See Exhibit C.* This number includes more than flat fee issues, but it is unknown how many more. OARC does not keep statistics on how many of those 45 matters involved flat fees.

In an effort to show how flat fee issues have come up, we have attached an **Appendix** to the end of this memo that outlines various flat fee cases for a few years

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<sup>4</sup> C.R.C.P. 251.9(b).

<sup>5</sup> C.R.C.P. 251.10

back. The cases are grouped into: A) cases in formal proceeding in front of the Presiding Disciplinary Judge; B) cases that resulted in a diversion agreement; C) cases that were dismissed; and, D) pending cases. The method used to assemble the Appendix was to search our data base for cases that involved the term “flat fee,” and also to review the diversion summaries that appear in the Colorado Lawyer each quarter. The Appendix does not represent a complete review of all flat fee cases; there are more, but time constraints led to this summary.

### **III. Current State of the Law**

When *In re Sather*, 3 P.3d 403 (Colo. 2000) was issued by the Supreme Court, this office understood the case to mean that lawyers had to return unearned fees to the client, and the lawyer could not do a unilateral *quantum meruit* analysis of what she earned. If the lawyer had no written fee agreement or communication with the client, the lawyer would have to return all fees advanced and seek a court’s determination of *quantum meruit*. The following language was viewed as direction about lawyer regulation in this area:

In addition to protecting client property, requiring an attorney to keep advance fees in trust until they are earned protects the client's right to discharge an attorney. See Colo. RPC 1.16(d) cmt. (“A client has a right to discharge an attorney at any time, with or without cause, subject to liability for payment for the lawyer's services.”). *Upon discharge, the attorney must return all unearned fees in a timely manner, even though*

*the attorney may be entitled to quantum meruit recovery for the services that the attorney rendered and for costs incurred on behalf of the client. See Colo. RPC 1.16(d); People v. Crews, 901 P.2d 472, 474-75 (Colo.1995); Olsen & Brown, 889 P.2d at 677.*

3 P.3d at 409-10. (emphasis added). *Sather* was focused much more on the issue of whether a lawyer should be required to place a flat fee in trust until it was earned. The issue of whether the Mr. Sather had earned fees under a *quantum meruit* theory and was entitled to the *amount* of fees he retained was not litigated in the case. At the time of the *Sather* matter the critical issue was whether a lawyer had to place the advanced flat fees in trust. The novelty of that entrustment issue eclipsed any concern about the money Mr. Sather retained.

The Court in *Sather* went to great lengths to discuss flat fees, general retainers, and special retainers. *Sather* was important guidance to OARC and all Colorado attorneys.

The Supreme Court has recently clarified that OARC's view of the above language was not quite correct. In *Matter of Gilbert*, 346 P.3d 1018 (Colo. 2015) the Court wrote:

We conclude that *In re Sather* does not stand for the proposition that where a noncontingent fee agreement is silent as to how the attorney will be paid in the event of early termination, the attorney must return the entire advance fee upon discharge regardless of the work performed to that point.

346 P.3d at 1023.

From the Court's opinion in *Gilbert*, one might conclude that a lawyer can unilaterally determine what is owed under a *quantum meruit* analysis and keep what the lawyer determines to be appropriate.<sup>6</sup>

But the status of the law is not that clear. The Court's opinion in *Gilbert* goes on to state at the end:

Moreover, by upholding the Hearing Board's determination in this case, *we do not intend to suggest that attorneys may unilaterally determine what they believe they are owed in quantum meruit*. Rather, we simply conclude that the Hearing Board did not err in this case when it determined that Gilbert did not violate Rule 1.16(d) by failing to return that portion of the fee to which she was entitled in quantum meruit.

346 P3d. at 1028.

The language seems to limit the opinion to the specific facts of *Gilbert* which makes it difficult to apply from a regulatory and educational perspective. We are at the point of needing clarification as to how we regulate lawyers not only to protect clients, but to educate lawyers how to handle flat fees.

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<sup>6</sup> It is important to remember that the Court's language in *Gilbert* arose from a case in which a lawyer had no written explanation to the client of how a *quantum meruit* analysis would be done. And also the lawyer had not informed the client of any mileposts or earmarks that explained how the flat fee was earned.

