Appendix C

Rule 1.0. Terminology

(a) – (b) **[NO CHANGE]**

(b-1) "Document" includes e-mail or other electronic modes of communication subject to being read or put into readable form.

(c) – (m) **[NO CHANGE]**

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

COMMENT

[1] – [8] **[NO CHANGE]**

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] **[NO CHANGE]**

Rule 1.1. Competence

[NO CHANGE]

COMMENT

[1] – [5] **[NO CHANGE]**

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. See Comments [18] and [19] to Rule 1.6.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

[NO CHANGE]

COMMENT

[1] – [5] **[NO CHANGE]**

[5A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[5B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

[6] – [14] **[NO CHANGE]**

Rule 1.4. Communication

[NO CHANGE]

COMMENT

[1] – [3] **[NO CHANGE]**

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

[5] – [6] **[NO CHANGE]**

[6A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[6B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

[7] – [7A] **[NO CHANGE]**

Rule 1.5. Fees

[NO CHANGE]

COMMENT

[1] – [6] [NO CHANGE]

Division of Fee

[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.

[9] – [18] **[NO CHANGE]**

Rule 1.6. Confidentiality of Information

(a) **[NO CHANGE]**

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

(3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client; or

(8) to comply with other law or a court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

COMMENT

[1] – [5] **[NO CHANGE]**

[6] – [12] **[NO CHANGE]**

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if the information is protected by the attorney-client privilege or its disclosure is reasonably likely to materially prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(8), a subpoena is a court order. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(8) permits the lawyer to comply with the court's order.

[15A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16A] The interrelationships between this Rule and Rules 1.2(d), 1.13, 3.3, 4.1, 8.1, and 8.3, and among those rules, are complex and require careful study by lawyers in order to discharge their sometimes conflicting obligations to their clients and the courts, and more generally, to our system of justice. The fact that disclosure is permitted, required, or prohibited under one rule does not end the inquiry. A lawyer must determine whether and under what circumstances other rules or other law permit, require, or prohibit disclosure. While disclosure under this Rule is always permissive, other rules or law may require disclosure. For example, Rule 3.3 requires disclosure of certain information (such as a lawyer's knowledge of the offer or admission of false evidence) even if this Rule would otherwise not permit that disclosure. In addition, Rule 1.13 sets forth the circumstances under which a lawyer representing an organization may disclose information, regardless of whether this Rule permits that disclosure. By contrast, Rule 4.1 requires disclosure to a third party of material facts when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless that disclosure would violate this Rule. See also Rule 1.2(d)(prohibiting a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent). Similarly, Rule 8.1(b) requires certain disclosures in bar admission and attorney disciplinary proceedings and Rule 8.3 requires disclosure of certain violations of the Rules of Professional Conduct, except where this Rule does not permit those disclosures.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b) (1) through (b)(8). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule.

Reasonable Measures to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to make reasonable measures to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent

the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Comments [3] and [4] to Rule 5.3.

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.13. Organization as Client

[NO CHANGE]

COMMENT

[1] – [2] **[NO CHANGE]**

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that, when the lawyer knows

that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] – [14] [NO CHANGE]

Rule 1.18. Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) – (d) **[NO CHANGE]**

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] **[NO CHANGE]**

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] – [9] **[NO CHANGE]**

Rule 4.3. Dealing With Unrepresented Persons

[NO CHANGE]

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] – [2A] **[NO CHANGE]**

Rule 4.4. Respect for Rights of Third Persons

[NO CHANGE]

COMMENT

[1] **[NO CHANGE]**

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. A document is inadvertently sent when it is accidentally transmitted, such as when an e-mail or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Paragraph (c) imposes an additional obligation on lawyers under limited circumstances. If a lawyer receives a document and also receives notice from the sender prior to reviewing the document that the document was inadvertently sent, the receiving lawyer must refrain from examining the document and also must abide by the sender's instructions as to the disposition of the document, unless a court otherwise orders. Whether a lawyer is required to take additional steps beyond those required by paragraphs (b) and (c) is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule,
"document" includes, in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] **[NO CHANGE]**

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

[NO CHANGE]

COMMENT

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility, as between the client and the lawyer, for the supervisory activities described in Comment [3] above relative to that provider. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rule 7.1. Communications Concerning a Lawyer's Services

[NO CHANGE]

COMMENT

[1] – [7] **[NO CHANGE]**

[8] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[9] Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.

Rule 7.2. Advertising

[NO CHANGE]

COMMENT

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, e-mail address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communications are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. See Rule 7.3 (a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange initiated by the lawyer.

[4] **[NO CHANGE]**

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and

communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a

lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] **[NO CHANGE]**

Rule 7.3. Solicitation of Clients

(a) **[NO CHANGE]**

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded, or electronic communication, or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, or harassment.

(c) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the lawyer has a family or prior professional relationship with the prospective client or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) no such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented resented by a lawyer in the matter; and

(2) if a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(d) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall:

(1) include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2);

(2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(e) **[NO CHANGE]**

COMMENT

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by e-mail or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone, or real-time electronic persuasion that may overwhelm a person's judgment.

[4] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit

a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] The requirement in Rule 7.3(d)(1) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2, and 7.3(b). See Rule 8.4(a).

Marcy Glenn

From: Stark, David W. <David.Stark@FaegreBD.com>
Sent: Monday, March 02, 2015 9:53 AM
To: Carolyn Powell; Daniel Taubman; Dick Reeve; Helen Berkman; Jim Coyle; Marcy Glenn; Mimi Tsankov; Stark, David W.
Subject: FW: Government Pro Bono

All,
The Court has decided to refer a proposed comment to Rule 6.1 to the Standing Committee on the Rules of Professional Conduct. The proposed comment reads as follows: **Individual government attorneys may provide pro bono legal services in accordance with their respective organization's internal rules and policies. Government organizations may adopt pro bono policies at their discretion.**

Below you will see the email string between me and the Chief's counsel, Kristen Burke, regarding the comment and the referral. On Friday I was given the go-ahead to share the comment with you. We will wait for action by the Standing Committee.

David W. Stark
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Faegre Baker Daniels LLP
3200 Wells Fargo Center | 1700 Lincoln Street | Denver, CO 80203-4532, USA

From: burke, kristen [mailto:kristen.burke@judicial.state.co.us]
Sent: Monday, February 23, 2015 4:33 PM
To: Stark, David W.
Subject: RE: Government Pro Bono

Hi Dave,

A quick update for you on the comment front. The Court has referred the draft comment to its Standing Committee on the Rules of Professional Conduct. The Justices would like that Committee's input before deciding whether to add the draft comment to Rule 6.1.

Word has it that you might be on the Standing Committee? If so, I hope you'll consider making the case you made to me in your last email to that group. Thanks and please let me know if you have any questions.

