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

AGENDA

April 3, 2020, 9:00 a.m.

VIRTUAL MEETING IN RESPONSE TO COVID-19 RESTRICTIONS

Meeting invitation with connection info to arrive via email next week

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1. Approval of minutes for January 10, 2020 meeting [pp. 1-6]
2. Report on Status of Proposed Advertising Amendments [Marcy Glenn and Justices Hood and/or Márquez]
3. Report from Diversity Subcommittee [Judge Espinosa]
4. Report from Contingent Fee Subcommittee [Alec Rothrock, pp. 7-22]
5. Report from Abandoned Estate Planning Documents Subcommittee [Fred Yarger, materials to be distributed separately]
6. New business:
    a. Potential addition of "scope of representation" to information required to be communicated under Rule 1.5(b) [John Lebsack, pp. 23-25]
7. Administrative matters:
    a. Select next meeting date
8. Adjournment (before noon)

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COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On January 10, 2020
(Fifty-Fifth Meeting of the Full Committee)

The fifty-fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, January 10, 2020, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justice William W. Hood, III, were Judge Michael H. Berger, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Margaret Funk, John M. Haried, Judge Lino S. Lipinsky de Orlov, Judge William R. Lucero, Cecil E. Morris, Jr., Noah C. Patterson, Henry Richard Reeve, Alexander (Alec) R. Rothrock, Marcus L. Squarrell, David W. Stark, Jamie S. Sudler, III, Eli Wald, Judge John R. Webb, Frederick R. Yarger, and Jessica E. Yates. Persons attending the meeting by telephone were Justice Monica M. Marquez, Judge Ruthanne N. Polidori and Tuck Young. Excused from attendance were Gary B. Blum, Nancy L. Cohen, and Boston Stanton. Tim Bounds, Herbert Tucker, Stan Kent and Frank Hill attended as guests to address the Abandoned Estate Planning Documents Statute. Supreme Court Staff Attorney and Committee liaison Jennifer J. Wallace also attended the meeting.

1. Meeting Materials: Minutes of January 10, 2020 Meeting.

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the fifty-fourth meeting of the Committee, held on October 4, 2019. Those minutes were approved.

2. Report Re: Supreme Court's Amendment to Rule 8.4(c).

The Chair reported that the Colorado Supreme Court had adopted the Full Committee's recommendation not to adopt a comment to address the meaning of the words "lawful investigative activities" as it appears in Rule 8.4(c).

3. Report from Diversity Subcommittee.

Judge Espinosa provided an update on the activities of the Diversity Subcommittee. Judge Espinosa advised that the subcommittee had met by telephone and that written materials,

including a letter to the various specialty bars to advise of opportunities for service on the Committee, were being prepared for review by the subcommittee and the Chair.

4. Report from ABA Advertising Amendments Subcommittee.

Professor Eli Wald, chair of the ABA Advertising Amendments Subcommittee, presented the subcommittee's report, which appeared in the meeting materials at pages 37-58. Professor Wald reported that the subcommittee had addressed all the comments raised by the Committee at its meeting on October 4, 2019 and that changes had been incorporated into the meeting materials. Professor Wald then opened the floor for comment.

A member suggested that the exclusionary language set forth in Rule 7.3(f)(1) ("… unless the recipient of the communication is a person specified in paragraph (b)(1), (b)(2) or (b)(3):…") should also be included in subsections (2) and (3) of proposed Rule 7.3(f). In response, one member suggested that the language should remain as drafted while another member suggested that the exclusionary language should also be included in subsection (3) but not in subsection (2). Professor Wald advised that he did not believe that the exclusionary language of (1) was applicable to subsection (2). Other comments suggested that some potential grammatical revisions to subsections (1) through (3) were necessary. Another member suggested that the word "shall" in subsection (f) should be changed to "must." The discussion concluded with Professor Wald agreeing to change the word "shall" to "must," and to add the language "unless the recipient of the communication is a person specified in paragraphs (b)(1), (b)(2) or (b)(3)" as an introductory clause to proposed Rule 7.3(f)(3).

The Chair suggested that another draft of Rule 7.3(f) be prepared. A motion to approve the recommendations of the subcommittee, subject to the discussed changes to Rule 7.3(f) being made, was made and seconded. The motion was approved with all members voting in favor of adoption. The Chair, together with various members of the Committee, thanked Professor Wald and the members of the subcommittee for their work on this important matter.

