COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On April 27, 2018
(Fiftieth Meeting of the Full Committee)

The fiftieth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, April 27, 2018, 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 Justice Center.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justices Nathan B. Coats and Monica M. Márquez, were Committee members Judge Michael H. Berger, Nancy L. Cohen, James C. Coyle, Thomas E. Downey, Jr., Margaret B. Funk, David C. Little, Judge William R. Lucero, Cecil E. Morris, Jr., Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, Eli Wald, and Judge John R. Webb. Present by conference telephone were members Gary B. Blum, Judge Ruthanne Polidori, and E. Tuck Young. Excused from attendance were members Cynthia F. Covell, John M. Haried, Boston H. Stanton, Jr., and Frederick R. Yarger. Absent were members Jacki Melmed and Lisa M. Wayne. Also present were Supreme Court staff attorneys Melissa C. Meirink and Jennifer J. Wallace.

I. *Fiftieth Meeting.*

The Chair noted that this was the fiftieth meeting of the Committee, which had held its first meeting on September 30, 2003. She commented that it has been quite amazing to be doing what the Committee has done in that span of time.

II. *Meeting Materials; Minutes of January 26, 2018 Meeting, the Forty-ninth Meeting of the Committee.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the forty-ninth meeting of the Committee, held on January 26, 2018. Those minutes were approved after correction of one member's middle initial and the correction of an erroneous reference to "Rule 1.4" to make it a reference to "Rule 1.5."

III. *Resignation of Member Federico C. Alvarez*.

The Chair noted with regret the resignation of Federico C. Alvarez from the Committee; he had been a member since September 2006, attending the fifteenth meeting of the Committee as his first meeting. The Chair read aloud Alvarez's message to her explaining his need to resign due to a conflict with other professional obligations. He will be missed.

IV. *Rule 1.5, Flat Fees*.

Noting that member James S. Sudler III would have to leave the meeting early, the Chair turned the meeting first to Item № 5 on its agenda, the development of comments to accompany the substance of proposed Rule 1.5(h) as that proposal had been developed by the Committee at its forty-ninth meeting. The Chair asked Sudler to conduct the Committee's consideration of such a comment.

Sudler began by noting that the subcommittee that has been considering flat fee arrangements now proposed a few small changes to the text of Rule 1.5(h) as the full Committee had settled upon it at the forty-ninth meeting, the subcommittee's changes to be as follows:[1]

> (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 ~~**must**~~ ***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 completion of the representation, the amount to be earned upon the completion of specified tasks or the occurrence of specified events; and
>
> (iv) The amount~~**, if any,**~~ or the method of ~~**calculation, of**~~ ***calculating the*** fees the lawyer earns, if ***any, should*** the representation ~~**terminates**~~ ***terminate*** before completion of the specified legal ~~**services**~~ ***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 1.15(A)(c) with respect to any portion of the flat fee that is in dispute.
>
> (3) The [following form] [form appearing in Appendix ___] may be used for flat fees ***and shall be sufficient***. The authorization of this form shall not prevent use of other forms consistent with this Rule.

Sudler specifically noted the phrase "and shall be sufficient" that has been inserted in subparagraph (3): While he could not say what it meant, he could point to its use in the rule providing for a form for contingency fee agreements, Contingent Fees Rule 7, Chapter 23.3, C.R.C.P.

The comments that the subcommittee now proposed be made to the commentary to Rule 1.5 to accommodate the changes proposed to the rule itself by the addition of Rule 1.5(h) were set forth in the materials the Chair had provided for this meeting. [The secretary here extracts the commentary for which changes are proposed from the whole of the commentary to that rule.]

> . . . .
>
> [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. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client. When the lawyer has regularly represented

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1. The text of the proposed rule that was contained in the materials for this fiftieth meeting split the word "information" at the end of the preamble of Rule 1.5(h)(1) into two words, "in formation"; and the word "specified" in Rule 1.5(h)(1)(iv) was misspelled as "sepcified."

—Secretary

a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. ***All flat fee arrangements must be in writing and 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. ***Arrangements other than contingent or flat fees require*** ~~**A**~~ ***a*** written communication ~~**must disclose**~~ ***that discloses*** the basis or rate of the lawyer's fees, but it 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 take 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 disclosure substantially inaccurate, a revised written disclosure should be provided to the client.

. . . .

[5] ~~**An**~~ ***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.

. . . .

[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).

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

[12] Advances of unearned fees, including ***advances of all or a portion of a*** ~~**"lump sum" fees and "flat fees,"**~~ ***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 1.15, 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) ***or (h)***. 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] ***A lawyer and client can 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 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] Alternatively, the lawyer and client may agree to an ~~**advance lump sum or**~~ ***advanced 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.

[15] 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 Rule 1.5(a); Feiger, Collison & Killmerv.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 oftime to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

. . . .

Sudler summarized the proposed changes as follows:

(a) A simple addition of a reference to Rule 1.5(h) has been made to Comment [11].