Kristen

From: Stark, David W. [mailto:David.Stark@FaegreBD.com]
Sent: Tuesday, February 17, 2015 1:28 PM
To: burke, kristen
Subject: RE: Government Pro Bono

Kristen,
I believe the short pithy comment you suggest is necessary. We have worked on a model policy for governmental agencies for several years, but have been unable to reach a consensus or address the issues raised by the stakeholders. The government lawyers in the subcommittee and others with whom I have discussed government pro bono have expressed many concerns about any written policy and about making a commitment to provide legal services to those in need. Those concerns include:

1. Conflicts of interest
2. Restrictions on providing service during regular work hours
3. Restrictions on use of agency equipment, supplies, and offices
4. Restrictions on secondary practice
5. Lack of malpractice insurance
6. Fear that a policy imposes an obligation to create a pro bono program that adopts the Supreme Court's aspirational goal of 50 hours per lawyer per year.
7. Recognition that a single policy will not fit all circumstances or agencies.

Additionally, many governmental agencies and lawyers don't have a clear understanding of the pro bono opportunities and the definition of pro bono work.

In view of the concerns raised, I don't believe we can or should create a model policy. Simply put, "one size doesn't fit all." But I do believe that the Court should send the message that government lawyers can and should provide pro bono services to those in need, so long as it is consistent with their employer's policies and any legal restrictions. The details should be left in the hands of those in charge of those agencies and offices. Government lawyers are a huge untapped resource and the Court should encourage them to serve the needs of the community.

I hope this answers your questions. Please call or email, if you need explanation or have additional questions.

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From: burke, kristen [mailto:kristen.burke@judicial.state.co.us]
Sent: Tuesday, February 17, 2015 10:10 AM
To: Stark, David W.
Subject: RE: Government Pro Bono

Hi Dave,

I'm glad you like the language. Before you run it by the working group, the Chief would like to take it to the Court with some additional information from you. She wants the working group to see something the Court will approve so the group doesn't waste valuable time strategizing around a proposal that will never be adopted.

The Court seems concerned about the need for this kind of language. Do you think a comment like this is necessary? If so, why? What ambiguities might it clear up? How will it help government attorneys and their employers?

Thanks for your thoughts on these questions. I hope to include your responses in a memo the Chief can take to the Court on Thursday. If that timeline won't work for you, the memo can wait until next week.

Best,

Kristen

From: Stark, David W. [mailto:David.Stark@FaegreBD.com]
Sent: Thursday, February 12, 2015 2:42 PM
To: burke, kristen
Subject: RE: Government Pro Bono

I like it. May I run it by the subcommittee?

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From: burke, kristen [mailto:kristen.burke@judicial.state.co.us]
Sent: Thursday, February 12, 2015 11:49 AM
To: Stark, David W.
Subject: Government Pro Bono

Hi Dave,

After your meeting with Terri and Mindy last week, a few of us put together the following draft language for the Supreme Court to consider adding as a comment to RPC 6.1:

Individual government attorneys may provide pro bono legal services in accordance with their respective organization's internal rules and policies. Government organizations may adopt pro bono policies at their discretion.

Although this draft does not contain the detail suggested by your group, do you think it would clear up questions government attorneys have as to whether they can do pro bono work at all? If so, do you think having a comment like this could be helpful?

My thought is that the comment could clarify to government attorneys and their employers that it is up to the individual government entities to create pro bono policies that makes sense for their respective organizations. Using this comment as an "in," the Service Group could approach government entities individually with the model plan you presented to SCAO in an effort to help them develop policies pursuant to the comment. What do you think of this approach?

Thanks,
Kristen

Kristen Cunningham Burke, Esq.
Counsel to Chief Justice Nancy Rice | Colorado Supreme Court
2 East 14th Avenue | Denver, CO 80203
o: 720-625-5466 | kristen.burke@judicial.state.co.us

Marcy Glenn

From: Alec Rothrock <arothrock@bfwlaw.com>
Sent: Tuesday, April 07, 2015 6:53 PM
To: Marcy Glenn
Subject: Standing Committee
Attachments: Gilbert Decision.pdf

Hi Marcy,

I don't know if you've read the *Gilbert* case that the Colorado Supreme Court decided yesterday, but both the majority and dissenting opinions send a message to the Standing Committee to fix some combination of Colo. RPC 1.5(f) and Cmt. [12], Colo. RPC 1.5. See maj. op. p. 23, n. 12 ("[G]iven the growing prevalence of [flat fee] arrangements, clarifying amendments to Colo. RPC 1.5(f) may be warranted"); dissent p. 3 (referring to "need for a clarifying Comment regarding flat fees"). Especially considering that *Gilbert* was a 4-3 decision, it is unclear what the substantive change should be.

Assume that a client has paid a flat fee to a lawyer in advance of the contemplated services. The client discharges the lawyer without cause before the lawyer completes all the contemplated services. The written fee agreement does not address whether and, if so, how much of the fee the lawyer may treat as earned in this event. May the lawyer keep some or all of the flat fee based on her perception of what she earned on a quantum meruit basis? This puts the onus on the client to sue the lawyer if the client disagrees with the lawyer's view of quantum meruit. Or, must the lawyer return the entire flat fee to the client and sue the client on a quantum meruit basis to recover what she believes she earned? The majority would say yes to the first question, whereas the dissent would say yes to the second question. Add to this mix the fact that the lawyer did not put the flat fee in trust. The majority and the dissent seem to agree that the lawyer's conduct would not have been controversial if she had deposited and kept it in her trust account. The question was whether the lawyer violated Colo. RPC 1.16(d) for failing to "refund[ ] any advance payment of fee . . . that has not been earned."

OARC and the dissent relied on Comment [12] to Colo. RPC 1.5, which, you will recall, the Court and the Ethics Committee wrote specifically for Colorado in the wake of *Sather:*

[12] Advances of unearned fees, including "lump-sum" fees and "flat fees," are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. *The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee,* if a written statement is required by Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

OARC and the dissent argued that the italicized language supports the view that Colo. RPC 1.5(f) limits the portion of an advance fee that a lawyer may consider "earned" under Colo. RPC 1.16(d) to whatever the fee agreement *states* the lawyer has earned. The majority did not view this language as dispositive, in part because it was in a Comment.

I think the Standing Committee should consider this case for possible changes to the Rules or the Comments or both.

Alec

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ADVANCE SHEET HEADNOTE
April 6, 2015

2015 CO 22

No. 13SA254, In re Gilbert—Attorney Discipline—Quantum Meruit—Colo. RPC 1.16(d).