#### **IV. Proposed Rules**

OARC's position is that it make sense to have a pattern flat fee arrangement which was circulated in January. *See Exhibit D.* And we are urging the full Standing Rules Committee to recommend the following rule<sup>7</sup> to the Supreme Court:

##### **NEW RULE 1.5( )**

**[Version 4, from Jan. 22, 2016 Memo, Exhibit C hereto]**

- (a) The term "flat fee" refers to an arrangement for legal services of an attorney or attorneys under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney.
- (b) Each flat fee arrangement shall be in writing and shall contain the following:
  - i. A description of the services the attorney agrees to perform;
  - ii. A statement of the maximum amount to be paid to the attorney for the services performed;
  - iii. A description of when or how fees are earned by the attorney, unless the attorney earns no fees until all of the specified legal services are completed;
  - iv. The amount if any of the fees the attorney is entitled to keep upon termination of the representation before the specified legal services or a portion of them have been performed.
- (c) If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement form [refer to where from is placed] and the attorney-client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

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<sup>7</sup>For alternative proposed rules *see Exhibit A* hereto, pp.2-3.



The proposed rules that have been discussed to date could give needed clarification to flat fee arrangements. There has not been much disagreement about a rule that specifies what a flat fee arrangement should contain. The major controversy in the proposed rules is this: what should happen if a lawyer has no flat fee agreement, or one that does not address what happens to fees upon termination before the objective of the representation is accomplished? Should the lawyer be required to return all of the advanced fee, and submit her *quantum meruit* claim to a court; or should the lawyer be able to determine unilaterally what she is owed despite not having explained in writing to the client how she would do this?

The version of a proposed rule that requires the lawyer to refund all of the advanced fee seems to some to be too harsh and imposes a penalty on a lawyer. However, any lawyer can easily avoid this result by having a simple fee agreement that explains what happens in the event of early termination. *See Exhibit D.*

One of the objections that has been expressed about such a rule, besides the penalty argument, is that the lawyer who has to go to court to assert a *quantum meruit* claim, will almost always face a counterclaim for malpractice. While that could be the case, the lawyer can avoid this possibility by having a simple fee arrangement as suggested.

OARC submits that it is not difficult to use a flat fee arrangement patterned after the form included with the proposed rules. The notion that a lawyer, who cannot use a simple fee arrangement, should be able to determine unilaterally what she is owed seems unfair to clients. That result rewards the lawyer for not being clear at the outset of the representation. It can work to deprive a client of needed funds to get their representation concluded by paying a successor lawyer.

## **V. Conclusion**

The proposed rule is fair to the lawyer and to the client, and is similar to Colo. RPC 1.5(c) that requires contingent fee agreements to comply with Chapter 23.3 of the Civil Rules of Procedure. The proposed rule gives lawyers a simple template to follow. It promotes the public interest through compelling clarity in communication about flat fees, and protects clients from lawyers who cannot comply with very simple flat fee arrangements.



## Memo

To: Standing Rules Committee  
From: Jamie Sudler and Nancy Cohen  
Date: January 22, 2016  
Subject: Fee Subcommittee Report

### Introduction

At the June 5, 2015 meeting of the Standing Rules Committee, a subcommittee was appointed to consider issues concerning flat fees and perhaps other fee issues triggered by 1) *In re: Gilbert*,<sup>1</sup> and, 2) a letter to the Committee from Steve Jacobson, Chair of the Attorney Regulation Committee.

The following members of the Committee agreed to serve on the Subcommittee: Lisa Wayne, David Little, Tom Downey, Cecil Morris, Matt Samuelson, and Gary Blum. Marcy Glenn, Chair of the Standing Rules Committee appointed Nancy Cohen and me to be co-chairs, and she appointed Steve Jacobson to the Subcommittee. The Subcommittee recruited practitioners including Jeff Joseph (immigration), Martha Ridgeway (estate planning), Nancy Elkind (immigration) and Melinda Harper (non-lawyer, CPA), all of whom actively participated in our meetings.

The Subcommittee met 5 times in person with some members calling in. We addressed flat fees almost exclusively at this time, but understand that the Committee may want us to address other fee issues in the future.

The discussions have resulted in the attached draft rules and a draft flat fee arrangement.

The Subcommittee did not reach a consensus on which version it supported. And, there was no one draft that drew the support of a majority of the Subcommittee. However, our sense of the Subcommittee's view as a whole is that a rule in the flat fee area will be helpful not only to protect the public, but also to guide practitioners.

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<sup>1</sup> *In re Gilbert*, 346 P.3d 1018 (Colo. 2015).

As our discussions evolved we do not remember anyone stating that we should do nothing in this area.

### **Proposed Rules**

As mentioned, there are 4 versions of a Flat Fee rule submitted for consideration by the whole Committee. The versions are identical in subparagraphs (a) and (b):

- (a) The term “flat fee” refers to an arrangement<sup>2</sup> for legal services of an attorney or attorneys under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney.
  
- (b) Each flat fee arrangement shall be in writing and shall contain the following:
  - i. A description of the services the attorney agrees to perform;
  
  - ii. A statement of the maximum amount to be paid to the attorney for the services performed;
  
  - iii. A description of when or how fees are earned by the attorney, unless the attorney earns no fees until all of the specified legal services are completed;
  
  - iv. The amount if any of the fees the attorney is entitled to keep upon termination of the representation before the specified legal services or a portion of them have been performed.