(b) The heading preceding Comment [12] has been deleted,

(c) All references to "lump-sum" fees have been deleted, save its retention in the direct quotation, found in Comment [16], from the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. Sudler wondered aloud whether there was a substantive difference between a "lump-sum" fee and a "flat" fee.

(d) The added first sentence to Comment [13] — "A lawyer and client can agree that a flat fee or a portion of a flat fee is earned in various ways" — is intended to invite flexibility in the use of flat fees.

(e) The changes to Comments [14] and [15] simply carry through with the change in terminology from "lump-sum fee" to "flat fee."

All of the members of the subcommittee, Sudler said, are in agreement that the Rule should offer a model form for a flat fee engagement agreement, giving some guidance as to the requirements of Rule 1.5's provisions governing flat fee agreements. A draft of such a form was included in the materials the Chair provided for this meeting.

A member noted that the proposed text of Rule 1.5(h)(iv) contemplates the calculation of earned fees "should the representation terminate before completion of the specified legal tasks or the occurrence of specified events." She noted that termination of a representation in a matter that is before a court in litigation might require the approval of the court, and she thought the possibility of such a requirement should be noted in the rule or a comment. A member of the subcommittee appreciated that observation and suggested that the phrase "subject to court approval, if necessary"

be included in the rule itself. However, another member thought the addition unnecessary in view of Rule 1.16(c).[2]

A member questioned the addition to Rule 1.5(h)(3) of the statement that use of the form of agreement "shall be sufficient"; she found those words "weird" and questioned their purpose. In response, another member pointed to the provision reading, "The following forms may be used and shall be sufficient," in Rule 7 of the contingent fee rules found in Chapter 23.3 of the Colorado Rules of Civil Procedure. When the member who had questioned the addition of the words asked whether there was a danger in departing from that example in this other set of court rules, yet another member added that Rule 6 of the contingent fee rules specifies that, "No contingent fee agreement shall be enforceable by the involved attorney unless there has been substantial compliance with all of the provisions of this Chapter 23.3" — which, this member noted, is text that the subcommittee has not included in its proposal for flat fees under Rule 1.5, although the provision as found in Rule 6 of the contingent fee rules "goes together" with the sufficiency text found in Rule 7 of those rules.

The member who had previously spoken to support the addition of a reference to court approval of termination of a representation under a flat fee agreement now spoke to note that a statement of the sufficiency of the form and substantial compliance with the rule go together as authority and enforcement, providing a safe harbor against prosecution for improper conduct. She would not want to see modification of those provisions in the contingent fee rules themselves, because there is relevant case law the benefit of which might be lost upon such a modification. With those assurances in the contingent fee rules, the lawyer is more likely to be able to recover the agreed-upon contingent fee without fear of an enforcement action if the client were to complain about the fee.

To that, the member who had found the wording weird pointed out that the client's contractual obligation to pay a particular fee or ability to avoid doing so would be a civil matter that would not be impacted by a parallel rule of professional conduct. She agreed, however, that a rule of enforcement that found an agreement that complied with the standards of that rule to be "sufficient" would likely be evidence of public policy.

To all of that, Sudler suggested that the matter be covered, instead, by the prefatory statement, "The following form may be used for a flat fee agreement." The member who had questioned the weird terminology said that she would be satisfied with that alternative, although she wondered whether it would actually provide the sought-after safe harbor. In reply to that question, Sudler expressed his view that a rule that stated that a particular form "may be used for a flat fee agreement" surely would be construed to provide that a use of that form was sufficient as a matter of ensuring compliance with the requirements of the flat fee provisions in an enforcement action against the lawyer. His concern, he said, was to avoid the case where one Court rule specified that use of a particular form would be "sufficient" while an apparently similar type of rule from the Court omitted such wording but did not provide an alternative statement — such as he here proposed — that gave practical assurance that use of the form would in fact be sufficient.

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2. Rule 1.16(c) provides, "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

—Secretary

In reply, the other member who was engaged in the dialogue said she agreed with Sudler's analysis and, while modification of the provision in the similar contingency fee rule might be an appropriate solution in theory, she would not want to imperil the extant case history interpreting that provision.

The member who had noted the existence of case law giving the "sufficiency" text of Rule 7 of the contingency fee rules the status of a safe harbor now added that, if there were to be a subsequent modification of the contingency fee rule by the Court, it could there adopt the approach that was now being suggested for the flat fee rule.

A member who had not previously spoken now pointed to the initial words of existing Rule 1.5(h)(1) — "The terms of a flat fee shall be communicated . . ." — and asked whether it should be worded, "The terms of a flat fee *agreement* shall be communicated. . . ." To that, another member said that an effort had always been made to avoid reference to an "agreement" anywhere in Rule 1.5 or its comments, and she pointed to the statement in existing Comment [2], "it need not take the form of a formal engagement letter or agreement." Another member interjected that the absence of explicit recognition that the relationship between a lawyer and a client is an agreement is perhaps the greatest single error in the Rules. The member who had asked whether the word "agreement" should be added into Rule 1.5(h)(1) followed up by wondering why the word is avoided; the Chair noted that the secretary has long espoused its usage, and the secretary added that he was not alone in that view.