5. Report from Contingent Fee Subcommittee.

Alec Rothrock, chair of the Contingent Fee Subcommittee, initiated the discussion of the subcommittee's work with a brief overview of the proposed addition to Rule 1.5 and comments on the proposed form of Contingent Fee Agreement and Disbursement Statement. The subcommittee's materials were included at pages 59-75 of the meeting materials.

Member Rothrock reviewed and commented upon the key substantive points of the subcommittee's proposal as follows:

1. The subcommittee is proposing that the current Rules Governing Contingent Fees, contained in Chapter 23.3 of the Rules of Civil Procedure, be eliminated and that all contingent fee-related rules, comments and forms be incorporated into proposed Rule 1.5. Member Rothrock noted that the proposed revisions would add substantial volume to existing Rule 1.5 and suggested that the Committee consider possible reorganization of that rule for clarity and ease of reading.

2. The proposal would eliminate the existing mandatory Disclosure Statement and would move the required disclosures into the actual language of Rule 1.5.

3. The proposal leaves undisturbed the substantial compliance standard for enforceability of a contingent-fee agreement and the disclosures necessary to preserve the lawyer's eligibility to recover attorney's fees on a *quantum meruit* basis if the attorney-client relationship is terminated before the event triggering a right to a fee occurs.

4. The proposal eliminates formalistic requirements of the current rule such as (a) the attestation by witnesses of the parties' signatures on the contingent fee agreements, (b) the creation of duplicate fully-executed agreements, and (c) the transmission by mail of one fully-executed agreement to the client at client's postal address within 10 days of execution.

5. The proposal contains provisions designed to protect clients by (a) alerting lawyers to the potential impropriety of provisions requiring clients to reimburse the lawyer for all sanctions awarded against a lawyer, and (b) requiring lawyers to inform clients that they may disapprove the hiring of associated counsel and discharge associated counsel if one is hired.

6. The proposal seeks to clarify that contingent fee agreements may be used in situations where the contingency does not involve the recovery of money, but allows the recovery of contingent fees on the amount of money the lawyer saves the client (a reverse contingent fee).

7. The proposal borrows language from ABA Model Rule 1.5(c) and its comments to expand the body of legal authority available to interpret common provisions.

8. The proposal also seeks to encourage lawyers to consider language (a) clarifying the lawyer's rights and obligations with respect to the defense of counterclaims and the handling of appeals; (b) clarifying who receives money awarded by the court as sanctions against an opposing party; and (c) addressing the possibility that the lawyer is ethically required to decline a client's request to receive funds subject to third-party claims.

The discussion on the language of the proposed rule itself was relatively brief. A member questioned the statement in subsection (7) that the form of Contingent Fee Agreement "… shall be sufficient." After further discussion, however, the member expressed agreement with the proposed language. The Chair later suggested that the language of the first sentence of subparagraph 7 be revised to state: "The form Contingent Fee Agreement provided in Appendix __ may be used for contingent fee agreements and shall be sufficient to communicate the matters set forth in Rule 1.5(c)(1)(A) through (H)." A member questioned the definition of the term "contingent fee" in proposed Rule 1.5(c). After some discussion, member Rothrock and the Chair noted their view that the language of the definition was sufficient and that it could not possibly address all situations in which a contingent fee agreement might apply. Several members suggested that language be added to a comment noting that reverse contingent fee agreements are included within the definition of "contingent fee."

The Committee then addressed comments relating to the language of the form Contingent Fee Agreement. Questions were raised with respect to certain language contained in paragraphs 4, 7 and 8 of the form. In addition, an overall question was raised with respect to the utilization of the terms "shall" and "must" throughout the provisions of proposed Rule 1.5 and the form Contingent Fee Agreement.

A member questioned whether the last sentence of paragraph 4 of the form Contingent Fee Agreement would allow an attorney to enter into an agreement for immediate payment if the attorney were terminated prior to the contingent event. Member Rothrock responded noting that the member's concerns were addressed in *Law Offices of Losavio v. Law Offices of McDivitt*, 865 P.2d 934 (Colo.App. 1993), and are addressed by proposed comment [12]. He noted that the language of comment [12] is derived from CBA Ethics Opinion 100 and that the last sentence of paragraph 4 of the form Contingent Fee Agreement incorporates language of the existing Chapter 23.3 Rules Governing Contingent Fees. There was additional discussion of the meaning of "sophisticated" as used in proposed comment [12].