In this attorney discipline proceeding, the supreme court considers whether an attorney violated Colo. RPC 1.16(d)—which requires attorneys to refund upon termination any advance payment of fee that "has not been earned"—by failing to return all of an advance fee when her flat fee agreement did not describe what payment, if any, the clients would owe the attorney if the representation ended early. The Hearing Board determined that the attorney in this case had earned part of the advance fee under a quantum meruit theory by performing services for the clients, and therefore she did not violate the ethical rules by retaining this amount after her discharge. The supreme court affirms the Hearing Board and holds that, under the facts of this case, the attorney did not violate Rule 1.16(d) by failing to return the portion of an advance fee to which she was entitled in quantum meruit for services rendered for her clients.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2015 CO 22

Supreme Court Case No. 13SA254
Original Proceeding in Discipline
Appeal from the Hearing Board, 12PDJ085

In the Matter of Juliet Carol Gilbert

Order Affirmed
en banc
April 6, 2015

Attorneys for Complainant-Appellant:
Office of Attorney Regulation Counsel
James C. Coyle, Regulation Counsel
Adam J. Espinosa, Assistant Regulation Counsel
Denver, Colorado

Attorney for Respondent-Appellee:
MiletichCohen PC
Nancy L. Cohen
Denver, Colorado

JUSTICE MÁRQUEZ delivered the Opinion of the Court.
CHIEF JUSTICE RICE dissents, and **JUSTICE COATS** and **JUSTICE EID** join in the dissent.

¶1 In this attorney discipline proceeding, the respondent, Juliet Carol Gilbert, agreed to provide certain immigration-related legal services to Christopher Henderson and Victoria Peters for a flat fee. The written fee agreement did not include milestones or otherwise describe what payment, if any, the clients would owe Gilbert if the representation ended before she completed all of the specific tasks identified in the agreement. When her clients terminated the representation early, Gilbert retained a portion of the fees advanced by the clients as compensation for the approximately four-and-a-half hours of work she had performed on the case to that point.

¶2 The Office of Attorney Regulation Counsel brought a disciplinary action against Gilbert alleging, among other things, that she violated Colorado Rule of Professional Conduct 1.16(d), which requires attorneys, upon termination, to refund any advance payment of fee that "has not been earned." The Office of Attorney Regulation Counsel argued that Gilbert was obligated to refund the entire advance fee paid by the clients because the fee agreement did not provide for either the assessment of a fee in the event of early termination or for any hourly fee. The Hearing Board determined, however, that Gilbert was entitled to a portion of the fee in quantum meruit because she had provided legal services for the clients and it would be unjust for the clients to retain the benefit of those services without compensating Gilbert. Because Gilbert had earned a portion of the advance fee in quantum meruit, the Board concluded that Gilbert did not violate Rule 1.16(d) by retaining the funds earned.[1]

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[1] People v. Gilbert, Case No. 12PDJ085 (Colo. O.P.D.J. July 17, 2013).

¶3 The Office of Attorney Regulation Counsel seeks review of the Hearing Board's determination. We conclude that the Hearing Board did not err when it determined that Gilbert did not violate Rule 1.16(d) under the circumstances of this case. Accordingly, we affirm the Board's order.

I. Facts and Procedural History

¶4 Gilbert was a sole practitioner specializing in immigration law. In May 2011, she agreed to represent Victoria Peters in removal proceedings before the immigration court.

¶5 Peters, a Trinidad and Tobago native, married Christopher Henderson in 2004. Henderson, however, had previously married Carmen Sanchez, a native of the Dominican Republic, and had never terminated or annulled that marriage. When Henderson filed a Form I-130 "Petition for Alien Relative" to classify Peters as his spouse, Henderson did not disclose his first marriage or the fact that the U.S. Citizenship and Immigration Services ("USCIS") had determined that his marriage to Sanchez was a sham. USCIS representatives met with Henderson and Peters and determined that the couple had married only to obtain lawful immigration status for Peters. The USCIS therefore denied the I-130 Petition, and the U.S. Department of Homeland Security initiated removal proceedings against Peters.

¶6 Henderson and Peters met with Gilbert a week before Peters' first appearance in immigration court for a master calendar hearing. Gilbert advised them that Peters had no relief other than voluntary departure from the United States. However, Gilbert told the couple that she could help them file a second I-130 Petition to demonstrate that they

had a bona fide marriage and that the immigration judge would continue Peters' removal case until the second I-130 Petition was adjudicated. Gilbert also explained that Henderson could not file the second I-130 Petition until he legally terminated or annulled his marriage to Sanchez. During the meeting, Gilbert showed the couple her standard fee schedule, which listed an hourly rate of $250 for "Miscellaneous Immigration and Consumer Rights Cases."

7 Gilbert followed up their meeting by mailing an engagement letter to Henderson and Peters defining the scope of her representation, which the couple signed and returned. The agreement provided that, for a flat fee of $3,550, Gilbert would perform three tasks: represent Peters at the master calendar hearing, assist the couple with the second I-130 Petition, and accompany them to their interview with USCIS. Notably, the fee agreement did not include benchmarks or milestones to indicate when Gilbert would earn portions of the advance fee, nor did it explain what payment, if any, the clients would owe Gilbert if the representation ended before she completed all three tasks.

8 Between May and August 2011, the couple paid installments totaling $2,950 toward Gilbert's $3,550 flat fee. Gilbert represented Peters at the master calendar hearing at the end of May, and the immigration court granted a continuance so that Henderson could seek an annulment of his first marriage. During the summer, Gilbert conducted legal research on the case and corresponded with the clients. By November, however, communication between Gilbert and the couple had broken down, and they discharged Gilbert. In an email to Gilbert terminating her representation, Peters and

Henderson acknowledged that Gilbert was entitled to payment for one hour for her appearance at the May hearing. They requested that Gilbert refund their payments, minus her hourly fee for the master calendar appearance. They also asked what her hourly charge was, noting that the fee agreement did not contain an hourly rate.

¶9 Once the immigration court granted her motion to withdraw, Gilbert mailed Henderson and Peters a letter and a partial refund of the advance fee payment. Gilbert's letter explained that she had spent 4.41 hours on legal work at $250 an hour—including the court appearance, travel time, research, correspondence, and the motion to withdraw—and that she had incurred $11.64 in costs. She therefore retained $1,114.14 as compensation for the work performed and refunded the remaining $1,835.86 of the advance fee payment. Henderson and Peters disputed the amount that Gilbert retained as earned fees.[2]

¶10 Henderson and Peters contacted the Office of Attorney Regulation Counsel and requested an investigation. The Office of Attorney Regulation Counsel filed a complaint against Gilbert, alleging several violations of the Colorado Rules of Professional Conduct in her dealings with Henderson and Peters. The Hearing Board ultimately held that Gilbert violated Colo. RPC 1.15(a), 1.15(c), and, in turn, 1.5(f),[3] because she commingled her clients' funds with her own by immediately placing the

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[2] Although she continued to believe that she had earned the $1,114.14, Gilbert later refunded this remaining amount to the clients in February 2013, shortly after disciplinary proceedings were commenced against her.

