

FAMILY LAW SECTION OF THE COLORADO BAR ASSOCIATION

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The Wellshire Inn

“Unbundled Legal Services and Flat Fees in Domestic Relations Cases”

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A. Unbundled Legal Services

1. Colo. RPC 1.2(c): “A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).”

a. “Informed consent”: “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Colo. RPC 1.0(e).

2. C.R.C.P. 11(b):

a. Papers filed by pro se party that were “prepared with the drafting assistance of the attorney” must include attorney’s name, address, telephone number and registration number, and attorney must advise pro se party to include the information.

b. Filing constitutes certification by attorney that, to the best of the attorney's knowledge, information and belief, pleading or paper is “(1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney, (2) is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

c. Attorney may rely on pro se party's representation of facts, unless attorney “has reason to believe” they are false or materially insufficient

d. Limited representation of pro se party does not constitute entry of appearance by attorney for purposes of C.R.C.P. 121, section 1-1 or C.R.C.P. 5(b)

e. Attorney's violation of Rule 11(b) “may subject the attorney to the sanctions provided in C.R.C.P. 11(a).”

3. C.R.C.P. 121, § 1-1(5):

- a. Attorney may make limited appearance for pro se party in a “specified proceedings” by filing “notice of the limited appearance”
- b. Filing of “notice of completion of limited appearance” terminates attorney’s appearance without necessity of leave of court
- c. Service of papers on such attorney is valid only for specific proceedings.

4. Cmt. [9A], Colo. RPC 4.2: With some exceptions, lawyer may not communicate directly with represented person. However, a “pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b) . . . and Rule 1.2, is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.”

- a. Lawyer whose opposing counsel filed limited entry of appearance under C.R.C.P. 121, § 1-1(5) to prepare motion to dismiss for pro se opposing parties had actual knowledge that opposing counsel subsequently expanded her representation to include settlement, making lawyer’s direct communications with opposing parties improper under Colo. RPC 4.2. 353 P.3d 936 (Colo. PDJ 2015).

5. Cmt. [2A], Colo. RPC 4.3: Since person represented by lawyer in limited representation is considered an “unrepresented person,” opposing counsel must comply with Colo. RPC 4.3 in dealings with that person.

6. Limited scope representation in local federal court: *Chung v. El Paso School District No. 11*, Civil Action No. 14-cv-01520-KLM, 2015 WL 225430 (D. Colo. Jan. 15, 2015) (Mix, M.J.).

B. Flat Fees

1. Colo. RPC 1.5(f): “Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer’s trust account pursuant to Rule 1.15(f)(1) [now Rule 1.15B(a)(1)] until earned. . . .”

2. Colo. RPC 1.5(g): “Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client’s right to terminate the representation, or that unreasonably restricts a client’s right to obtain a refund of unearned or unreasonable fees, is prohibited.”

3. “[T]he 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.” Cmt. [10], Colo. RPC 1.5.

4. “[T]he 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.” Cmt. [13], Colo. RPC 1.5. “Alternatively, the lawyer and client

may agree to [a] 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." Cmt. [14], Colo. RPC 1.5. "The portions of the . . . 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." Cmt. [15], Colo. RPC 1.5.

5. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee or expense that has not been earned or incurred." Colo. RPC 1.16(d).

6. *In re Gilbert*, 346 P.3d 1018 (Colo. April 6, 2015) (Marquez, J.): Lawyer whose flat fee representation was terminated prior to completion of work did not violate Colo. RPC 1.16(d) when she rejected client's demand for full refund, refunded part of flat fee, and withheld amount she believed she had earned by multiplying recorded hours times her regular hourly rate. Her fee agreement was silent on whether she earned any portion of the flat fee during the course of the representation. But see dissenting opinion of Chief Justice Rice, joined by Justices Coats and Eid.

7. The Colorado Supreme Court's Standing Committee on the Rules of Professional Conduct is considering recommendation of a new Rule of Professional Conduct that would require all flat fee agreements to be in writing and to contain certain information, including the amount of the fee the lawyer would be entitled to keep upon a premature termination of the representation.

- a. Views differ on whether lawyer who does not comply with rule must refund entire flat fee
- b. Concept borrowed from Rules Governing Contingent Fees