Discussion on paragraph 7 of the form Contingent Fee Agreement centered on the impact of hiring associated counsel and its effect on the amount of the agreed-upon contingent fee. The discussion of this issue also highlighted the need to address the language of the proposed rule in subsection (1)(H). A member suggested changing the word "amount" to "allocation." Member Rothrock indicated that the amount of the agreed-upon contingent fee should not change with the addition of associated counsel. Any proposed amendment to the amount of the fee occurring by virtue of the hiring of associated counsel is governed by the existing rules relating to midstream modification of fee agreements. Member Rothrock further advised that issues relating to allocation are governed by existing Rule 1.5(d) and suggested that a cross-reference to that rule might be appropriate.

The discussion with respect to paragraph 8 of the form Contingent Fee Agreement centered on whether the language "… so the client may handle these claims" from the third sentence of that paragraph should be deleted. Member Rothrock expressed his disagreement with the suggestion, stating that the language was there to protect attorneys and was consistent with CBA Ethics Opinion 94. The Chair questioned whether the language of the rule should discuss in more detail the calculation of amounts payable under the agreement, but member Rothrock advised that he believed that the language of subsection (1)(C) adequately addresses the issue.

A member then suggested that the word "shall" be changed to "must" throughout the proposed rule and form Contingent Fee Agreement. A second member suggested that the terms "shall" and "must" were inconsistently used throughout the proposed rule and form of agreement. These comments led to a larger discussion of the ongoing debate on the usage of "shall" and "must" and the experiences of several members addressing that issue in other standing rules committees. A member suggested that Rule 1.1 be amended to provide that the terms "shall" and "must" are used interchangeably throughout the rules. The Chair suggested that perhaps a subcommittee be appointed to address the larger style and drafting issue, but no action was taken on that point. The Chair did suggest, however, that the language being considered for the new Advertising and Contingent Fee Rules be drafted in accordance with existing statutory provisions.

Further discussion on how to incorporate the proposed Contingent Fee Rules into existing Rule 1.5 was held. The Chair requested that the subcommittee consider the issue and report back to the Committee.

The issues raised with respect to the language of proposed Rule 1.5(c)(7) and paragraphs 4, 7 and 8 of the form Contingent Fee Agreement discussed at the meeting were referred back to the subcommittee for additional consideration and further report to the Committee.

6. New Business: Abandoned Estate Planning Documents Statute.

In response to a letter from Tim Bounds and Pete Bullard dated December 6, 2019 (meeting materials at pages 80-81), the Chair invited Mr. Bounds, Mr. Bullard and other interested persons to attend the Committee meeting to discuss the potential ethical impacts of the recently enacted Colorado Electronic Preservation of Abandoned Estate Planning Documents Act, which has been codified as C.R.S. § 15-23-101, *et seq.* with conforming amendments to the Colorado Probate Code at C. R. S. §§ 15-12-304 and 15-12-402. Mr. Bounds, Mr. Tucker, Stan Kent and Frank Hill attended the meeting to address these issues.

Tim Bounds and Herbert Tucker led the discussion of this issue before the Committee and reviewed the materials contained at pages 80-111 in the meeting packet. They explained the issues relating to abandoned estate planning documents and the recent legislative response thereto, which will become effective January 1, 2021. Mr. Bounds reviewed a hypothetical problem (meeting materials at pages 108-09) as a way to introduce the potential ethical implications for practicing attorneys. He then reviewed a number of the Rules, which he believed would require revision in order to provide a safe harbor to practicing attorneys. *See* meeting materials at pages 110-11.

The discussion of the legislation and the proposed impact to the Rules raised a number of questions from members relating to provisions of the legislation itself, the hypothetical problem presented and the language of some of the proposed conforming amendments. The Chair inquired as to whether there were any ABA Model Rule provisions dealing with the issues raised by the legislation. Mr. Bounds and Mr. Tucker indicated that while other states (Illinois, California and Indiana) have similar legislation, they were not aware of any professional conduct rule provisions to address the perceived ethical concerns. The discussion concluded with the Chair forming a subcommittee to consider proposed amendments to the Rules necessitated by virtue of the legislation. The Chair circulated a sign-up sheet for Committee members to volunteer to serve on the subcommittee and expressed her hope that Mr. Bounds, Mr. Tucker, and others with interest in the subject also would volunteer to serve. The Chair thanked the meeting guests for bringing the new statute and associated ethics issues to the Committee's attention.