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<sup>2</sup> The Subcommittee used the term “arrangement” instead of “agreement” because Colo. RPC 1.5(b) does not require an agreement, but instead requires the lawyer to give the client a written advice of the basis or rate of the fee and expenses.

The Subcommittee did reach a consensus that (a) and (b) are appropriate. However, particular members may not be in support of a new rule if it contains a subparagraph (c) with which they do not agree. We decided to submit this issue to the Committee as a whole.

The issue on which there was no consensus is what happens if a lawyer's flat fee arrangement does not contain the items in subparagraph (b) above. Version 1 has no provision about what happens. Version 2, 3 and 4 contain alternative provisions.

Version 2 provides:

(c) If a flat fee arrangement is not in substantial compliance with this Rule then it is unenforceable.

Version 3 provides:

(c) If a flat fee arrangement is not in substantial compliance with this Rule and the attorney-client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

Version 4 provides:

(c) If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement form [refer to where from is placed] and the attorney-client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

There was much discussion among the members of these drafts and what should happen if a lawyer does not include the basic principles in a flat fee arrangement. Our sense is that the Subcommittee wants a full discussion of these versions at the Committee where people can express their thoughts and listen to other points of view.

Version 4 refers to a Flat Fee Arrangement form. The proposed form is attached and the main motivation for the form is to give lawyers a template they can adapt to their practice. It is a bare bones template, and many lawyers would use the form as a starting point. The form could be used regardless of the version supported by the Committee.

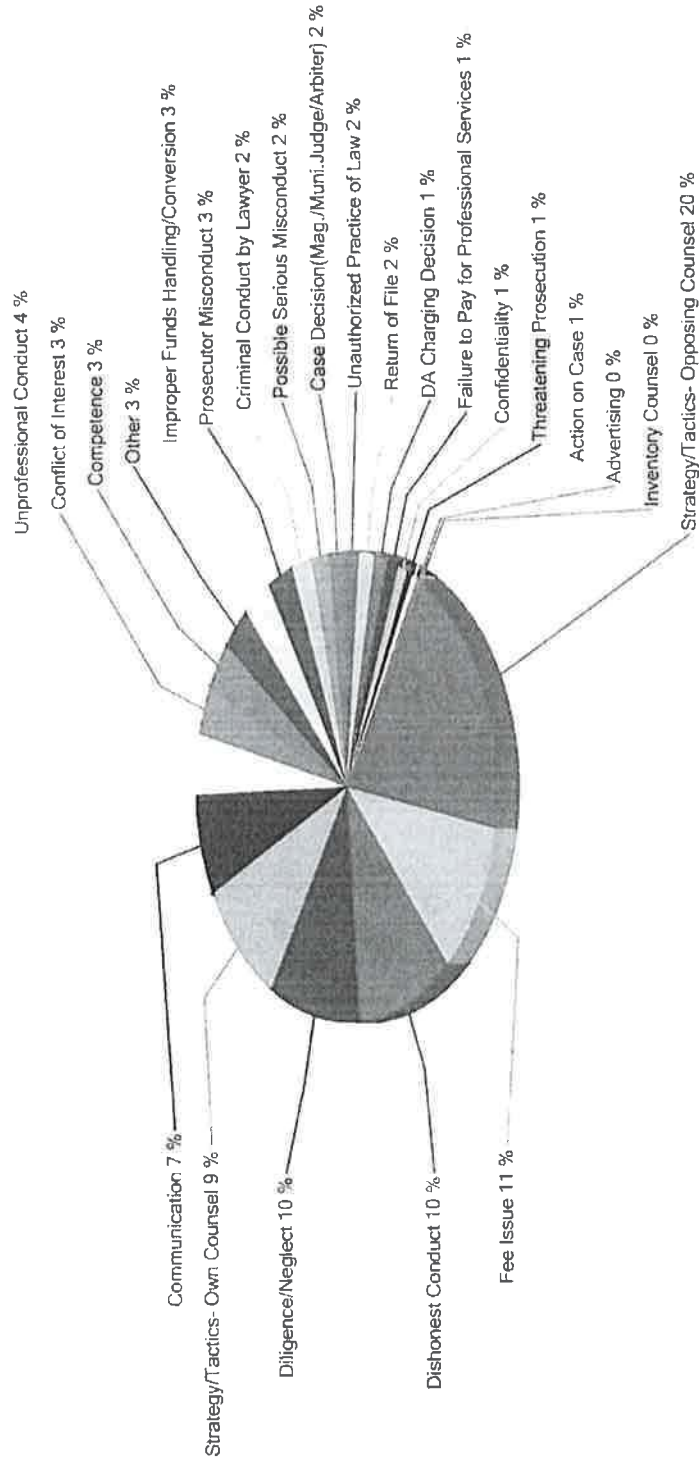
We did not attempt at this point to decide where the form would appear, although, of course, we noted that the Contingent Fee form is in Chapter 23.3 of the Civil Rules of Procedure.