Sudler noted that the concern about references to an "agreement" between lawyer and client centered on a belief that an actual agreement would need the client's signature, which might often be difficult to obtain. Another member, who had not previously spoken, pointed out that Chapter 23.3 requires the signing of duplicate copies of a written contingency fee agreement, with one copy to be provided to the client.[3]

The Chair noted that dealing specifically with *agreements* for the provision of legal services by a lawyer to a client is a much larger matter than just the question of whether the rules for flat fee arrangements should refer to agreements. She asked whether the Committee wanted to consider that matter "globally."

Without answering the Chair's question, a member who had not previously spoken now said he thought the provisions for flat fees should replicate the terminology of the contingent fee rules. He would retain the subcommittee's proposed text for Rule 1.5(h)(3): "The [following form] may be used for flat fees and shall be sufficient." If the language regarding sufficiency were to be modified, it should, in this member's view, be modified in parallel in both the flat fee rules and the

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3. Rule 4(b) of the contingency fee rules in Chapter 23.3, C.R.C.P., provides—

> Each contingent fee agreement shall be in writing in duplicate. Each duplicate copy shall be signed both by the attorney and by each client. One signed duplicate copy shall be mailed or delivered to each client within ten days after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the attorney for a period of six years after the completion or settlement of the case or the termination of the services, whichever event first occurs.

—Secretary

contingency fee rules. He added that, if the Committee were to explicitly recognize that the client-lawyer relationship involved an agreement, that would require reworking of the entirety of Rule 1.5, if not also other rules.[4]

Yet another member who had not previously spoken added that the contingency fee rules are very strict, requiring signatures of both client and lawyer; he noted that failure to comply fully with the contractual requirements of the contingent fee rules has led to clients attacking their lawyers' entitlements to the claimed contingent fees, with the lawyers turning to principles of quantum merit or other arguments to salvage rights to fees.

The member who had first noted the safe-harbor nature of the "sufficiency" text in the contingency fee rules added that, unlike a contingency fee, the flat fee arrangement does not give the lawyer an economic stake in the litigated matter itself. And, she added, even large corporate clients are interested in curtailing legal costs and find the flat fee appealing for that reason. The reason for the use of a flat fee arrangement is different from that which may make a contingency fee arrangement desirable in another context, and we should not make the rules governing the use of flat fees so cumbersome that a client cannot secure the benefit of a fixed price for the lawyer's services.

The member who had first questioned the effort to avoid the term "agreement" now noted that a lawyer's use of a flat fee arrangement might be accompanied by a number of kinds of misconduct by that lawyer — such as charging an unreasonable fee in violation of Rule 1.5(a) — and the member questioned the scope of the protection that might seem to be given to the accompanying misconduct by a statement that use of a particular form of flat fee agreement would be "sufficient." Would that sufficiency extend to protect the lawyer with respect to all of the requirements of Rule 1.5, including the requirement that the fee be reasonable?

Another member agreed with that concern but worried about the "legislative history" that could be argued to exist if this rule did not replicate the sufficiency provision of the similar contingent fee rules. She noted that this Committee, even with its explanatory minutes, cannot create legislative history to support one interpretation or another of a rule it has proposed and the Court has adopted.

The member who had voiced the concern that the proffered text of sufficiency could unintendedly sanction misconduct responded that a specific, coherent, and complete statement within Rule 1.5 of the rules governing flat fees would seem to make irrelevant, to those flat fee rules, provisions found in other rules that dealt with other matters, even if those other rules might seem to be "parallel" to the flat fee rules in structure or in the context of lawyers' fee arrangements.

The other participant in this dialogue said that, if the Committee wished to change the sufficiency text, it should send the matter back to the subcommittee for a thorough consideration of the implications.

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4. None of the members noted that Rule 1.5(a) opens with the statement that a lawyer "shall not make an agreement for . . . an unreasonable fee" or that Rule 1.5(c) or that Rule 1.5(d) permits a fee division among lawyers only with the client's agreement to the arrangement, confirmed in writing. And none noted that the sixth sentence of the existing text of Comment [2] to the rule provides that written disclosure of the basis or rate of fee to a new client "need not take the form of a formal engagement letter or agreement, and it need not be signed by the client."

—Secretary

A member who had not previously spoken conceded the apparent validity of the expressed concern that a statement of sufficiency as to use of a particular form might be argued to give approval to ostensibly compliant forms that in fact furthered lawyer misconduct, but he wondered whether any lawyer would actually make such a claim to cover outrageous conduct. He would leave the sufficiency text as it was submitted by the subcommittee. Another member supported that view by pointing out that the reasonableness test of Rule 1.5(a) remained in place as a self-contained requirement that would not "go away" because of the sufficiency provision.

A member who had not previously spoken now spoke to characterize the entire discussion as academic and to urge the Committee to move on.

With that suggestion, the Chair asked for comments on other aspects of the subcommittee's proposal.

