

Colorado's New Rule 1.5(h)

Handling Flat Fees

BY BRYON M. LARGE



On January 31, 2019 the Colorado Supreme Court adopted new Colorado Rule of Professional Conduct 1.5(h) regarding flat fee arrangements. This article addresses the new rule's requirements.

On January 31, 2019 the Colorado Supreme Court published an amendment to Rule 1.5 of the Colorado Rules of Professional Conduct (Colo. RPC or Rules), adding new subsection (h) to address flat fees. New Rule 1.5(h) defines a flat fee as “a fee for specified legal services for which the client agrees to pay a fixed amount, regardless of the time or effort involved.”¹ Rule 1.5(h) became effective immediately for all flat fee agreements entered into on or after January 31, 2019.²

Lawyers use flat fee billing for various reasons. These include an evolving marketplace that expects a set price, predictability of costs for clients, and the lawyer's unending desire to avoid tracking time. However, this model has its drawbacks, including establishing reasonable compensation, given the unpredictability of litigation; changing case needs; and maintaining a quality work product while striving to work more efficiently. A significant area of concern is how lawyers handle advance retainers for flat fees. New Rule 1.5(h) instructs lawyers on how to handle these retainers.

Rule 1.5's Basis in Case Law

For the most part, Rule 1.5(h) codifies Colorado case law on how lawyers should handle flat fees, notably the Colorado Supreme Court opinions in *In re Sather*³ and *Matter of Gilbert*,⁴ which address flat fees and advance retainers. Before Rule 1.5(h)'s adoption, flat fee arrangements were analyzed under the *Sather* and *Gilbert* framework. Rule 1.5(h) built on this jurisprudence.

In the 2000 *Sather* case, the Court addressed concerns about handling client fees. First, the Court explained and reaffirmed that lawyers should segregate their clients' money from their own in a trust account.⁵ Next, the Court held

“that an attorney earns fees only by conferring a benefit on or performing a legal service for the client.”⁶ Finally, the Court stated that fees are always subject to a refund under certain conditions, and characterizing an advance

“
Rule 1.5(h)
(1) requires
that the terms
of a flat fee be
communicated
in writing
before or within
a reasonable
time after
commencing
representation.”

retainer as “nonrefundable” could unreasonably deter clients from exercising their right to a refund.⁷ In clarifying the handling of fees, the Court expressly held that a lawyer cannot enter into a nonrefundable retainer or fee agreement.⁸ These concepts were codified in Rules 1.5(f) and (g).

In *Gilbert*, the Court returned to the discussion of flat fees, this time in the context of what happens to the flat fee when the representation ends prematurely. The lawyer in *Gilbert* agreed to represent a married couple in an immigration matter for a flat fee of \$3,550.⁹ The agreement did not contain any benchmarks or milestones stating when portions of the fee were to be earned¹⁰ and did not explain what payment the lawyer would receive if the representation ended prematurely.¹¹ However, the lawyer's fee schedule listed an hourly rate of \$250 for miscellaneous work.¹²

The clients terminated the lawyer's representation before it concluded, and they requested a partial refund. The Court affirmed that the lawyer in *Gilbert* could recover her legal fees in quantum meruit by charging the clients by the hour for the work completed and refunding the remainder of the retainer.¹³ The Court observed that although including benchmarks or milestones would be wise, the Rules did not require them at that time.¹⁴

Creating Rule 1.5(h)

Rule 1.5(h) was conceived against this backdrop. Rule 1.5(h)(1) requires that the terms of a flat fee be communicated in writing before or within a reasonable time after commencing representation. This is a slight departure from the more general requirement of Rule 1.5(b), which requires the communication to be in writing only when the lawyer has not regularly represented the client. Rule 1.5(h)(1) requires that the communication be in writing for *all* flat fee arrangements, regardless of the prior relationship between the lawyer and client.

At a minimum, Rule 1.5(h) requires the written communication to contain four parts:

1. “A description of the services the lawyer agrees to perform.”¹⁵ Here, the lawyer

should clearly articulate the exact scope of the work the lawyer has been hired to complete.

2. "The amount to be paid to the lawyer and the timing of payment for the services to be performed."¹⁶ The lawyer should specify the specific flat fee he or she is going to be paid. If the lawyer will take payments over time to complete the flat fee retainer, the timing of payments should also be specified in writing.
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."¹⁷ In the written communication, if the lawyer intends to earn portions of the fee before the case is completed, the lawyer must specify benchmarks or milestones defining

when the lawyer intends to treat the money as earned. Established benchmarks should be reasonable and proportional to comply with the reasonableness requirement found in Rule 1.5(a). For example, a family law attorney on a divorce case might consider establishing benchmarks for filing a petition, serving disclosures, attending a pre-hearing conference, and entry of the decree. A criminal law attorney on a DUI matter might consider establishing benchmarks for entering his or her appearance, reviewing discovery, attending a pre-trial motions hearing, and completion of trial and sentencing. The respective benchmarks should be proportional to the totality of the case.