We have not drafted comments to go along with any of the versions. And we did not consider exactly where to place a new flat fee rule; however, Rule 1.5 is the logical place for it. One suggestion is that it could be Rule 1.5(h).

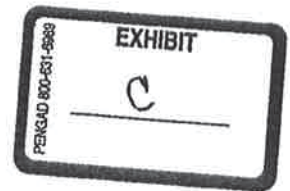
### Conclusion

The Subcommittee forwards these proposals to the Committee for discussion and consideration. During that discussion, the members of the Subcommittee will be able to express their views of the different versions.

Colorado Supreme Court  
 Attorney Regulation Counsel  
 Central Intake - Nature of Inquiries  
 January 01, 2015 - December 31, 2015



PENGAD 800-837-6888  
 EXHIBIT  
 B



## Rule Violation Counts

1/1/2015 Thru 12/31/2015

### Rule

1.1 ~ Rule 1.1 Competence	22
1.15 ~ Rule 1.15 Safekeeping Prop.	4
1.15(a)(2013) ~ Rule 1.15(a)(2013)	2
1.15a ~ Rule 1.15(a)	34
1.15b ~ Rule 1.15(b)	13
1.15c ~ Rule 1.15(c)	15
1.15d1 ~ Rule 1.15(d)(1)	2
1.15j ~ Rule 1.15(j)	1
1.15j1 ~ Rule 1.15(j)(1)	1
1.15j2 ~ Rule 1.15(j)(2)	1
1.16a ~ Rule 1.16(a)	2
1.16a1 ~ Rule 1.16(a)(1)	1
1.16a3 ~ Rule 1.16(a)(3)	1
1.16d ~ Rule 1.16(d)	31
1.2 ~ Rule 1.2 Scope & Objectives	2
1.2(d) ~ Rule 1.2(d)	1
1.2a ~ Rule 1.2(a)	1
1.3 ~ Rule 1.3 Diligence	42
1.4 ~ Rule 1.4 Communication	2
1.4a ~ Rule 1.4(a)	17
1.4a2 ~ Rule 1.4(a)(2)	3
1.4a3 ~ Rule 1.4(a)(3)	15
1.4a4 ~ Rule 1.4(a)(4)	9
1.4b ~ Rule 1.4(b)	15
1.5 ~ Rule 1.5 Fees	1
1.5(d) ~ Rule 1.5(d)	1
1.5a ~ Rule 1.5(a)	11
1.5b ~ Rule 1.5(b)	11
1.5c ~ Rule 1.5 (Fees)	1
1.5c ~ Rule 1.5(c)	1
1.5f ~ Rule 1.5(f)	18
1.5g ~ Rule 1.5(g)	1
1.6 ~ Rule 1.6 Confidentiality	2
1.6a ~ Rule 1.6(a)	1



1.6d ~ Rule 1.6(d)	1
1.7 ~ Rule 1.7 Conflict - General	3
1.7a2 ~ Rule 1.7(a)(2)	1
1.8 ~ Rule 1.8 Conflict - Trans.	1
1.8a ~ Rule 1.8(a)	1
1.8c ~ Rule 1.8(c)	1
1.8e ~ Rule 1.8(e)	2
1.8j ~ Rule 1.8(j)	1
1.9 ~ Rule 1.9 Conflict - Fmr Client	2
251.10 ~ Rule 251.10(a)	3
251.21 ~ Rule 251.21	1
251.5 ~ Rule 251.5	11
251.8 ~ Rule 251.8 Serious Misconduct / Felony Conviction	4
251.8.6 ~ Rule 251.8.6 Failure to Cooperate	4
3.1 ~ Rule 3.1 Meritorious Claims	1
3.3a ~ Rule 3.3(a)	1
3.3a1 ~ Rule 3.3(a)(1)	3
3.4 ~ Rule 3.4 Fairness-Opp. Party	1
3.4a ~ Rule 3.4(a)	2
3.4b ~ 3.4(b)	1
3.4c ~ Rule 3.4(c)	16
3.5 ~ Rule 3.5 Impartiality & Decor.	1
4.1 ~ Rule 4.1 Truthfulness	2
4.2 ~ Rule 4.2 Communication	1
4.4 ~ Rule 4.4 Respect for Rights	1
4.5a ~ Rule 4.5(a)	1
5.1(b) ~ Rule 5.1(b)	1
5.3 ~ Rule 5.3 Resp.-Nonlawyer Asst.	1
5.3b ~ Rule 5.3(b)	2
5.3c ~ Rule 5.3(c)	1
5.5a ~ Rule 5.5(a)	3
5.5a1 ~ Rule 5.5(a)(1)	3
5.5a3 ~ Rule 5.5(a)(3)	2
8.1b ~ Rule 8.1(b)	9
8.4b ~ Rule 8.4(b)	9
8.4c ~ Rule 8.4(c)	44
8.4d ~ Rule 8.4(d)	22
Rule 1.15(a)(2008) ~ Rule 1.15(a)(2008)	3
Rule 1.15(b)(2008) ~ Rule 1.15(b)(2008)	2

