

Rule Change #2002(4)

COLORADO RULES OF PROFESSIONAL CONDUCT
(Appendix to Chapters 18 to 20)

RULE 1.5. FEES

(a) [No Change]

(b) [No Change]

(c) [No Change]

(d) [No Change]

(e) [No Change]

(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) until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(a).

(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.

[The following is an additional comment to be added to the bottom of the existing comment]

Advances of Unearned Fees and Engagement Retainer Fees

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.

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), 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. Colo. RPC 1.5(a).

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

Advances of unearned fees, including "lump-sum" fees and "flat fees," 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). 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.

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.

Alternatively, the 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. 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.

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 Colo. RPC 1.5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

Rule 1.5(f) Does Not Prohibit an "Engagement Retainer Fee"

"[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 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 cmt. 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.

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.

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.

Amended and Adopted by the Court, En Banc, May 30, 2002,
effective July 1, 2002.

Justice Martinez would adopt an earlier alternative draft of the
rule that permits flat fees to be deposited in an attorney's
operating account under certain defined and limited
circumstances.

BY THE COURT:

Rebecca Love Kourlis
Justice, Colorado Supreme Court

Michael L. Bender
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