4. "The amount or 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."¹⁸ Here, the lawyer should specify how he or she will get paid if the representation ends prematurely or between benchmarks. It is not uncommon to specify an hourly rate so the lawyer can recover a portion of the fees in quantum meruit. Other arrangements, such as identifying a percentage of work to be compensated, might also be acceptable. Ideally, the lawyer should consider the types of disputes that might arise in the calculation, such as how the lawyer will identify the number of hours worked, or what percentage of the case or benchmark has been completed.

Lawyers must ensure that their total flat fee is reasonable and the intermediate benchmarks or milestones are reasonable and proportional to the overall work to be completed.¹⁹ Whether the benchmarks or milestones are objectively reasonable will be evaluated by the reasonableness of fees criteria in Rule 1.5(a).²⁰ Frontloaded agreements that disproportionately treat larger sums of fees as earned early in the case will likely be scrutinized for proportionality and reasonableness under Rule 1.5(a).

The Interaction Between Rules 1.5(h) and 1.15A

Rule 1.5(h)(2) mandates how to handle a dispute about whether a flat fee or a portion of the flat fee has been earned. When such a dispute arises, the Rule directs a lawyer to comply with Rule 1.15A(c), which requires the lawyer to keep disputed funds in the lawyer's trust account until the dispute has been resolved. Portions of the flat fee that are not disputed can be moved out of trust.

For example, if a flat fee agreement anticipates four benchmarks and the lawyer's services are terminated after the first and second benchmarks have been reached, but before the third benchmark is reached, the lawyer should treat the fees allocated to the first two benchmarks as earned by moving the money from the trust account to the operating account. Next, the lawyer should return the portion of money allocated to the fourth benchmark to the client, because there is no dispute that



Our Courts is a joint activity of the Colorado Judicial Institute and the Colorado Bar Association that provides nonpartisan information programs to adult audiences around the state to further public knowledge and understanding of the state and federal courts in Colorado.

For more information or to schedule a presentation, visit ourcourtscolorado.org.

the fourth benchmark has not been earned. The money allocated to the third benchmark should remain in trust until the lawyer and the client resolve their dispute, as described in Rule 1.15A(c).

Flat Fee Form Agreement

Finally, Rule 1.5(h)(3) provides that lawyers may use the Colorado Supreme Court's new flat fee agreement form, which is simple and clear and complies with the rule. Rule 1.5(h)(3) allows for other forms to also be used, as long as they are consistent with the rule. A Word version of the Court's form is available on the Office of Attorney Regulation Counsel (OARC) website²¹ and is reprinted in the Appendix to this article.

Helpful Resources

Lawyers are encouraged to contact private ethics counsel if they have questions about handling flat fees in their practices or would like their fee agreements reviewed for compliance with the Rules. Lawyers seeking a more in-depth review of how to manage trust accounts in Colorado may enroll in OARC's half-day trust account school.

Conclusion

Substantively, the requirements for handling flat fees and advance retainers have changed little in the codification of case law to Colo. RPC 1.5(h). But the new rule contains helpful guidance for lawyers who use the flat fee model. And the Colorado Supreme Court's adoption of form language offers lawyers a consistent format for flat fee agreements. ^{CL}

NOTES

1. Colo. RPC. 1.5(h).
2. Rule Change 2019(05) (Jan. 31, 2019), [https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2019/Rule%20Change%202019%20\(05\)\(2\).pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2019/Rule%20Change%202019%20(05)(2).pdf).
3. *In re Sather*, 3 P.3d 403 (Colo. 2000).
4. *Matter of Gilbert*, 346 P.3d 1018 (Colo. 2015).
5. *Sather*, 3 P.3d at 409. See also Colo. RPC 1.5(f).
6. *Sather*, 3 P.3d at 410. See also Colo. RPC 1.5(f).
7. *Sather*, 3 P.3d at 413. See also Colo. RPC 1.5(g).
8. *Id.*
9. *Gilbert*, 346 P.3d at 1020.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1027-28.
14. *Id.* at 1027.
15. Colo. RPC 1.5(h)(1)(i).
16. Colo. RPC 1.5(h)(1)(ii).
17. Colo. RPC 1.5(h)(1)(iii).
18. Colo. RPC 1.5(h)(1)(iv).
19. See generally Colo. RPC 1.5, cmt. [11].
20. *Id.*
21. <http://coloradosupremecourt.com/index.asp>.



Professionalism Matters

Enjoy some good, bad and ugly attorney behavior and earn 1 ethics credit in the process. The Professionalism Coordinating Council has some entertaining and engaging vignettes that illustrate negative and positive attorney behavior.

The Council has a speaker panel and is ready to present them and discuss professionalism issues with any local or special bar association, Section, Committee, Inn of Court, law firm or other group of attorneys.

You can view a vignette at cobar.org/professionalismvideos to get a taste.

Please contact **Melissa Nicoletti** at the CBA/DBA at melissan@cobar.org or 303-860-1115 to schedule a program today.



Bryon M. Large is assistant regulation counsel at the Colorado Supreme Court Office of Attorney Regulation Counsel—b.large@csc.state.co.us.

This article reflects the author's views and not necessarily the views of the Office of Attorney Regulation Counsel.

Coordinating Editor: Stephen G. Masciocchi, smasciocchi@hollandhart.com

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:

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 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:

Signature

ATTORNEY [FIRM]:

Signature