A member took the opportunity to question the meaning of Rule 1.5(h)(iv), which, as modified by the subcommittee following the last meeting, would read—

> (iv) The amount or the method of calculating the fees the lawyer earns, if any, should the representation terminate before completion of the specified legal tasks or the occurrence of specified events.

This member was concerned that the provision would deny the client any way of knowing, when contemplating an early termination of the lawyer's services, what alternative bill the client would then be facing: If the alternative "method of calculating the fees the lawyer earns" was to be an hourly-rate charge, the client could not know, until the lawyer went back to add up the accrued hours from time records and did the multiplication calculation, what would have to be paid as the price of termination.

In reply, a member of the subcommittee acknowledged that the provision was perhaps not as explicit as it might be but said that the idea was that the alternative fees would be determined by establishing and tracking "milestones": If the lawyer's services were terminated between Milestone № 3 and Milestone № 4 — and if the lawyer's flat fee arrangement with the client was that the lawyer earned the flat fees established for Milestones № 1, № 2, and № 3 *plus* that for Milestone #4 but not in excess of the agreed-upon alternative hourly rate for the time accrued after Milestone № 3 to the point of termination — then the client would know in advance what the lawyer's maximum fee entitlement was upon the early termination before completion of Milestone № 4. And, further, the actual fee entitlement might be less than expected if the accrued-time maximum limited the fees to less than those that would have been earned had Milestone #4 been accomplished prior to the termination.

The subcommittee member added that, if no milestones had been established in the flat fee arrangement, then the lawyer would not be entitled to any fee upon termination prior to completion of the entire engagement. The subcommittee's thought is that the rule's preclusion of any fee recovery — when the termination occurs before completion of the entire engagement and the lawyer has not made provision for partial payment upon interim milestones — would of itself encourage lawyers to establish milestones for partially-completed services in flat fee engagements.

But another member questioned whether the proposal would work that way. If the engagement had not been established with milestones for partial completion of the anticipated

services but the arrangement provided that, in the event of early termination, the lawyer was entitled to a fee calculated upon the hours of service actually accrued multiplied by a stated rate, then that would be just the situation that had been posited in the question raised by the member who thought the client would not have the data needed to weigh the cost of early termination.

And that member who had raised that question now reiterated her concern that the client could not compare the cost of an early termination of the engagement to the cost of allowing the lawyer to proceed to completion and recover the agreed-upon flat fee.

A member expressed his view that the existing contingency fee rules provide the same dilemma, in that the lawyer is entitled to a quantum meruit recovery — which would be determined based upon the quantum of the lawyer's services actually performed to the time of termination multiplied by an appropriate hourly rate as established by testimony in the litigation for recovery of a fee. The member did not see that this difficulty should preclude the entire effort to provide for flat fees for lawyers' services. In his view, the only alternative would be complete forfeiture of any fee recovery to the lawyer whose services are terminated before completion of the entirety of the bargained-for services and in the absence of completed milestones toward those services.

The lawyer who had raised the question said that her understanding was that clients in contingency-fee arrangements cannot be charged fees in excess of the agreed percentage of the value of recovery, and in the case of an early termination of the lawyer's services followed by succession by another lawyer, the discharged lawyer is entitled to share in the eventual recovery by a comparison of the respective contributions of each of the two lawyers, measured in quantum meruit.

A member of the subcommittee commented that the subcommittee had tried to deal with these matters by providing that the lawyer's recovery in the event of early termination could not exceed the bargained-for flat fee, as well as by setting it up to encourage the use of milestones as previously described. But termination can occur for unexpected reasons, for reasons not attributable to the lawyer's conduct or services. Quantum meruit should be available to the lawyer in such circumstances, subject to the flat fee cap, even if no milestones had been provided. In reply to a member's question about why the rule does not explicitly refer to *quantum meruit* as an alternative recovery, this subcommittee member said he had tried to get those words included in the proposal but had failed within the subcommittee. He added, though, that the rule would permit the lawyer and the client to agree to either an hourly-rate or to a quantum meruit alternative — if not some other alternative — for the calculation of fees due upon an early termination.

A member acknowledged the difficulties that had been discussed but wondered whether a comment to the rule could suggest that it would be "advisable" — where the arrangement between the lawyer and the client provided for an hourly-rate charge for termination prior to completion of services or prior to completion of the next milestone, as the case might be — for the lawyer to keep track of the hourly accruals throughout the representation and to regularly inform the client of the accruals so that the client would, in the course of the matter, be able to calculate the alternative fee to be paid upon an early termination. Yet the member saw as she spoke that even the contemplation of the record-keeping and disclosure burden that such a suggestion would entail could discourage lawyers from using flat fee arrangements. Another member voiced agreement with that concern.

Sudler said that, if the lawyer wishes to be entitled to some compensation in the event of an early termination, the lawyer can set up milestones as envisioned by the subcommittee and provide for the charging of an hourly rate to account for time accrued between milestones, knowing that the

rule would preclude recovery of more than that fee to which the lawyer would be entitled through completion of the next, uncompleted, milestone. It would be in the lawyer's interest to establish reasonable, useful milestones.