7. Administrative Matters.

a. The next meeting of the full Committee was scheduled for April 3, 2020.

b. The meeting was adjourned at 11:34 AM.

Respectfully submitted,

Thomas E. Downey, Jr., Secretary

(These minutes have not been approved by the Committee)

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From: Alec Rothrock <arothrock@bfwlaw.com>
Sent: Thursday, March 26, 2020 6:05 PM
To: Marcy Glenn
Subject: Contingent Fee Project
Attachments: Rule 1.5 and Comments (redline).docx; 03-26-20 redline version of Forms.docx

External Email

Marcy,

On behalf of the Contingent Fee Subcommittee, attached for presentation to the Standing Committee are redlined versions of (a) Rule 1.5 and Comments in their entirety, including revised subsection (c) and related Comments, and (b) an Appendix of forms that adds a form contingent fee agreement and disbursement statement to the existing form flat fee agreement. The redlining reflects the changes made since the Committee's last meeting on January 10, 2020, except that I did not redline the change throughout of "attorneys' fees" to "attorney fees."

In the Comments, please note that existing paragraph [3] is covered by proposed paragraph [6], which is why paragraph [3] is shown as "repealed." There never was a paragraph [3A]. All the contingent fee Comments are grouped together in and after paragraph [6]. The non-uniform (unique to Colorado) paragraphs are numbered using letters, which is how non-uniform Rules or Comments are usually identified. For ease of reference, the subcommittee added the subheadings "Contingent Fees" and "Division of Fee." These are the subheadings used in the Comments to ABA Model Rule 1.5, except that the subtitle "Contingent Fees" is "*Prohibited* Contingent Fees" in the ABA Model Rules.

Substantively, the following is a summary of the comments that led to the redlined changes:

1. Some Committee members did not like the language in the Rule and the form Contingent Fee Agreement requiring lawyers to inform clients in writing of the "effect, if any, of the hiring of associated counsel on the amount of the contingent fee." The objection was that the language suggested that the lawyer can unilaterally increase the fee.

2. There was discussion at the January meeting about the meaning of the language in proposed Rule 1.5(c)(7) that the form Contingent Fee Agreement "shall be sufficient." This language appears in Rule 7 of the Rules Governing Contingent Fees and in Colo. RPC 1.5(h)(3) in reference to the form flat fee agreement.

3. The purpose of the cross-reference in Comment [12] is to alert lawyers that, in the unusual instance in which a client agrees to pay an "alternate fee" immediately if the representation is terminated—instead of out of an eventual recovery through successor counsel—they will have to modify or remove the phrase in the last sentence of paragraph (4) of the form Contingent Fee Agreement that an alternate fee is payable "only out of the gross recovery obtained by or on behalf of the Client."

4. The subcommittee removed a few words in paragraph (8) of the form Contingent Fee Agreement because of an objection that the sentence was wordy.

5. Someone suggested that we include language in a Comment that contingent fees may be appropriate in circumstances not involving the recovery of money, such as reverse contingent fees. Comment [6] reflects this change.

6. Finally, the Committee asked the subcommittee to consider whether Colo. RPC 1.5 should be reorganized by, for example, breaking it down into separate rules the way former Rule 1.15 is now Rules 1.15A-1.15E. After seeing proposed subsection (c) and related Comments included within Rule 1.5 and Comments, the subcommittee does not believe it necessary to break down Rule 1.5 into separate rules. The subcommittee also recommends adding the form contingent fee agreement and disbursement statement to the form flat fee agreement in an Appendix of forms following Rule 1.5. Identifying the group of forms as an Appendix is modeled on the Appendix of forms following the Colorado Rules of Civil Procedure.

Alec

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Colo. RPC 1.5

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing.

(c) A "contingent fee" is a fee for legal services under which compensation is to be contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the representation.