[3] Citations are to the Colorado Rules of Professional Conduct as they appeared in the Hearing Board's 2013 opinion, before they were repealed and readopted effective June 17, 2014.

couple's fee payments in her business account upon receipt, before she earned them. For these violations, the Hearing Board ordered Gilbert suspended from the practice of law for three months, stayed upon the successful completion of six months' probation.[4] The Board concluded that the Office of Attorney Regulation Counsel had not proven the other alleged violations, including its claims that Gilbert violated Colo. RPC 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation, and Colo. RPC 1.15(b), which requires attorneys to provide a prompt accounting when requested. The Office of Attorney Regulation Counsel does not challenge these rulings.

¶13 Relevant here, the Hearing Board dismissed the claim that Gilbert failed to refund unearned fees in violation of Colo. RPC 1.16(d) when she retained part of the advance fee payment as compensation for the work she had performed instead of refunding the entire amount upon her discharge. To determine whether Gilbert violated Rule 1.16(d), the Hearing Board first ascertained whether the funds that Gilbert retained had been "earned" for purposes of the Rule. The Board found that Gilbert showed Henderson and Peters her standard fee schedule, which indicated that she charged an hourly rate of $250 for "miscellaneous immigration" cases, but that this schedule was not part of the written fee agreement. The Hearing Board also found that the written fee agreement did not describe what payment, if any, would be due if the representation ended before Gilbert completed the three tasks she agreed to perform. However, the Board observed that this court has recognized an attorney's right to quantum meruit recovery for the reasonable value of services the attorney provided

[4] Gilbert does not appeal the Hearing Board's determination or the sanction imposed.

before being discharged. The Hearing Board reasoned that, under the circumstances of this case, Gilbert was entitled to recover a portion of her fee in quantum meruit. Accordingly, the Board concluded that Gilbert did not violate Rule 1.16(d) by retaining a portion of the fee she believed she had earned.

¶12 Specifically, the Hearing Board concluded that the elements of quantum meruit were present here because: Gilbert "unquestionably provided legal services"; Peters received a benefit from Gilbert's services; and it would be unjust in light of the parties' intentions and expectations for Peters to retain the benefit of Gilbert's services without paying for them. The Hearing Board observed, for example, that Peters acknowledged in her email terminating Gilbert that Gilbert was entitled to a fee for her appearance at the hearing. The Board found that although Peters and Henderson may not have realized that Gilbert had also performed legal research on the case, it was "entirely reasonable" for Gilbert to have done so and to have billed her clients for the time she spent communicating with them.[5] Finally, the Hearing Board found that Gilbert's misconduct in this case did not bar her from quantum meruit recovery because "although she violated Colo. RPC 1.15(a), 1.15(c), and 1.5(f), her misconduct was not willful, it did not vitiate the value of her legal services, and her clients were made whole."[6] Thus, the Hearing Board concluded that because Gilbert was entitled to a

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[5] The Hearing Board also observed that Gilbert did not charge Peters and Henderson for all of the legal services she provided.

[6] The Hearing Board noted that Peters and Henderson discharged Gilbert because of a general deterioration of the relationship, and not because Gilbert was commingling their funds or for any other fault on her part.

portion of her fee in quantum meruit, she did not violate Rule 1.16(d) by failing to return unearned funds.

¶13 Pursuant to C.R.C.P. 251.1(d) and C.R.C.P. 251.27(a), the Office of Attorney Regulation Counsel now seeks review of the Hearing Board's determination that Gilbert did not violate Rule 1.16(d).

II. Standard of Review

¶14 Under C.R.C.P. 251.27(b), this court affirms the decision of the Hearing Board unless we determine, based on the record, that the Hearing Board's findings of fact are clearly erroneous or unsupported by substantial evidence in the record, or that the form of discipline imposed (1) bears no relation to the conduct, (2) is manifestly excessive or insufficient in relation to the needs of the public, or (3) is otherwise unreasonable. C.R.C.P. 251.27(b); In re Haines, 177 P.3d 1239, 1244 (Colo. 2008). We review the Board's conclusions of law de novo. C.R.C.P. 251.27(b); In re Haines, 177 P.3d at 1245.

III. Analysis

¶15 Colorado Rule of Professional Conduct 1.16(d) protects clients' interests by requiring attorneys to refund unearned fees when the representation ends:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. . . .

(Emphasis added.) A discharged attorney violates this rule if she fails to refund unearned fees in a timely fashion. In re Sather, 3 P.3d 403, 415 (Colo. 2000). Thus,

whether Gilbert violated Rule 1.16(d) by failing to refund unearned fees turns on whether she "earned" the portion of the advance fee that she retained as compensation for the work she performed before she was discharged.

¶16 The Office of Attorney Regulation Counsel argues that Gilbert violated Rule 1.16(d) because the flat fee agreement in this case did not expressly provide for compensation for work performed short of completing all three tasks identified: appearing at the hearing, filing the second I-130 Petition, and attending the interview with USCIS. In support of its argument, the Office of Attorney Regulation Counsel relies on Colo. RPC 1.5(b), which requires an attorney who has not regularly represented the client to communicate the basis or rate of her fee and expenses to the client, in writing, before or within a reasonable time after commencing the representation. The Office of Attorney Regulation Counsel also points to comment 11 to Rule 1.5, which states that the written statement explaining the basis or rate of the fee "should include a description of the benefit or service that justifies the lawyer's earning the fee," as well as "a statement describing when a fee is earned."

¶17 Rule 1.5(f) explains that an attorney earns the fee when she "confers a benefit on the client or performs a legal service for the client." Colo. RPC 1.5(f); see also In re Sather, 3 P.3d at 410 ("[A]n attorney earns fees only by conferring a benefit on or performing a legal service for the client."). The Office of Attorney Regulation Counsel points to comment 12 to this rule, which states that advance fees are 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 . . . ."

¶18 Relying on these comments to Rule 1.5, the Office of Attorney Regulation Counsel contends that, for purposes of Rule 1.16(d), Gilbert did not "earn" the $1,114.14 that she retained as compensation for the legal services she performed before she was discharged because the fee agreement contained no provision governing payment of fees in the event that Gilbert's representation ended before she completed the three identified tasks. Thus, regulation counsel argues, Gilbert's failure to promptly refund the entire advance fee violated Rule 1.16(d). In addition, the Office of Attorney Regulation Counsel contends that this court's opinion in In re Sather required Gilbert to return the entire advance fee and then separately seek quantum meruit recovery against her former clients if she wished.