Another member agreed with this approach to meeting the requirement of Rule 1.5(h)(iv) that "the amount or the method of calculating the fees" in the event of early termination be specified in the agreement, saying that the lawyer would be smart to keep records of the hourly accrual of services on the matter for use as evidence in the event the lawyer finds herself or himself in the "early termination quagmire." In his view, the client is sufficiently protected by the requirement that the method of calculation be specified in the statement of the terms of the flat fee arrangement.

To that, another member noted that "if the lawyer is smart" was the limiting factor in this view of the matter. Some will not be smart. But this member went on to say that, while she acknowledged the validity of the concern that clients will not find it easy to forecast the cost to them of early terminations, the Court should adopt the rule as it has been proposed and watch to see if that turns out to be a significant problem in its operation.

A member asked whether an alternative fee would not, by definition, be "unreasonable" if it turned out to be more than the established flat fee. Another member disagreed with that view of the meaning of the word "unreasonable" as it is used in Rule 1.5(a); she noted that lawyers often agree to caps on their hourly fee accruals although the actual accruals would not be deemed unreasonable. Further, this member did not think the reasonableness standard of Rule 1.5(a) would apply to the reasonableness of an alternative fee such as was under discussion. She did not, however, explain that conclusion, although it was questioned by another member.

The member who had first questioned the wisdom of putting the client in a guessing-game as to the cost of early termination expressed her view that this was set up to punish the client by making termination more expensive than keeping the lawyer.

To that, a member of the subcommittee reminded the Committee that the subcommittee's proposal would prohibit a fee-upon-early-termination that exceeded the bargained-for flat fee.

And to that, the member who had earlier disagreed that a calculated alternative fee upon early termination that exceeded the flat fee cap would necessarily be "unreasonable" within the meaning of Rule 1.5(a) and who had noted that lawyers often agree to caps on their hourly fee accruals although the actual accruals would not be deemed unreasonable now said she understood that the alternative fee could not exceed the bargained-for flat fee as a cap; she explained that her earlier disagreement was only to make the point that a fee that was higher than the bargained-for flat fee would not, for that reason alone, be "unreasonable" and therefore in violation of Rule 1.5(a).

Another member agreed that there was validity to the concern that clients will not find it easy to forecast the cost to them of early terminations, but he felt there was no good solution for that problem and felt that the Committee should propose the Rule to the Court for adoption to see if it worked in practice. As he put it, the Committee should get this done and address problems as they then come up in application of the flat fee rules.

A member, noting that the alternative fee cannot be higher than the flat fee (referring to the flat fee payable through the next milestone if termination occurs before completion of that next

milestone), suggested that the phrase "hourly rate" just be replaced with "quantum meruit" in Comment [13] to Rule 1.5.

To that, a member of the subcommittee said that an hourly rate may be much easier to deal with than a quantum meruit calculation; the latter might simply lead to litigation. The subcommittee's purpose, this member thought, was to establish a maximum cost to early termination that could be identified without litigation over the value of the services that were actually rendered before termination.

Another member of the subcommittee agreed, saying the subcommittee had looked to the contingent fee rules to structure these flat fee rules; he noted that some measure other than either hourly rate or quantum meruit could have been used, such as determination of what percentage the services actually completed before termination was of the aggregate of services that would have been required from the commencement of the representation through to completion of the contemplated undertaking.

And to that, the Chair said that the Committee was in danger of letting the perfect be the enemy of the good. The proposal from the subcommittee was much better than the just-suggested alternative.

A member — apparently thinking of the meaning of "quantum meruit" as the benefit received by the contracting party, as distinguished from the value of the lawyer's accrued time — questioned what the actual *meruit* received by the client would be if the engagement were terminated between milestones, or before completion, and the client actually received no deliverable. In contrast, if the agreement provided for calculation of the alternative fee upon early termination based on accrued hours to the point of termination, at least that was subject to a calculation.

A member called for a vote on acceptance of the text of Rule 1.5(h) as it has been modified by the subcommittee following the prior meeting of the Committee.[5] Upon the ensuing vote, the Committee approved that text, with two members voting against it.

Following the vote on the substantive text of Rule 1.5(h), the Committee turned to the unfinished business of the comments to that rule.

A member who was attending the meeting by telephone asked this question: When, in a flat fee arrangement, a lawyer engages another lawyer as an associated lawyer on a case, is it necessary that there be an agreement between the two lawyers as to the associated lawyer's compensation?

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5. That is, as set forth at the beginning of Part IV of these minutes. —Secretary

To that, a member of the subcommittee dealing with Rule 1.5 suggested that Rule 1.5(b)[6] would require an agreement between the two lawyers — with or without the client's participation — that provided for an allocation of the flat fee between them. That would make sense to this member, because the client would not see a fee increase on account of the associated lawyer's engagement or of that lawyer's provision of services on the matter.[7]

Another member cited the *Hannon*[8] case and concluded from that case that client approval is not needed when a lawyer engages another lawyer to assist in a matter.