Rule 1.15(c)(2008) ~ Rule 1.15(c)(2008)

2

UPLCONTEMPT ~ Contempt

1



**Flat Fee Arrangement**

\_\_\_\_\_ (“Lawyer”) will charge \_\_\_\_\_ (“Client”) fees for providing legal services on the following basis or at the following rate:

**I. Legal Services to be Performed.**

In exchange for the fees described in this Arrangement, Lawyer will perform the following legal services: [Insert description of case. Example: representation in DUI criminal matter in Jefferson County.]

**II. Flat Fee.**

This is a flat fee arrangement. Client will pay Lawyer the sum of \$ \_\_\_\_\_ for Lawyer’s performance of “Work to be Performed” as described in Section I of this Statement. *Client understands that Client is NOT entering into an hourly rate contract for the fee. This means that Lawyer will devote such time to the case as is necessary, but Lawyer’s compensation will not be increased or decreased based upon the amount of hours expended. Instead, Lawyer has offered the Client a fixed fee for Lawyer’s services.*

**III. When fee is earned.**

a. Flat fees 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: _____ |

- b. All unearned fees held by Lawyer shall be timely returned to Client at the completion of the representation.

**IV. When Fee is Paid.**

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

**V. Right to Terminate Representation.**

Client and Lawyer 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 cause, or by Lawyer with or without cause, Client shall pay, and Lawyer shall be entitled to, all fees earned by Lawyer as described above up to the point of termination. In a litigation matter, Client shall pay, and Lawyer shall be entitled to, all fees earned up to the point that the court grants Lawyer's motion for withdrawal. *Should the representation be terminated during a period between completions of increments described in Section III above, the client shall pay fees based on a computation of time actually worked by the Lawyer at the rate of \_\_\_\_\_ per hour. However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the next increment.*

**VI. Estimate of Costs.**

Lawyer anticipates that this representation is likely to result in the following costs, which are the sole responsibility of Client:

Type: \_\_\_\_\_ Estimated Cost: \_\_\_\_\_

Type: \_\_\_\_\_ Estimated Cost: \_\_\_\_\_

**VII. Fee Arbitration [Optional]**

Client and Lawyer agree that any disputes that arise between them concerning the fees owed by Client or earned by Lawyer shall be submitted to fee arbitration with . . . . .



## APPENDIX

### Summary of Recent Cases Involving Flat Fees

Compiled by Jamie Sudler

Chief Deputy Regulation Counsel

#### A. Formal Proceedings – Cases Filed in front of Presiding Disciplinary Judge

##### 1. 13 PDJ 029 – Stipulation: 90-Day Suspension all Stayed – 2 year probation with refund of about \$3,300 to Client.

Client retained Respondent to provide legal services in September of 2009. Client's brother died in Denver, Colorado weeks after inheriting a large amount of money. After an investigation, including an autopsy, the manner of death was ruled an accident. The cause of death was found to be complications from blunt force injuries of the thorax due to a fall.

Client was suspicious of the circumstances of her brother's death Respondent was hired to investigate the facts surrounding the death and the thoroughness of the subsequent police investigation.

Client paid Respondent a flat fee of \$35,000 on September 28, 2009. Respondent deposited the check into his COLTAF account. The flat fee was based on an estimated 100 hours of investigative time and approximately \$5,000 in expenses.

Respondent did not provide the Client with a written fee agreement or provide any written communication regarding the basis of his fee. There was no agreement, written or oral, between Respondent and the Client regarding when the \$35,000 flat fee would be earned. Respondent contends that there was an implied agreement that the flat fee would be earned as Respondent performed legal services on behalf of Client.

Over the next seven months, following Respondent's deposit of the \$35,000 fee into to his trust account, Respondent made eleven withdrawals until none of the Client's fee remained in the account.

Respondent never provided the Client with any written accounting or explanation of the services he had performed to earn the various amounts withdrawn from the trust account.

Respondent did not keep written time records. He met with his bookkeeper, who is also his wife, approximately once a week to tell her the percentage of the total work he had completed on the file. She would then transfer the corresponding percentage of the flat fee from the trust account as earned fees.

