

## FLAT FEES AND NEW RULE 1.5(h)

By: Herrick K. Lidstone, Jr.  
Burns, Figa & Will, P.C.

In Rule change 2019(05), effective January 31, 2019, the Supreme Court added Rule 1.5(h) to address flat fee agreements under the Colorado Rules of Professional Conduct (“Colo. RPC”). Lawyers have been using flat fee arrangements for years, but always subject to the requirements of Rule 1.5(a) which provides that:

“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”

Colo. RPC Rule 1.5(a) lists eight non-exclusive factors to be considered in determining the reasonableness of the fee, but until new Rule 1.5(h) was adopted, there was no specific guidance for flat fee engagements.

Rule 1.5(h) now provides that 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.” Colo. RPC Rule 1.5 provides that an attorney does not always have to enter into a written engagement with clients, especially when the lawyer and the client have had a long-term relationship.<sup>1</sup>

However, even when a lawyer has previously represented a client, and similar to the requirement for contingent fees,<sup>2</sup> Rule 1.5(h) requires that “[t]he terms of a flat fee shall be communicated in writing before or within a reasonable period of time after commencing the representation and shall include” certain specified information.<sup>3</sup> So, “[a]ll flat fee arrangements must be in writing and must comply with” Rule 1.5(h).<sup>4</sup>

### **Required Agreement Terms**

Rule 1.5(h) requires that the flat fee agreement contain at least the following information (with the language of the rule being in italics):

1. *A description of the services the lawyer agrees to perform.* Although not stated in the rule, this description should be as specific and detailed as possible. As lawyers know, representation sometimes (frequently) changes during the course of a project – whether litigation or transactional. If the scope of the engagement expands, the flat

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<sup>1</sup> Rule 1.5, Cmt. [2].

<sup>2</sup> See Chapter 23.3 of the Colorado Rules of Civil Procedure, Rule 4(a) which requires that “[b]efore a contingent fee agreement is entered into the attorney shall disclose to the prospective client in writing” information about the contingent fee relationship so that the client can make an informed decision.

<sup>3</sup> A significant difference between a flat fee agreement and a contingent fee agreement is that the contingent fee agreement must be agreed “[b]efore a contingent fee agreement is entered into.” The flat fee agreement may be entered into “within a reasonable period of time” after commencing the representation. Best practice, of course, would require the flat fee agreement be entered into “before” rather than “after commencing the representation.”

<sup>4</sup> Rule 1.5, Cmt. [2].

fee agreement should not limit the lawyer's right to receive appropriate payment and the flat fee agreement should provide for renegotiation of the amount to be paid to the lawyer. Of course, the engagement letter should address this possibility.

2. *The amount to be paid to the lawyer and the timing of payment for the services to be performed.* Again, consider the possibility that the scope of the representation changes materially. The lawyer should be constantly aware of his or her agreement and be prompt to advise the client when the representation is going beyond the scope of the flat fee agreement and the agreed flat fee is no longer appropriate.
3. *If any portion of the flat fee is to be earned by the lawyer before conclusion of the representation, the amount to be earned upon the completion of specified tasks or the occurrence of specified events.*<sup>5</sup>
4. *The amount or the method of calculating the fees the lawyer earns, if any, should the representation terminate before completion of the specified tasks or the occurrence of specified events.*

### **Partial Payments**

Comments [14] and [15] are important to address when considering partial payments through the course of a flat fee representation.

- Comment [14] provides that “[a] lawyer and client may agree that a flat fee or a portion of a flat fee is earned in various ways” – including the completion of specific tasks or the occurrence of specific events, regardless of the amount of the lawyer’s time involved.<sup>6</sup>
- Comment [15] provides that the fees attributed to each event “need not be in equal amounts,” but “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 in the entire matter.”<sup>7</sup>

To make a determination of when an advance fee or flat fee is earned, “the written statement of the basis or rate of the fee . . . 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 . . . [and] should be evaluated under an objective standard or reasonableness.”<sup>8</sup> Of course a clear statement as to the

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<sup>5</sup> Rule 1.5, Cmts. [14], [15].

<sup>6</sup> Rule 1.5, Cmt. [14].