A member noted the duplication — found in the existing text of the comment — in the first and third sentences of Comment 2 to Rule 1.5—

> 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. . . . When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee. . . .

He suggested that the duplication could be resolved by having the first three sentences of the comment read as follows:

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6. Rule 1.5(b) provides—

> (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.

—Secretary

7. The disclosure statement contained in Rule 7 of the contingent fee rules includes this statement—

> I have been informed and understand that my attorney may sometimes hire another attorney to assist in the handling of a case. That other attorney is called an "associated counsel." *I understand that the attorney fee agreement should tell me how the fees of associated counsel will be handled.*

Emphasis added. —Secretary

8. Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C., 287 P.3d 842 (Colo. 2012). In that case, the Colorado Supreme Court permitted associated counsel to pursue, upon an early termination of the associated lawyer's services, a quantum meruit recovery against the law firm that had engaged with the client under a contingent fee arrangement, even though the associated lawyer had no contractual relationship with the client and had not himself complied with the contingent fee requirements vis-à-vis that client. The court said—

> We agree with Hannon and hold that C.R.C.P. Chapter 23.3 does not bar a withdrawing attorney from maintaining a quantum meruit action against former co-counsel even if it would bar the attorney from recovering from the client. Chapter 23.3 does not purport to impose restrictions on fee sharing agreements or equitable recovery between attorneys. Rather, its purpose is to ensure that the client is fully advised of the financial obligations he or she assumes by entering into a contingent fee agreement. [Citation omitted.]

—Secretary

> 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 as to the basis or rate of the fee or the expenses, the change should be promptly communicated to the client in writing. In a new client-lawyer relationship, the basis or rate of the fee and of the expenses must be promptly communicated in writing to the client.

The member noted that this suggested revision would include changes with respect to expenses along with changes in the basis or rate of the fee as matters to be communicated to the client — as, he said, should probably have been stated in the original text. He also noted that the revision would add expenses to the fees as matters that should be communicated to a new client.

This member also suggested that the sentences within Comment [2] that deal with flat fees and contingent fees — that is, the fourth, fifth, and sixth sentences — should be moved to the end of Comment [2]. Deletion of the word "Moreover" would be appropriate, also. The member added that it should be clarified that the flat fee and contingent fee requirements apply whether or not the relationship between the lawyer and the client is new or is already established.

To the last of those suggestions, another member stated his view that there need not be a new flat fee or contingent fee disclosure with respect to each new engagement between a lawyer and a person who has previously been a client to that lawyer, just as the comment does not contemplate a new disclosure for each new matter undertaken by a lawyer for one who has previously been a client of that lawyer when the fee arrangement is hourly or otherwise not a flat fee or a contingent-fee arrangement. The member suggested, for example, that the lawyer could agree to do all of the foreclosures for an existing client for a stated flat fee.

Other members expressed doubt about that proposition, but the matter was not pursued to a conclusion.

A member questioned the phrase "other than" in the seventh sentence of Comment [2] as it had been proposed to the Committee by the subcommittee: "Arrangements *other than contingent or flat fees* require a written communication . . . ." The member suggested that the phrase invites a conclusion, contrary to the amended rule itself, that no writing is required with respect to contingent- or flat-fee arrangements."

A member of the subcommittee said that implication clearly was not intended; she suggested deletion of "or flat fees" from the phrase, leaving, "Arrangements other than contingent fees require a written communication . . . ." She made no mention of the writing requirement for contingent fees that is stated in the separate contingent fee rules of Chapter 23.3 of the Colorado Rules of Civil Procedure.

Another member suggested that the entire clause be deleted, restoring that sentence to its existing text. The restored sentence would not be inconsistent with the special provisions for flat fees that would be added to Rule 1.5.

A member noted a lack of clarity in existing Comment [2], which ambiguity would remain in that comment as it would be revised, in that it speaks of a written disclosure of the basis or rate of fee to a new client but its sixth sentence (as counted in the current version of the comment) adds

that the written disclosure "need not take the form of a formal engagement letter or agreement, and it need not be signed by the client." This should, she suggested, be "fixed" — but a fix was not forthcoming from the Committee at this time.

A member questioned the term "must" in the new full sentence that the subcommittee would add to Comment [2], reading, "All flat fee arrangements must be in writing and comply with paragraph (h) of this Rule"; the member would use the alternative "shall." But another member thought it inappropriate to state a command in a comment, as distinguished from substantive rule text.

A member wondered whether the sentence that had just been discussed should be revised to delete the words "be in writing and," so that it would simply read, "All flat fee arrangements must comply with paragraph (h) of this Rule." That suggestion was not taken up by any other member.

A member noted that the term "can" found in the proposed new sentence at the beginning of Comment [13] — which reads, "A lawyer and client can agree that a flat fee or a portion of a flat fee is earned in various ways" — should be changed to "may."

A member expressed his objection to the term "arrangement" that is used several times within the rule and comments; he did not acknowledge that the term is found in the existing text of the Rule 1.5 comments as well as in the subcommittee's revisions. No other member joined in that objection.