(1) The terms of a contingent fee agreement shall be communicated in writing before or within a reasonable time after commencing the representation and shall include the following information:

A. The names of the lawyer and the client;

B. A statement of the nature of the claim, controversy or other matters with reference to which the services are to be performed, including each event triggering the lawyer's right to compensation;

C. The method by which the fee is to be determined, including the percentage or amounts that will accrue to the lawyer in the event of settlement, trial or

appeal, or other final disposition, and whether the contingent fee will be determined before or after the deduction of (i) costs and expenses advanced by the lawyer or otherwise incurred by the client, and (ii) other amounts owed by the client and payable from amounts recovered;

D. A statement of the circumstances under which the lawyer may be entitled to compensation if the lawyer's representation concludes, by discharge, withdrawal or otherwise, before the occurrence of an event that triggers the lawyer's right to a contingent fee;

E. A statement regarding expenses, including (i) whether the lawyer is authorized to advance funds for litigation-related expenses to be reimbursed to the lawyer from the recovery, and, if so, the amount of expenses the lawyer may advance without further approval ,(ii) an estimate of the expenses to be incurred ~~and the amount of expenses the lawyer may advance without further approval,~~ and (iii) the client's obligation, if any, to pay expenses if there is no recovery;

F. A statement regarding the possibility that a court will award costs or attorney fees against the client;

G. A statement regarding the possibility that a court will award costs or attorney fees in favor of the client, and, if so, how any such costs or attorney fees will be accounted for and handled;

H. A statement informing the client that the lawyer wishes to hire a lawyer in another firm to assist in the handling of a matter ("associated counsel"), the lawyer will promptly inform the client in writing of the identity of the associated counsel and that the hiring of associated counsel will not increase the contingent fee, unless the client otherwise agrees in writing. The statement shall also provide that the client has the right to disapprove the hiring of associated counsel and, if hired, to terminate the employment of associated counsel; and

I. A statement that other persons or entities may have a right to be paid from amounts recovered on the client's behalf, for example when an insurer or a federal or state agency has paid money or benefits on behalf of a client in connection with the subject of the representation.

(2) A contingent fee agreement must be signed by the client and the lawyer.

(3) The lawyer shall retain a copy of the contingent fee agreement for seven years after the final resolution of the case, or the termination of the lawyer's services, whichever first occurs.

(4) No contingent fee agreement may be made (a) for representing a defendant in a criminal case, (b) in a domestic relations matter, where payment is contingent on the securing of a divorce or upon the amount of maintenance or child support, or property settlement in lieu of such amounts, or (c) in connection with any case or proceeding where a contingency method of a determination of attorney fees is otherwise prohibited by law.

(5) Upon conclusion of a contingent fee matter, the lawyer shall provide the client a written disbursement statement showing the amount or amounts received; an itemization of costs and expenses incurred in handling of the matter; sums to be disbursed to third parties, including lawyers in other law firms; and computation of the contingency fee.

(6) No contingent fee agreement shall be enforceable unless the lawyer has substantially complied with all of the provisions of this Rule.

(7) The form Contingent Fee Agreement provided in Appendix _ may be used for contingent fee agreements and shall be sufficient to comply with paragraph (c)(1) of this Rule. The authorization of this form shall not prevent the use of other forms consistent with this Rule. Nothing in this Rule prevents a lawyer from entering into an agreement that provides for a contingent fee combined with one or more other types of fees, such as hourly or flat fees, provided that the agreement complies with this Rule insofar as the contingent fee is concerned.

(d) Other than in connection with the sale of a law practice pursuant to Rule 1.17, a division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the basis upon which the division of fees shall be made, and the client's agreement is confirmed in writing; and

(3) the total fee is reasonable.

(e) Referral fees are prohibited.

(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 1.15B(a)(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 1.15A(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.

(h) 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.

(1) The terms of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and shall include the following information:

(i) A description of the services the lawyer agrees to perform;

(ii) The amount to be paid to the lawyer and the timing of payment for the services to be performed;

(iii) 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; and

(iv) 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.

(2) If all or any portion of a flat fee is paid in advance of being earned and a dispute arises about whether the lawyer has earned all or part of the flat fee, the lawyer shall comply with Rule 1.15A(c) with respect to any portion of the flat fee that is in dispute.