**2. 14 PDJ 038** - six-month suspension all stayed during a two-year probation with conditions including financial monitoring.

Respondent agreed to represent his niece, and her then-husband, with respect to claims arising from a December 2007 automobile accident. Respondent was to handle the representation for a flat fee of \$1,000 each, to be collected out of any recovery. (This arrangement was apparently a flat fee to be collected based upon a contingency.)

Respondent did not execute a fee agreement or otherwise provide the clients with a writing setting forth the basis or rate of the fee and expenses for the representation.

This matter was resolved through a stipulation approved by the PDJ for a six-month suspension all stayed during a two-year probation with conditions including financial monitoring.

**3. 15 PDJ 046 – Currently Pending in front of PDJ** (allegations below are from the complaint and only those related to fees are included):

Respondent represented client in an immigration matter.

Respondent and Client first met on August 31, 2012. On that date, Respondent issued a “Memo” to Client that described their fee agreement. They agreed to a flat fee of \$2,000 for the immigration matter, which Respondent would earn at a rate of \$200 per hour. Client paid Respondent \$600 during their first meeting. Client then paid the balance of the \$2,000 fee through monthly installments of \$200 per month.

Client also paid approximately \$1,700 in filing fees. Respondent deposited the initial \$600 payment, as well as all subsequent payments, directly into his operating account.

Respondent deposited the initial \$600 into his operating account before he earned it.

Respondent's planned to file for a waiver based on the hardship Client's deportation would impose on her son. Respondent recommended that Client and her husband send their son to a therapist so that their application could be supported by the therapist's opinion. Respondent's I-601A strategy was fatally flawed, because I-601A applications cannot depend on the hardship imposed on a citizen child.

Respondent told Client's husband to file the I-601A forms, but her husband did not know how. He asked to meet with Respondent to discuss the process but Respondent would not return his calls.

Client and her husband sent Respondent a certified letter requesting a fee refund, but it was returned unopened.

Once Client filed a complaint with the Office of Attorney Regulation Counsel, Respondent delivered a packet of information to Client and her husband regarding the I-601A process, but never communicated with them again and never refunded any of his fees.

### **3. 15 PDJ 035 – Stipulation to Public Censure**

#### Calderon Matter, #14-797

On March 27, 2013, the client (an undocumented immigrant) hired respondent to defend him against charges for second degree assault, menacing, and child abuse. Client had a previous lawyer who provided Respondent the file and a large amount of discovery.

Respondent used an hourly fee agreement form, but added a handwritten note stating the client agreed to a "flat fee of \$10,000 for representation through trial." Client signed the fee agreement.

Also on March 27, 2013, Client paid Respondent \$2,500 cash. The rest of the fee was to be paid in \$500 monthly payments. Trial was set for October 2013. Respondent did not put the Client's initial \$2,500 in his trust account, and instead used the \$2,500 to pay office expenses. OARC stipulated that Respondent earned the \$2,500 within approximately one week of receiving it from the client.

The client's trial was pushed to February 2014. After all evidence was given to the jury for deliberation, the jury came back with a question to the judge. The Judge, Respondent and the deputy district attorney read the question. The wording of the jury's question made it clear the jury was about to find the client guilty of at least second degree assault.

Respondent then took the client out to the hall and told the client about the jury's question and reminded the client he would receive at least five years in jail, and then deportation.

The client was understandably extremely upset, as was Respondent. Respondent then said to his client, "If you were ever thinking of running, now would be the time to do it."

The client did not run. The jury came in and gave the verdict of guilty as to second degree assault, the client was remanded into custody and is now in prison.

Salvator Matter, # 14-3498

On October 5, 2013, Client Husband paid Respondent \$5,000 to represent Client's wife. She is an undocumented immigrant. Respondent was hired to defend her against charges of Intent to Defraud, due to her use of a false identification card, and to help her with immigration issues.

Respondent and Client Husband signed a flat fee agreement wherein Respondent agreed to represent Client Wife through disposition of her case for \$5,000. Client Husband paid the full amount on October 5, 2013.

Respondent did not put the \$5,000 in his trust account or otherwise safeguard the funds. OARC stipulated that Respondent earned the \$5,000 during the next month. In November 2013, Client's wife decided to plead guilty to a charge involving moral turpitude, and thus she was scheduled to be deported.



The PDJ approved a stipulation to a public censure.