¶19 Gilbert counters that the Office of Attorney Regulation Counsel's reliance on Rule 1.5(b) (requiring the attorney to communicate the "basis or rate of the fee" in writing) is misplaced, given that it never alleged that she violated Rule 1.5(b). Gilbert further argues that she did not violate Rule 1.16(d) by failing to refund unearned fees because she was entitled to a portion of the advance fee under quantum meruit.

¶20 To determine whether Gilbert violated Rule 1.16(d), we briefly review our prior cases generally discussing an attorney's right to recover fees in quantum meruit. We then examine our cases discussing quantum meruit in the context of attorney discipline matters, particularly In re Sather. We conclude that In re Sather does not stand for the proposition that where a noncontingent fee agreement is silent as to how the attorney will be paid in the event of early termination, the attorney must return the entire advance fee upon discharge regardless of the work performed to that point. To the

contrary, the facts and holding of In re Sather are consistent with the Hearing Board's conclusion here that Gilbert did not violate Rule 1.16(d) by failing to return the portion of the advance fee to which she was entitled in quantum meruit. Although Gilbert violated other ethical rules not at issue here, we conclude that, under the circumstances of this case, Gilbert did not violate Rule 1.16(d) by failing to refund the portion of the advance fee to which the Hearing Board determined she was entitled in quantum meruit as compensation for the services she provided before her discharge.

A. Quantum Meruit in Fee Dispute Cases

¶21 Quantum meruit is an equitable doctrine that invokes an implied contract where the parties either have no express contract or have abrogated it. See Dudding v. Norton Frickey & Assocs., 11 P.3d 441, 444 (Colo. 2000). The doctrine does not depend on the existence of a contract, either express or implied in fact, but rather applies where a need arises to avoid unjust enrichment to a party in the absence of an actual agreement to pay for the services rendered. See id. That is, the equitable doctrine of quantum meruit "seeks to restore fairness when a contract fails" by "ensuring that the party receiving the benefit of the bargain pays a reasonable sum for that benefit." Id. at 445. To recover in quantum meruit, a plaintiff must demonstrate that: (1) the defendant received a benefit, (2) at the plaintiff's expense, and (3) it would be unjust for the defendant to retain that benefit without paying for it. Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C., 2012 CO 61, ¶ 19, 287 P.3d 842, 847; Dudding, 11 P.3d at 445.

¶22 In the legal services context, courts applying the doctrine of quantum meruit have recognized that when a client discharges his or her attorney, the client remains

obligated to pay the reasonable value of the services rendered, barring conduct by the attorney that would forfeit the attorney's right to receive a fee. Dudding, 11 P.3d at 445; see also Olsen & Brown v. City of Englewood, 889 P.2d 673, 675 (Colo. 1995) ("There is no question that an attorney who withdraws for a justifiable reason or is terminated by a client without cause is entitled to compensation for services rendered."). At the same time, we have recognized that the trust and confidence that underlies the attorney-client relationship distinguishes this relationship from other business relationships. Dudding, 11 P.3d at 445. By allowing an attorney to recover the reasonable value of services provided, the doctrine of quantum meruit operates to preserve the client's right to discharge an attorney while preventing clients from unfairly benefiting at their attorney's expense where the parties have no express contract or have abrogated it. See LaFond v. Sweeney, 2015 CO 3, ¶ 27, 343 P.3d 939, 947; Melat, ¶ 19, 287 P.3d at 847; Dudding, 11 P.3d at 447; see also Colo. RPC 1.16 cmt. 4 ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.").

¶23 In cases involving fee disputes, we have recognized that quantum meruit is an appropriate measure of recovery for the reasonable value of work performed by an attorney who is discharged without cause. In Olsen & Brown, for example, we held that an attorney who was discharged without cause could not recover damages for services not performed before his discharge based on the client's breach of the parties' noncontingent attorney-client contract. 889 P.2d at 677. Rather, we held that the

discharged attorney's remedy was to recover the reasonable value of services actually performed on the basis of quantum meruit. Id.[7]

¶24 We have applied the doctrine of quantum meruit differently to contingent fee arrangements. Given the unique nature of contingent fee agreements, we have held that an attorney who is discharged or withdraws may seek quantum meruit recovery for the reasonable value of the work performed before discharge or withdrawal, but only where the written contingent fee agreement contemplates the availability of such recovery. See Dudding, 11 P.3d at 446; Elliott v. Joyce, 889 P.2d 43, 46 (Colo. 1994). In Elliott, we observed that contingent fee agreements in Colorado are limited by this court's rules governing contingent fees, as set forth in C.R.C.P. Chapter 23.3. See 889 P.2d at 45. Chapter 23.3 requires a contingent fee agreement to be in writing and to contain certain specific information. Id.; see also C.R.C.P. Ch. 23.3, Rule 5. Importantly, Rule 5(d) expressly requires that the written contingent fee agreement include "a statement of the contingency upon which the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney." Elliott, 889 P.2d at 45; see also C.R.C.P. Ch. 23.3, Rule 5(d). And Rule 6 provides that no contingent fee agreement shall be enforceable by the involved attorney unless the agreement substantially complies with the rules. Elliott, 889 P.2d at 45; see also C.R.C.P. Ch. 23.3, Rule 6. Given our specific rules under Chapter 23.3 governing the content of contingent

[7] We have also applied the doctrine of quantum meruit in other situations where a fee agreement failed. In Melat, for example, we held that an attorney could pursue an action in quantum meruit against former co-counsel for a share of the contingent fee where the attorney withdrew from the case before it was completed. ¶ 6, 287 P.3d at 845.

fee agreements, we held in Elliott that an attorney who withdraws before completion of the case may seek quantum meruit recovery only where "the contingent fee agreement specifically sets forth the circumstances under which the client will be liable." 889 P.2d at 46. This result is admittedly somewhat counterintuitive, given that the very purpose of the equitable doctrine of quantum meruit is to assure fairness in situations where the parties have no express agreement.

¶25 Six years later, in Dudding—another contingent fee case—we acknowledged that the doctrine of quantum meruit has arisen "precisely to address the absence of a written agreement." 11 P.3d at 448. Nevertheless, we felt compelled to honor both our prior case law and our rules governing contingent fee agreements by reaffirming that, to seek quantum meruit recovery, the attorney must provide some notice to the client in the fee agreement of the possibility that the attorney may seek equitable recovery in quantum meruit if the contract fails. Id. at 448, 449.[8] Importantly, Dudding concerned a contingent fee agreement, and nothing in our discussion in that case expressly extended its holding to other types of fee agreements.