(3) The form Flat Fee Agreement following the comment to this Rule may be used for flat fee agreements and shall be sufficient. The authorization of this form shall not prevent the use of other forms consistent with this Rule.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible, but when there has been a change from their previous understanding the basis or rate of the fee should be promptly communicated in writing. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client, but the communication need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier communication substantially inaccurate, a revised written communication should be provided to the client. All flat fee arrangements must be in writing and must comply with paragraph (h) of this Rule. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1.

[3] Repealed. ~~Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.~~

~~[3A] Repealed.~~

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an

ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] A fee agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Contingent Fees

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[6] Contingent fees, whether based on the recovery or savings of money, or on a nonmonetary outcome, are subject to the reasonableness standard of paragraph (a) of this Rule. ~~Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule.~~ In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. *E.g.,* 28 U.S.C. § 2678 (limiting percentage of fees in Federal Tort Claims Act cases); C.R.S. § 8-43-403 (limiting percentage of contingent fee in certain worker's compensation cases). The prohibition on contingent fees in certain domestic relations matters does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, maintenance or other financial orders because such contracts do not implicate the same policy concerns.

[6A~~7~~] The scope of representation in a contingent fee agreement should reflect whether the representation includes the handling of counterclaims, third-party claims to amounts recovered, and appeals.

[6B~~8~~] A lawyer may include a provision in a contingent fee agreement setting forth the lawyer's agreement to reimburse the client for any attorney fees and costs awarded against the client. A provision in a contingent agreement in which the client must reimburse the lawyer for any attorney fees or costs awarded against the lawyer may be improper.

[6C~~9~~] Nothing in this Rule prohibits a lawyer from arranging, in the contingent fee agreement or otherwise, for a third party to guarantee some or all of the financial obligations of the client in the contingent fee agreement.

[6D~~10~~] Third parties often hold claims to amounts recovered by the lawyer on behalf of the client. The lawyer may be required, as a matter of professional ethics, to pay these amounts from the proceeds of a recovery and not to disburse them to the client.

[6E~~11~~] A tribunal may award attorney fees to the client under a fee-shifting provision of a contract or statute or as a sanction for discovery violations or other litigation misconduct. The fee agreement may provide for a different allocation of such an award of fees as between the client and the lawyer depending on the circumstances giving rise to the award, such as whether the fees are awarded as a sanction for improper conduct that necessitated additional effort by the lawyer, or whether the fees are awarded under a contractual or statutory fee-shifting provision. This rule does not limit the ways in which clients and lawyers may contract to allocate awards of attorney fees; however, the lawyer must comply with the reasonableness standard of paragraph (a) of this Rule.

[6F~~12~~] A conversion clause that requires payment of the alternate fee immediately upon termination, and regardless of the occurrence of the contingency, would discourage most clients from discharging their lawyer. Few clients have the financial means to pay a contingent fee from their own resources, with no guarantee of replenishment by a recovery from a third party. Such a conversion clause is appropriate only if the client is sophisticated in legal matters, has the means to pay the fee regardless of the occurrence of the contingency, and has specifically negotiated the conversion clause, and the contingent fee agreement expressly requires payment of the alternate fee immediately upon termination. ~~Such a conversion clause is appropriate only if the client is relatively sophisticated in legal matters, has the demonstrated means to pay the contingent fee regardless of the occurrence of the contingency, and has specifically negotiated the conversion clause.~~ *See* Appendix, Form 1, Contingent Fee Agreement, ¶ (4) ("Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the Client . . .").

Division of Fee

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[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (d) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (d) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Advances of Unearned Fees and Engagement Retainer Fees

[10] 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.

[11] 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) or (h), 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. Rule 1.5(a).

[12] Advances of unearned fees, including advances of all or a portion of a flat fee, are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.5(f), 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.

[13] 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.

[14] A lawyer and client may agree that a flat fee or a portion of a flat fee is earned in various ways. For example, the lawyer and client may agree to an advance 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 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 flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance 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 Rule 1.5(a); Feiger, Collison & Killmer v. Jones, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

[16] "[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 [*i.e.*, a flat 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 Comment 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.

[17] 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.

[18] 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.

Appendix

Colo. RPC 1.5 Forms

~~Rules of Prof.Cond., Form Flat Fee Agreement~~

Form 1

CONTINGENT FEE AGREEMENT

Dated _____, 20___

_____ (Client), retains _____ (Lawyer) to perform the legal services described in paragraph (1) below. The Lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are: _____. The representation (will) (will not) [indicate which] include the handling of counterclaims, third-party claims to amounts recovered, and appeals.