#### **4. 14 PDJ 075 – Eight-month Stayed Suspension by Stipulation**

In late 2011, Client, a dentist, hired Respondent in a collection matter involving a second dentist. Respondent and his client entered into an hourly fee agreement with a retainer. Three weeks later, after negotiation about the fee, the client signed a second fee agreement with the same scope of representation. The agreement stated that the client would pay \$3,000.00 immediately and \$3,000.00 per week up to an “estimated sum” of \$25,000.00. Although Respondent later referred to this agreement as a “flat fee” agreement, he intended it to be an hourly fee agreement with a cap of \$25,000.00. No hourly rate in fact appears in the agreement. Respondent did not abide by his obligation to make his fee agreement clear.

Client paid Respondent more than \$25,000.00 between late 2011 and mid-2012. Respondent deposited all of those payments into his operating account, believing he had earned them prior to receipt based upon work he had performed. By depositing the funds into his operating account, Respondent commingled his client’s funds with his own.

The PDJ approved a stipulation to an 8-month stayed suspension all stayed during an 18-month suspension.

#### **5. 14 PDJ 028 – 90-day suspension stayed for 2 year probation**

On November 30, 2012, Respondent agreed to represent Client in a DUI and Vehicular Assault case for the entirety of her case for a flat fee of \$2000. Respondent’s fee agreement did not contain benchmarks describing when the fee would be earned.

When Client’s grandmother gave Respondent two checks totaling \$2000 to cover Respondent’s fee, he deposited them into his operating account, not his trust account, despite not having earned the funds. Respondent believed he had earned at least a portion of the funds.

Respondent's services were terminated on December 17, 2012, and he agreed to accept \$500 of his \$2000 fee for work performed to that date. He and Grandmother agreed to meet on December 24, 2012 to receive her refund.

Respondent did not refund the remaining \$1500. According to Grandmother, Respondent advised her that he did not have the funds in the bank and could not refund her the total amount until after the beginning of 2013. Respondent states that he told Grandmother that his bookkeeper was not available to issue the check at that time.

When he made that statement, Respondent did have funds available in his operating account to pay Grandmother the full \$1500. His bookkeeper issued a check for the full \$2000 on December 26, 2012.

On January 8, 2013, Respondent mailed a \$2000 check to Grandmother and Client, along with an invoice for \$1480, which Respondent said Client owed him.

In November 2014, after a request for investigation was filed, Respondent refunded the \$2000 to Grandmother and withdrew his invoice.

The PDJ approved a stipulation to a 90-day suspension stayed for 2 year probation.

**6. 15 PDJ 014 – 60-day stayed suspension for one-year probation (prior discipline).**

***13-6340***

Respondent represented Client who had been charged with various crimes. The representation began in 2012 and thereafter Client was charged with other crimes. Respondent did do work in the case: he filed eight (8) motions and he eventually moved to withdraw in May 2013 in Denver District Court cases. Respondent also handled a Department of Social Services case for Client.

The client stated that Respondent was hired on a flat fee basis. Respondent stated that there was no flat fee arrangement and that it was an hourly fee at a rate of \$200.00 per hour. Respondent did not advise his client in writing of the basis or rate of his fee. Had he done so, there would not have been any

misunderstanding between Respondent and his client about the fee arrangement. In failing to do so, Respondent violated Colo. RPC 1.5(b). The evidence indicates that all of the money Respondent was paid in the matter, \$3,500 was earned.

#### *14-1342*

In the second matter, Respondent represented a Client in criminal matters. And similar to his failure to have a written fee agreement in the first matter above, Respondent did not have a written fee agreement, or advice in writing to this client of the basis or rate of his fee. Respondent admits he violated Colo. RPC 1.5(b). As in the earlier matter, the evidence indicates that all of the money Respondent was paid in this matter, \$500, was earned.

The PDJ approved a stipulation to a sixty-day stayed suspension during a one-year probation.

## **B. Diversion Agreements**

### **January 2016**

1. Respondent represented a married couple in a bankruptcy proceeding. The parties entered into two flat fee agreements, one for a Chapter 7 bankruptcy and the other for a Chapter 13 bankruptcy; the agreements listed services that were both included and excluded from the flat fee. Both fee agreements stated that if the parties enter into a fee arrangement for additional services not included in the flat fee, the parties would sign a separate hourly fee agreement. After Respondent filed a Chapter 13 bankruptcy petition for the clients, Respondent performed additional hourly work for them. However, the clients did not sign an hourly fee agreement, and Respondent did not contemporaneously communicate with the clients about the additional hourly work being performed. Nearly three years later, Respondent invoiced the clients for approximately \$30,000 in additional hourly legal fees. Respondent has not pursued collection of those fees.

***Rules Implicated:*** Colo. RPC 1.4 and 1.5.

***Diversion Agreement:*** As part of the conditions of the one year diversion agreement, Respondent must attend ethics school, submit to fee arbitration should the client request it, and pay all costs associated with the diversion agreement.