¶26 Soon thereafter, we made clear in Mullens v. Hansel-Henderson, 65 P.3d 992, 998 (Colo. 2002), that our holding in Dudding does not apply to situations where the

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[8] As we pointed out in Mullens v. Hansel-Henderson, 65 P.3d 992 (Colo. 2002), Rule 7 of Chapter 23.3 now provides a form Contingent Fee Agreement which contains a sample notice provision for such agreements: "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." Id. at 996 (quoting C.R.C.P. Ch. 23.3, Rule 7, Form 2, subsection 3).

attorney has successfully completed the agreed-upon legal services in a contingent fee agreement. In reaching that conclusion, we reasoned that Rule 5(b) requires a contingent fee agreement to give a client notice of the possibility of quantum meruit recovery because, absent such notice, a contingent fee client has "no expectation to pay" if the attorney withdraws prematurely. Id. at 997. However, where the attorney has successfully completed the agreed-upon legal services, the very nature of the contingent fee agreement gives rise to the client's expectation that she must pay the attorney from the funds the attorney has recovered for the client. Id. at 998–99. Because the attorney in Mullens had completed the legal services for which he was retained under the contingent fee arrangement and had obtained a substantial settlement for the client, we held that he properly retained fees in quantum meruit for the reasonable value of the legal services he provided, even though the parties' contingent fee agreement was unenforceable because it was not in writing. Id. at 999.

B. Quantum Meruit in Attorney Discipline Cases

¶27 We have carried principles of quantum meruit recovery into our attorney discipline cases. Relevant here, our prior rulings indicate that, where the parties have a flat fee agreement, a discharged attorney does not violate the ethical obligation to refund unearned fees where the attorney is entitled to a portion of the fee in quantum meruit for the reasonable value of services rendered before being discharged.

¶28 In People v. Johnson, 612 P.2d 1097, 1098 (Colo. 1980), private defense counsel received an advance payment of $1,500 toward an orally agreed-upon total fee of $5,000 to handle a murder case. The client discharged him soon thereafter, and the attorney

failed to refund any of the money despite the client's requests for a refund of the unearned portion of the $1,500 payment. Id. We held that because there was no definitive agreement regarding the amount that the attorney would be paid if his services were terminated, the oral fee agreement necessarily "was upon a quantum meruit basis." Id. at 1099. The grievance committee found that the attorney was entitled to $500 on a quantum meruit basis for work performed, and we agreed with this determination. However, the grievance committee also determined that by retaining the additional $1,000 that was unearned, the attorney violated DR-2-110(A)(3), the disciplinary rule then in effect requiring prompt refund of unearned parts of a fee. Id. We affirmed the committee's determination that the attorney violated DR-2-110(A)(3) by "failing to return that portion of the $1500 payment which was unearned." Id. We ordered the attorney to return $1,000 in unearned fees to his client, but in so doing, we implicitly allowed him to retain the $500 to which he was entitled under quantum meruit. Id.

¶29 Our more recent decision in In re Sather likewise took no issue with an attorney's retention of a portion of a flat fee as compensation for services provided before discharge. 3 P.3d at 415. In that case, we disciplined an attorney under current Rule 1.16(d) for failing to return the unearned portion of a $20,000 advance fee after his client discharged him. Id. at 405. The written agreement between the attorney and client described the arrangement as a "non-refundable" flat fee contract and stated that the client acknowledged that the "minimum flat fee" of $20,000 would not be returned to him regardless of the amount of time that the firm expended. Id. at 406. After the client

discharged the attorney, the attorney provided an accounting claiming that his fees and expenses as of the date of discharge totaled $6,923.64. Id. at 407. Despite the "non-refundable" language in their agreement, the attorney acknowledged that he should refund the remaining $13,076.36 to the client.[9] Id. However, the attorney did not fully refund this difference until nearly five months later and thus violated Rule 1.16(d) by failing to return the unearned fee in a timely manner. Id.

¶30 Significantly, we held that the attorney violated Rule 1.16(d) by failing to return the unearned $13,076.36—not by failing to return the entire $20,000 advance payment. See id. at 415 ("Upon discharge, [the attorney] acknowledged his obligation to return the unearned portion of the $20,000 to [the client], and [the attorney] eventually returned the entire unearned amount of $13,076.36. . . . Because [the attorney] only partially returned the unearned fees three months after being discharged and did not return the remainder of the unearned fees until five months after being discharged, we agree with the Board that his conduct violated Colo. RPC 1.16(d)." (emphasis added)). In so doing, we first implicitly recognized that the attorney "earned" and rightfully retained $6,923.64 for his work—even though nothing in the opinion suggested that his "non-refundable" flat fee agreement provided for quantum meruit recovery (or an hourly fee) upon early termination. We then concluded that he violated Rule 1.16(d) by failing to return the portion of the fee that he had not earned.

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[9] In addition to violating Rule 1.16(d), the attorney violated Colo. RPC 8.4(c) by characterizing the $20,000 fee as "non-refundable" when he knew that he would have to refund it under certain circumstances. Id. at 405.

¶31 The Office of Attorney Regulation Counsel argues that In re Sather requires an attorney who is discharged by her client to refund the entire advance fee if the agreement is silent about early termination, regardless of whether the attorney has expended time and money on the case. The Office of Attorney Regulation Counsel points to an isolated statement in In re Sather to support this position: "Upon discharge, the attorney must return all unearned fees in a timely manner, even though the attorney may be entitled to quantum meruit recovery for the services that the attorney rendered and for costs incurred on behalf of the client." Id. at 409-10 (emphasis added). The phrase "even though," according to the Office of Attorney Regulation Counsel, means that an attorney must first return all fees that a client has advanced and then pursue quantum meruit recovery in a separate claim against the client.

¶32 The Office of Attorney Regulation Counsel's argument fails for two reasons. First, the statement in In re Sather on which it relies forms no part of our discussion or holding regarding the attorney's violation of Rule 1.16(d) in that case, but rather appears in a separate part of the opinion discussing an attorney's obligation under Rule 1.15(f) to maintain advance fees in a separate trust account until the fees are earned. Id. The Office of Attorney Regulation Counsel therefore reads this language out of context and overlooks the facts of In re Sather. The attorney in that case violated Rule 1.16(d) by retaining funds beyond those to which he was entitled in quantum meruit for his work. Id. at 415. Had we intended to hold in In re Sather, contrary to our approach in Johnson, that Rule 1.16(d) requires an attorney to return the entire advance fee regardless of any benefits conferred or services rendered, we would have ordered the

attorney to return the entire $20,000 that the client paid him. Yet neither in In re Sather nor in Johnson did we require the attorney to refund all advance fee payments and then separately seek quantum meruit recovery from his former client. It would be a waste of resources in these circumstances to force attorneys to return money to which they are entitled and then bring suit against the client to recover it. Rather, the above-quoted statement in In re Sather, read in context, simply acknowledges that, although an attorney must return all unearned fees in a timely manner under Rule 1.16(d), such unearned fees do not include compensation to which the attorney is entitled in quantum meruit for the reasonable value of services the attorney has rendered before discharge. Id. (citing, inter alia, Olsen & Brown, 889 P.2d at 667).