(2) The contingency upon which compensation is to be paid is the Client's recovery of funds by settlement or judgment.

(3) The Client will pay the Lawyer __ percent of the (gross amount collected) (net amount collected) [indicate which]. ("Gross amount collected" means the amount collected before any subtraction of expenses and disbursements) ("Net amount collected" means the amount of the collection remaining after subtraction of expenses and disbursements [including] [not including] costs or attorney fees awarded to an opposing party and against the Client.) [indicate which]. "The amount collected" (includes) (does not include) [indicate which] specially awarded attorney fees and costs awarded to the client and against an opposing party.

(4) The Client is not to be liable to pay compensation otherwise than from amounts collected for the Client by the Lawyer, except as follows: In the event the Client terminates this contingent fee agreement without wrongful conduct by the Lawyer which would cause the Lawyer to forfeit any fee, or if the Lawyer justifiably withdraws from the representation of the Client, the Lawyer may ask the court or other tribunal to order that the Lawyer be paid a fee based upon the reasonable value of the services provided by the Lawyer. If the Lawyer and the Client cannot agree how the Lawyer is to be compensated in this circumstance, the Lawyer will request the court or other tribunal to determine: (1) whether the Client has been unfairly or unjustly enriched if the Client does not pay a fee to the Lawyer; and, if so (2) the amount of the fee owed, taking into account the nature and complexity of the Client's case, the time and skill devoted to the Client's case by the Lawyer, and the benefit obtained by the Client as a result of the Lawyer's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the Client and the amount of such fee shall not be greater than the fee that would have been earned by the Lawyer if the contingency described in this contingent fee agreement had occurred.

(5) A court or other tribunal may award costs or attorney fees to an opposing party and against the client.

(6) The Client will be liable to the lawyer for reasonable expenses and disbursements. Such expenses and disbursements are estimated to be $ _____. The Client authorizes the Lawyer to incur expenses and make disbursements up to a maximum of $ _____. The Lawyer will not exceed this limitation without the client's further written authority. The Client will reimburse the Lawyer for such expenditures (upon receipt of a billing), (in specified installments), (upon final resolution), (etc.) [indicate which].

(7) If the Lawyer wishes to hire a lawyer in another firm to assist in the handling of a matter (called an "associated counsel"), the Lawyer will promptly inform the Client in writing of the identity of the associated counsel and that the hiring of associated counsel will not increase the contingent fee, unless the client otherwise agrees in writing. The Client has a right to disapprove the hiring of associated counsel and to terminate the employment of associated counsel for any reason.

(8) Other persons or entities may have a right to be paid from amounts recovered on the Client's behalf. The Client (authorizes) (does not authorize) [indicate which] the Lawyer to pay from the amount collected the following: (e.g., all physicians, hospitals, subrogation claims and liens, etc.). The Lawyer may be legally required to pay the claims of third parties out of any monies collected for the Client, and not to disburse them to the Client ~~so the Client may handle these claims~~. However, if the Client disputes the amount or validity of the third-party claim, the Lawyer may deposit the funds into the registry of an appropriate court for determination. Any amounts paid to third parties (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

(Signature of Client)

(Signature of Attorney)

(Signature of Client)[1]

(Signature of Lawyer)

Form 2

FINAL DISBURSEMENT STATEMENT

GROSS RECOVERY $_____

Itemization of expenses incurred in handling of case:

_____$_____
_____$_____
_____$_____
_____$_____

Total Expenses $_____

Amount of Expenses Advanced by Lawyer $_____

Amount of Expenses Paid by Client $_____

NET RECOVERY $_____

Computation of Contingent Fee:

_____% of (Net) (Gross) Recovery = $ _____

Total Fee (and expenses advanced by Lawyer)* $_____

DISBURSEMENT TO CLIENT $_____

* (If fee is on "Net Recovery" and Lawyer has advanced expenses which are being reimbursed from the "gross recovery.")

(Signature of Lawyer)

(Signature of Client)
By signature client acknowledges receipt of a copy of this disbursement statement.

Form 3

~~ORM~~ FLAT FEE AGREEMENT

~~Currentness~~

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*].