2. Respondent represented a client in a criminal case. The fee agreement called for a “total contractual amount,” with a “down payment” of half the total amount, followed by equal payments twice per month thereafter. The fee agreement appeared to contemplate a flat fee but did not contain benchmarks or any other indicator of when the fee was earned. The client made periodic payments. Respondent deposited all payments directly into Respondent’s law firm operating account, although it was not clear under the fee agreement whether the payments were earned at the time they were made. Respondent performed substantial work for the client. The client eventually pled guilty to the pending charges.

***Rules Implicated:*** Colo. RPC 1.15(a).

***Diversion Agreement:*** As part of the conditions of the one year diversion agreement, Respondent must submit to a financial audit, attend trust account school, and pay all costs associated with the diversion agreement.

**April 2015 - 14-1539 and 14-2636 (not summarized in Colorado Lawyer)**

3. Respondent agreed to represent Client on second degree felony assault charges that arose while Client was on parole. There was no written fee agreement or advisement of the basis of the fee. Both Respondent and Client agree that the “initial fee was \$3,500

Respondent explained that it was to cover mostly pre-arrest tasks and there would be an additional fee of \$500.00 if a plea was reached and more if the case went to trial. Client believed that this was a flat fee meant to cover the matter to resolution. According to Respondent, he explained to Client that if terminated, he would be owed an hourly rate of \$400.00. Respondent received a total of \$4,497.00 in fees on behalf of Client. Respondent provided documentation that he had worked a total of 14 hours on this matter.

According to Respondent, at the time of his termination he was owed another \$500.00 which his firm has written off.

In a second matter Respondent agreed to represent another Client on charges of prohibited use of a weapon, and possession with intent to distribute. On May 5, 2011, Respondent agreed to represent Client for \$3,500. There was no written fee agreement or statement explaining the basis of the fee.

Respondent was paid \$3,472 in May of 2011. The money was deposited into Respondent's operating account. Client pled guilty on July 22, 2011, and was sentenced on October 21, 2011 to a probationary term of four years.

Respondent agreed to represent Client again on possible probation revocation charges for \$5,000. There was no fee agreement or written statement explaining the basis of the fee.

In September 2014, Respondent was terminated by Client. Client wrote a letter to Respondent dated September 5, 2014 demanding a refund – no amount was specified.

*Rules Implicated:* Colo. RPC 1.4(a)(2); 1.5(b); 1.5(f); 1.5(g) 1.15(a).

*Diversion Agreement:* Three-year diversion agreement with conditions.

#### **February 2015 (Not summarized in Colorado Lawyer) 14-1490**

4. On January 16, 2014, Respondent was retained to represent Client in connection with two related criminal matters. Respondent and client signed a legal representation agreement.

Pursuant to the agreement, the entire pretrial representation would be undertaken for a \$3,000 "flat-rate" fee. If a trial were required, the client would be responsible for paying Respondent \$1,500 per day of trial.

Pursuant to the representation agreement, the pre-trial fee of \$3,000 would be earned in increments. \$1,500 would be an "engagement retainer" and would be earned upon receipt "as it is a fee which is earned as it conveys a certain benefit to the client. The benefit to the client will be that the

‘engagement fee’ ensures that the attorney will undertake the client’s case, the attorney agrees to commit his time to the client’s case and causes the attorney to forego other potential employment opportunities as a result of time commitments or conflicts.”

The remaining \$1,500 of the flat-rate fee would be earned “at the following intervals: A review of the case and preparation for any negotiations with district attorney, filing and handling of any motions, hearings, and final disposition including plea and sentencing hearings, if applicable.”

Client paid an initial \$1,500 on January 16, 2014. Because this amount was deemed earned upon receipt, Respondent deposited it directly in his operating account.

Client paid the second \$1,500 installment of the \$3,000 flat fee, which was received by the Respondent on January 23, 2014.

Respondent interpreted his fee agreement to allow him to deposit this entire amount into his operating account because the representation had “entered the phase” described by the language of the fee agreement quoted above. However, that language does not state when the fee would be earned and therefore eligible for a deposit into the operating account rather than the trust account. The language instead suggests that the fee would be earned in increments, or “intervals,” although the rate the fee is to be earned is not apportioned among the intervals.

Respondent moved forward with the representation of Client. Plea agreements were discussed but no offer was finalized.

In May of 2014, Respondent’s services were terminated. On May 5, 2014, Client’s mother demanded a refund of the \$3,000 paid to the Respondent. Respondent replied that he would need to review his time records on the case and that he would provide her an accounting.

Two days later, Respondent provided an invoice to Client. The fee agreement provided that Respondent’s time would be billed at an hourly rate of \$200 per hour in the event of termination. The invoice showed that Respondent was owed \$3,820, or \$820 over the amount of the fee that would be charged for the entire representation.

The Respondent has not refunded any portion of the \$3,000 fee.