¶33 Second, the Office of Attorney Regulation Counsel's argument hinges on its view that, for purposes of Rule 1.16(d), an attorney cannot "earn" a fee except as explicitly provided for in the fee agreement. This view is not grounded in Rule 1.16(d) but instead rests on comment 12 to Rule 1.5. Comments to the Rules of Professional Conduct do not add obligations to the Rules but merely provide guidance for practicing in compliance with the Rules. Colo. RPC, Preamble and Scope, ¶ 14. Ultimately, the text of the Rule is authoritative. Id. at ¶ 21. Consistent with our decision in In re Sather, the text of Rule 1.5(f) provides that fees are earned when the lawyer "confers a benefit on the client or performs a legal service for the client." Colo. RPC 1.5(f); In re Sather, 3 P.3d at 410 (holding that fees are earned by "conferring a benefit on or performing a legal service for the client").

¶34 The approach that the Office of Attorney Regulation Counsel urges effectively forecloses quantum meruit recovery for the reasonable value of services the attorney actually performed if a flat fee agreement fails to contain benchmarks or milestones setting forth exactly how the attorney will earn the fee shy of completing the agreed-upon services.[10] Such an approach is inconsistent with the result in both Johnson and In re Sather. It is also inconsistent with the core purpose of quantum meruit, which seeks to provide equity precisely where an agreement is lacking or has failed.

¶35 In advancing its argument, the Office of Attorney Regulation Counsel essentially seeks to treat flat fee agreements in the same fashion as contingent fee agreements—yet we have never suggested that the unique requirements of Chapter 23.3 for contingent fee agreements necessarily apply to other types of fee agreements. In stark contrast to the specific requirements for contingent fee agreements, see C.R.C.P. Ch. 23.3, Rule 5, no rule currently requires a noncontingent flat fee agreement to include a provision indicating the possibility of quantum meruit recovery in the event of early termination.

¶36 Unlike a contingent fee arrangement, in which the attorney's fee is contingent upon the outcome of the case, a flat fee (sometimes called a "fixed fee") is a fee based on an agreed amount for particular services, regardless of the time or effort involved and

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[10] Under the Office of Attorney Regulation Counsel's approach, an attorney with a flat fee agreement can never "earn" a portion of the fee by merely "conferring a benefit or performing a legal service for the client," but instead must complete the agreed-upon services in full. Given this view of how fees are earned, it is difficult to understand how such an attorney who is discharged before completing the agreed-upon services could ever establish entitlement to any portion of the fee in quantum meruit.

regardless of the result obtained. See In re Sather, 3 P.3d at 410 (noting that a "flat fee" is a type of fee paid in advance for specified legal services to be performed by the attorney). Flat or fixed fee arrangements can benefit the client by establishing in advance the maximum amount the client will have to pay for legal fees, thus permitting the client to budget based on a fixed sum rather than face potentially escalating hourly fees that may exceed the client's ability to pay. See id. (citing Alec Rothrock, The Forgotten Flat Fee: Whose Money Is It and Where Should It Be Deposited?, 1 Fla. Coastal L.J. 293, 354 (1999)). Whereas a client in a contingent fee arrangement generally has no expectation of payment unless the attorney obtains a successful result, a client in a flat fee arrangement expects to pay the attorney for his or her services regardless of the result obtained. The flat fee agreement merely establishes the maximum that the client may owe.

¶37 Although attorneys are certainly wise to include benchmarks or milestones in flat fee agreements, the Rules of Professional Conduct do not presently require them. Moreover, our case law barring quantum meruit recovery unless the fee agreement includes notice of this possibility arose out of the specific rules governing the content of contingent fee agreements. We have not suggested that the notice requirement pertaining to contingent fee agreements necessarily applies to other forms of fee agreements or that quantum meruit recovery under other types of fee agreements is likewise barred absent such notice.

C. Gilbert Did Not Violate Rule 1.16(d)

¶38 We conclude that the Hearing Board did not err when it determined that Gilbert did not violate Rule 1.16(d) under the circumstances of this case. The Board first determined that Gilbert was entitled to a portion of her fee in quantum meruit: it specifically found that Gilbert "unquestionably provided legal services" and that Peters received a benefit from Gilbert's services. The Hearing Board further concluded that it would be unjust in light of the parties' intentions and expectations for Peters to retain the benefit of Gilbert's services without paying for them. The Board specifically found that Peters and Henderson understood—and in fact expected—that Gilbert would begin work immediately, and that Peters' email expressly acknowledged that Gilbert was entitled to payment for appearing at the master calendar hearing. It also found that, although Gilbert did not include her hourly rate in the written fee agreement, she showed Peters and Henderson her list of standard fees during their initial meeting, which included her hourly fee. These findings are supported by the record.[11]

¶39 The Hearing Board ultimately determined that Gilbert did not violate Rule 1.16(d) by failing to return that portion of the fee to which she was entitled in quantum meruit. We conclude that the Hearing Board did not err in determining that Gilbert did not violate Rule 1.16(d) under the circumstances of this case.

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[11] The Office of Attorney Regulation Counsel does not contest any of the Hearing Board's findings of fact. Instead, it argues, as discussed above, that Gilbert was required to return the entire advance fee under In re Sather because her flat fee agreement was silent as to how Gilbert would be paid if she was discharged.

¶40 Certainly, Gilbert's dealings with Henderson and Peters warranted disciplinary action. By commingling her clients' advance fee with her own monies, Gilbert violated Colo. RPC 1.15(a), 1.15(c), and 1.5(f), and she was disciplined for these violations. The wiser course would have been for Gilbert to include benchmarks or milestones in the fee agreement[12] and deposit the clients' advance fee in her trust account until earned. Moreover, by upholding the Hearing Board's determination in this case, we do not intend to suggest that attorneys may unilaterally determine what they believe they are owed in quantum meruit. Rather, we simply conclude that the Hearing Board did not err in this case when it determined that Gilbert did not violate Rule 1.16(d) by failing to return that portion of the fee to which she was entitled in quantum meruit.

IV. Conclusion

¶41 We hold that, under the circumstances of this case, Gilbert did not violate Colo. RPC 1.16(d) when she failed to return a portion of the advance fee to which she was entitled under quantum meruit. Accordingly, we affirm the Hearing Board's order.

CHIEF JUSTICE RICE dissents, and **JUSTICE COATS** and **JUSTICE EID** join in the dissent.

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[12] Indeed, we recognize that, given the growing prevalence of such fee arrangements, clarifying amendments to Colo. RPC 1.5(f) may be warranted.