The Committee then approved the proposed comments to Rule 1.5 — the approval was not explicit as to which, if any, of the suggestions for change that had been made in the preceding discussion would be incorporated in the comments as thus approved.

The Committee then turned its attention to the proposed form for flat fee agreements.

A member expressed his disagreement with the form because it would permit the lawyer, as well as the client, to make a unilateral determination to withdraw from the engagement.[9] That, the member said, is contrary to the Rule itself, which does not permit the lawyer to withdraw, and with Rule 1.16, which contains strictures on a lawyer's unilateral withdrawal from a representation. Rather, the form might state that the lawyer may terminate in accordance with Rule 1.16.

The member further wondered whether the intention was, by negative implication, to mean that the lawyer is to get no fee if the lawyer *unjustifiably* withdraws from the engagement.

A member of the subcommittee replied that such implication was not intended by the subcommittee, which had drawn from the text of the contingency fee rules, which use the term

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9. The first sentence of Part V of the form provides, "Client and Lawyer [or Firm] each have the right to terminate the representation at any time and for any reason."

—Secretary

"justifiably" but in admittedly different contexts.[10] The member added that the subcommittee had not considered the matter.

Another member of the subcommittee said that an unjustifiable withdrawal from the engagement would be a breach of the client-lawyer contract and would preclude recovery of any fee by the lawyer. He did not refer to the possibility of quantum meruit recovery in his remark.

Yet another member suggested that there might be a difference in outcome depending on whether the engagement was for services in litigation or in a non-litigation matter.

A member repeated that the provision under discussion was drawn from the contingent fee form agreement that is found in Rule 7 of the contingent fee rules; there, he said, if you unjustifiably withdraw from a contingent fee engagement, you cannot recover a fee for any services provided prior to termination. If the same language is used in these flat fee provisions, it must be given the same meaning.

A member asked about the meaning of "wrongful conduct" in the form's provision that

> In the event the representation is terminated by Client without *wrongful conduct* by the Lawyer which would cause the Lawyer to forfeit any fee, or the Lawyer justifiably withdraws from representing Client, Client shall pay, and Lawyer shall be entitled to, the fee or part of the fee earned by Lawyer as described in Section I, above, up to the time of termination.

The member asked whether the wording effectively equates the client's withdrawal in the absence of wrongful conduct by the lawyer with justifiable termination by the lawyer. There was no reply to that question.

A member of the subcommittee said the text had been drawn from the form of contingent fee agreement provided in Rule 7 of those rules, which text reads—

> In the event the client terminates this contingent fee agreement without wrongful conduct by the attorney which would cause the attorney to forfeit any fee, or if the attorney justifiably withdraws from the representation of the client, the

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10. The disclosure form provided in Rule 7 of the contingent fee rules provides for the client to acknowledge that—

> I have been informed and understand that if, after entering into a fee agreement with my attorney, I terminate the employment of my attorney or my attorney *justifiably withdraws*, I may nevertheless be obligated to pay my attorney for the work done by my attorney on my behalf

And the form of contingent fee agreement itself provides—

> In the event the client terminates this contingent fee agreement without wrongful conduct by the attorney which would cause the attorney to forfeit any fee, or if the attorney *justifiably withdraws* from the representation of the client, the attorney may ask the court or other tribunal to order the client to pay the attorney a fee based upon the reasonable value of the services provided by the attorney.

—Secretary

attorney may ask the court or other tribunal to order the client to pay the attorney a fee based upon the reasonable value of the services provided by the attorney.

To that observation, another member of the subcommittee asked why it would not be true, too, in the flat fee situation: "I can't stand working for you any more. I terminate." But why allow that? She concluded that the subcommittee had adopted the contingent fee rule text without fully thinking through the implications.

The Chair agreed that the matter needs to be thought through more fully.

A member suggested that, if the subcommittee was to take a further look at the form of the form, then it should also consider more fully the concern that had been expressed about the client not having sufficient information about the alternative fee that might be owed if the engagement were to terminate before completion of the engagement. He suggested that a second form might be provided to deal with engagements in contexts where milestones cannot be used for functional reasons.

A member of the subcommittee suggested that that could be accomplished by an additional paragraph to clarify that the alternative fee could not exceed the agreed-upon flat fee.

In response to a member's suggestion that the form include a provision that advance deposits of fees under a flat fee arrangement must be retained in the lawyer's trust account pending entitlement, another member noted that trust account treatment is required in all cases of the lawyer's receipt of a deposit against future fees; she saw no reason to call out the requirement in this particular kind of arrangement.

Turning to basic concepts, the member who had first expressed concern about the client not having sufficient information about the alternative fee that might be owed if the engagement were to terminate before completion of the engagement now noted that, under the current proposal, a crafty lawyer would simply agree to a flat fee of "$X through trial," knowing that, if the engagement were terminated prior to completion of trial, the fee would be that which was determined upon a quantum meruit determination.

To that, another member said that the lawyer would be entitled to no recovery if the arrangement had not specified interim milestones.