<sup>7</sup> Rule 1.5, Cmt. [15].

<sup>8</sup> Rule 1.5, Cmt. [11].

work to be done and the milestones to judge when any portion of the fee is to be earned as required in the engagement letter discussed in Rule 1.5(h) is the best means of establishing reasonableness.<sup>9</sup>

## **Disputes**

If a dispute develops regarding whether the lawyer has earned all or any portion of the flat fee during the course of, or following termination of, the representation, Rule 1.5(h)(2) requires the lawyer to comply with Colo. RPC 1.15A(c) with respect to any portion of the flat fee that is in dispute. Rule 1.15A(c) requires that the lawyer keep separate any portion of the fee that is in dispute until the dispute is resolved. The lawyer may distribute the portions of the flat fee that are not being disputed. The best way to prevent disputes over fees, however, is to present the flat fee (or any other engagement) clearly to the client.

## **Is the Flat Fee the Right Choice?**

Flat fees have long been a staple of legal practice. Clients like flat fees because it gives clients some certainty as to the cost to be expected. Lawyers do not necessarily like flat fees unless they involve repetitive tasks or the flat fees are properly qualified to ensure that the scope of the engagement is defined and appropriately limited. Understand that any flat fee agreement is likely to be interpreted for the advantage of the client, not the lawyer.

Rule 1.5 now provides a form Flat Fee Agreement as follows:

### **Form Flat Fee Agreement**

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

**I. Legal Services to Be Performed.** In exchange for the fee described in this Agreement, Lawyer will perform the following legal services (“Services”): *[Insert specific description of the scope and/or objective of the representation. Examples: Represent Client in DUI criminal case in Jefferson County; Prepare a Will [or Power of Attorney or contract]]*

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

**III. When Fee Is Earned.** The flat fee will be earned in increments, as follows:

- a. Description of increment: \_\_\_\_\_ Amount earned: \_\_\_\_\_
- b. Description of increment: \_\_\_\_\_ Amount earned: \_\_\_\_\_
- c. Description of increment: \_\_\_\_\_ Amount earned: \_\_\_\_\_

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<sup>9</sup> See discussion of Rule 1.5, Cmts. [14] and [15], above.

- d. Description of increment: \_\_\_\_\_ Amount earned: \_\_\_\_\_
- e. Description of increment: \_\_\_\_\_ Amount earned: \_\_\_\_\_

[*Alternatively:* The flat fee will be earned when Lawyer [or Firm] provides Client with [*Select one:* the Will, the Power of Attorney, the contract, *other specified description of work*].

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

**V. Right to Terminate Representation and Fees on Termination.** Client has the right to terminate the representation at any time and for any reason, and Lawyer [or firm] may terminate the representation in accordance with Rule 1.16 of the Colorado Rules of Professional Conduct. In the event that Client terminates the representation without wrongful conduct by Lawyer [or Firm] that would cause Lawyer [or Firm] to forfeit any fee, or Lawyer [or Firm] justifiably withdraws in accordance with Rule 1.16 from representing Client, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned by Lawyer [or Firm] as described in Section I, above, up to the time of termination. In a litigation matter, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned up to the time when the court grants Lawyer’s motion for withdrawal. If the representation is terminated between the completion of increments described in Section III above, Client shall pay a fee based on [an hourly rate of \$\_\_\_\_\_] [the percentage of the task completed] [*other specified method*].

However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the increment, and in any event all fees shall be reasonable.

**VI. Costs.** Client is liable to Lawyer [or Firm] for reasonable expenses and disbursements. Examples of such expenses and disbursements are fees payable to the Court and expenses involved in preparing exhibits. Such expenses and disbursements are estimated to be \$\_\_\_\_\_. Client authorizes Lawyer [or Firm] to incur expenses and disbursements up to a maximum of \$\_\_\_\_\_, which limitation will not be exceeded without Client's further written authorization. Client shall reimburse Lawyer for such expenditures [*Select one:* upon receipt of a billing, in specified installments, or upon completion of the Services].

Dated: \_\_\_\_\_

CLIENT:

ATTORNEY [FIRM]:

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