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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]:
Signature	Signature

JOHN P. CRAVER
DAVID J. NOWAK
MICHAEL J. DAUGHERTY
ROBERT H. COATE
MONTY L. BARNETT
KEITH R. OLIVERA
MATTHEW W. TILLS
JAMES M. MESECK
ADAM J. GOLDSTEIN
GRANT R. CURRY
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RACHEL E. RYCKMAN

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WALTER A. STEELE
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MATTHEW A. RALSTON
NICK B. KLANN

November 6, 2019

Marcy Glenn
Chair, Rules of Professional Conduct Standing Committee
Sent by email to MGlenn@hollandhart.com

Re: Revision of Colo. RPC 1.5(b)

Dear Marcy:

I am writing to suggest that the Standing Committee look into revising Colo. RPC 1.5(b) to add language from ABA Model Rule 1.5(b) regarding the scope of representation. The addition would require lawyers to communicate to clients, in writing, the scope of representation as well as the basis of the fee.

ABA Model Rule 1.5(b) states:

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

The topic of "scope of representation" is not included in Colo. RPC 1.5(b), which states:

> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing.

The Colorado rule differs from the Model Rule in two key respects:

- Colorado requires the basis of the fee to be communicated in writing, while the Model Rule states this as a preference but not a requirement. Colorado added this requirement in

2000 by deleting the word "preferably" from Rule 1.5(b); explanatory langue was added to the comment. *See Rule Change #2000(10)*.[1]

- Colorado requires only the basis or rate of the fee to be communicated, while the Model Rule requires not only that but also the "scope of the representation."

From my review of the Standing Committee's report about whether to adopt the rule changes in the ABA's Ethics 2000 project, it appears the "scope of representation" phrase was part of revised ABA Model Rule 1.5(b), but the Standing Committee did not include that in its recommendations to the Colorado Supreme Court. Reasons were not stated. *See pp. 7, 30-32, Report and Recommendations Concerning the American Bar Association Ethics 2000 Model Rules of Professional Conduct, December 30, 2005*.

I believe "scope of representation" should be added to Colo. RPC 1.5(b). In forming the lawyer-client relationship, the scope of representation is just as important as the basis of the fee. In my experience, differences over the scope of representation are one of the most common disputes that arise between lawyer and client. I have seen this issue arise in many attorney discipline and legal malpractice cases.

Consideration of this issue involves two steps: first, should there be a requirement to communicate the scope of representation at the outset; second, must that communication be in writing. On the first issue, the ABA Ethics 2000 Commission noted: "As a practical matter, a statement about fees is rarely complete without a corresponding statement of what the lawyer is expected to do for the fee." [2]

On the second issue (in writing), adding that requirement would not be a burdensome addition the current mandatory writing concerning the basis of the fee. Both lawyer and client would benefit from written confirmation of the scope.

Curiously, Model Rule 1.5(b) addresses changes to the *fee* during the representation, but not changes to the *scope*. The first sentence of Model Rule 1.5(b) states the requirement for communication of both scope and fee; the second sentence addresses changes but only as to the fee: "Any changes in the basis or rate of the fee or expenses shall also be communicated to the

[1] The ABA Ethics 2000 Commission recommended deleting "preferably" but the House of Delegates rejected that recommendation https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule15/ https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule15h/ (*last accessed 10/31/2019*)

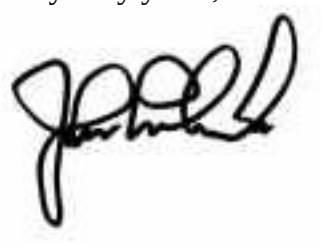
[2]https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule15rem/ (*last accessed 10/31/2019*).

client."[3] The rationale for not addressing changes to the scope is not clear, since changes to the scope are at least as common as changes to the fee. It would be better to require the lawyer to communicate changes to either the scope or the fee, in writing.

In conclusion, I respectfully ask the Standing Committee to consider revising Colo. RPC 1.5(b) by adding the words in bold:

> (b) When the lawyer has not regularly represented the client, **the scope of the representation and** the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Any changes in **the scope of the representation or** the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing.

Very truly yours,



John Lebsack

[3] The last sentence of Colo. RPC 1.5(b) is similar: "Any changes in the basis or rate of the fee or expenses shall also be *promptly* communicated to the client, *in writing*." (Italics shows words added to the Model Rule.)