But the member who had asked the question asked why that would be so, if "completion of trial" was itself considered a milestone, albeit a single milestone in a one-milestone arrangement. Would not the lawyer be entitled to the hourly fee or other agreed-upon early-termination rate for time accrued to that milestone?

The member who had thought there would be no recovery in the posited circumstances pointed to the text of Rule 1.5(h)(1)(iii): "If any portion of the flat fee is to be earned by the lawyer before completion of the representation, the amount to be earned upon the completion of specified tasks or the occurrence of specified events . . . ." Events or occurrences would have to have been specified in the fee arrangement. The member noted that lawyers can often be seen to front-load their fees; under these flat fee rules, there might be an incentive to back-load the fees in the establishment of milestones, in order to recover higher fees at an alternative hourly rate if the engagement were terminated early. The member concluded by saying he acknowledged the problem

but did not see any way around it other than to rely on the general requirement of reasonableness in the fee.

Turning back to the suggestion that the fee form refer explicitly to the trust account requirement for handling unearned fee deposits, a member of the subcommittee commented that any dispute over fees earned upon an early termination of the engagement would require that fees deposited in advance would have to remain in the lawyer's trust account until the dispute was resolved. With that thought, he agreed that a reference to the requirement that advances of fees be held in the trust account should be included somewhere in the form of agreement, in order to advise the client of that requirement.

In response to the Chair's request for further comments, a member of the subcommittee said that the text of the Rule and its comments— although approved at this meeting — should not be submitted to the Court until the form of agreement was also agreed upon. All concurred in that observation.

And a round of applause followed for the subcommittee and its work.

V. *Report on consideration of amendments based on* Pena-Rodriguez *by the Standing Committee on the Rules of Evidence and the Standing Committee on Civil Jury Instructions.*

The Chair invited Judge John Webb to advise the Committee about the recent consideration of rules amendments prompted by the United States Supreme Court's reversal of the Colorado Supreme Court's decision in Peňa-Rodriguez v. People, 350 P.3d 287 (Colo. 2015), which had held that juror affidavits of racially biased statements made by other jurors fell within the rule precluding examination into the validity of a jury verdict. On appeal in Peňa-Rodriguez v. Colorado, 137 S.Ct. 855 (2017), the United States Supreme Court reversed and remanded the case; Justice Kennedy held that, where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

A subcommittee of the Colorado Supreme Court Standing Committee on the Rules of Evidence decided not to recommend any change to the Colorado Rules of Evidence; and the Supreme Court's Pattern Civil Jury Instructions Committee also voted against recommending any changes to the pattern instructions, wanting to avoid even suggesting that the *Peňa-Rodriguez* decision had any application in a civil matter, as distinguished from a criminal case. Among other concerns, those committees recommended no action in order not to create distinctions between racial bias and other forms of discrimination by jurors.

With these committees' determinations not to make any textual changes in response to *Peňa-Rodriguez*, Judge Webb said, this matter — unlike our ongoing treatment of flat fees rules — is at an end.

Judge Webb added that the Colorado Supreme Court justices had indicated their disinterest in including a citation to *Peňa-Rodriguez* in Colorado Evidence Rule 6.6. Justice Monica Márquez, who was present at this meeting, added that the question of citing the *Peňa-Rodriguez* case in Colorado Rule of Evidence 6.6 had led to a consensus among the justices not to include case citations in court rules as a general principle.

Given this review of the aftermath of *Peňa-Rodriguez*, the Chair concluded that there was no matter for this Committee to consider with regard to that case.

VI. *Report from Rule 8.4(c) Subcommittee*

At the Chair's request, member Thomas Downey reported that the subcommittee that has been considering amendment of Rule 8.4(c) had nothing to present to the Committee at this time. The subcommittee met in February of this year to deal with one or two of the comments to that provision in the Rules, considering again what had been thought to have been settled at the forty-ninth meeting of the Committee, on January 26th of this year. Downey said a consensus is apparently building among the subcommittee members that no comment is really needed, but the subcommittee will consider that question further before the next meeting of this Committee.

VII. *Report from Contingent Fee Subcommittee*

At the Chair's request, member Alexander Rothrock reported that a subcommittee will be looking at the contingency fee rules, including whether those rules should be moved from Chapter 23.3 of the Court's Rules of Civil Procedure into the Rules of Professional Conduct, the substantive content of those rules, and the language of those rules.

VIII. *New Business, Expiration of Some Members' Terms*

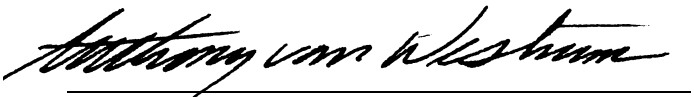
The Chair declared there was no new business for the Committee to consider at this meeting.

And the Chair noted that the terms of some of the members would expire at the end of the coming June. She asked that those whose terms would thus expire let her know if they would like their terms to be renewed.

IX. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:15 a.m. The next scheduled meeting of the Committee will be on Friday, July 27, 2018, beginning at 9:00 a.m., in the Supreme Court Conference Room unless otherwise announced.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its fifty-first meeting, on July 27, 2018.]