CHIEF JUSTICE RICE, dissenting.

¶42 The majority holds that "Gilbert did not violate [Colorado Rule of Professional Conduct ('RPC')] 1.16(d) by failing to refund the portion of the advance fee to which the Hearing Board determined she was entitled in quantum meruit as compensation for the services she provided before her discharge." Maj. op. ¶ 20. The majority's reasoning is premised on a fundamental misunderstanding of the procedural workings of the equitable remedy of quantum meruit. Quantum meruit is a quasi-contractual doctrine that permits a party to a contract to recover the reasonable value of her services if the contract fails. In this case, rather than recovering fees not delineated in her written flat-fee contract when her clients terminated her representation, as might be appropriate under quantum meruit, Gilbert unilaterally withheld the fees to which she felt she was entitled and then justified her withholding under the guise of quantum meruit.

¶43 The majority's holding permits attorneys to unilaterally retain as "earned," in their own business accounts, advance fees that they had not earned by the terms of their written agreement simply because they feel that they would win a quantum meruit case. This inverts the procedural structure of quantum meruit and unjustly shifts the burden onto clients who owe nothing under the terms of the agreement to bring an action against the attorney to resolve the status of the disputed funds. Because a determination of what is "earned" in quantum meruit necessarily requires the party seeking recovery to bring an action as a plaintiff and to prove what she earned, fees cannot properly be considered "earned" in quantum meruit until they have been adjudicated as such. Here, Gilbert did not bring a claim against her clients and secure a

court ruling delineating what she had earned in quantum meruit but rather unilaterally withheld funds that she had not earned by the terms of her written agreement without first obtaining a quantum meruit ruling in her favor. Therefore, I would hold that she violated RPC 1.16(d)'s requirement that she "refund[] any advance payment of fee or expense that has not been earned or incurred" upon termination of representation.[1] Because I fear that the majority is doing a disservice to the public by permitting Gilbert's unilateral retention of advance fees under the guise of quantum meruit, I respectfully dissent.

I. The Relevant Rules of Professional Conduct Contextualized

¶44 RPC 1.16(d), in relevant part, requires that "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee or expense that has not been earned or incurred." Because Gilbert had not previously represented these clients, she was required to communicate, in writing, "the basis or rate of the fee and expenses" that she would charge. Colo. RPC 1.5(b). Gilbert's written agreement with her clients

[1] Gilbert could have complied with RPC 1.16(d) while avoiding the risk that funds returned to her clients and then pursued in quantum meruit would be exhausted prior to recovery simply by complying with the requirement that advance fees be kept in trust. See Colo. RPC 1.15(c) (2013) (repealed and readopted in 2014 as Colo. RPC 1.15A(c)) (requiring that attorneys maintain disputed property separately until the dispute is resolved). This rule permits attorneys to keep disputed funds in the trust account until their quantum meruit claim is resolved, and arguably even to immediately deposit into a trust account disputed funds that they failed to hold in trust initially when a client terminates the representation and the attorney feels entitled to quantum meruit. Had Gilbert taken either of these paths, I would agree that she acted in compliance with RPC 1.16(d). But she did neither, choosing instead to simply withhold the funds in her business account and force the client to bring an action against her. RPC 1.16(d) does not permit such behavior.

simply established a flat rate that she would charge once three distinct tasks had all been completed, only one of which she completed prior to her termination. Despite having no agreement regarding hourly recovery upon termination, Gilbert withheld a portion of her clients' advance fees premised on an hourly rate. Thus, whether Gilbert violated RPC 1.16(d) turns on whether the fees to which she unilaterally determined that she was entitled in quantum meruit—based on an hourly rate that was not incorporated or referenced in her written agreement with her clients—were nonetheless "earned" prior to an adjudicative body determining that she was entitled to them.

¶43 Under RPC 1.5(f), "[f]ees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client." But this language is not so clear as the majority makes it seem, see maj. op. ¶ 33, as is evidenced by the need for a clarifying Comment regarding flat fees. In the context of an advance lump-sum fee, as is at issue here, Comment 12 to RPC 1.5 clarifies that "the lawyer must deposit an advance of unearned fees in the lawyer's trust account" and "[t]he 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 [RPC] 1.5(b)" (emphasis added). Although the majority correctly observes that "the text of each Rule is authoritative" and that "Comments do not add obligations to the rules," these Comments should be given weight as "guides to interpretation," especially where the rule's language is as general as that of 1.5(f). Colo. RPC, Preamble and Scope, ¶¶ 14, 21; see also maj. op. ¶ 33.

¶46 Additionally, "[t]he standard principles of statutory construction apply to our interpretation of court rules," In re Marriage of Wiggins, 2012 CO 44, ¶ 24, 279 P.3d 1, 7, and statutes must be read "as a whole, construing each provision consistently and in harmony with the overall statutory design," Whitaker v. People, 48 P.3d 555, 558 (Colo. 2002). The overarching purpose of RPC 1.5 is to require lawyers to establish clear, reasonable fee agreements with their clients, and in this context, RPC 1.5(f) clarifies that advance fees are not the property of the attorney immediately, but rather only once the attorney performs the work for which the fees were advanced under the agreement. See RPC 1.5. Therefore, 1.5(f) must be read in the greater context of 1.5's regulation of fee agreements, and as its related regulations and Comment 12 amply demonstrate, 1.5(f)'s definition of "earned" is limited to fees contemplated by the fee agreement.[2] Furthermore, as I will demonstrate, fees in quantum meruit cannot properly be considered "earned" until they are adjudicated as such.

II. Quantum Meruit Permits Recovery, Not Retention

¶47 Although an attorney may generally recover the reasonable value of work done when the agreement underlying that work fails, this must be done by filing a claim against the client and obtaining a judgment finding that the fees were earned in

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[2] Of more pragmatic concern, under the majority's broad reading of RPC 1.5(f), an attorney who is advanced fees under a written flat-fee agreement can remove funds from that advance for any work that the attorney feels relates to the completion of the agreed-upon task, regardless of the efficiency or necessity of the tasks performed—or theoretically even for work that benefits the client but is wholly unrelated to the agreed-upon task—and then unilaterally retain them upon termination under quantum meruit. This possibility highlights the need to reference the written terms of an agreement when determining whether an attorney "earned" advance fees under 1.5(f).

quantum meruit, which Gilbert failed to do. The majority repeatedly states that Gilbert did not violate 1.16(f)'s prohibition against retaining advance fees that have not been earned upon termination because she was "entitled" to those fees in quantum meruit. Maj. op. ¶¶ 20, 27, 41. But Gilbert did not earn fees in quantum meruit simply by saying she did; rather, she earned them only when she proved that she was entitled to them in quantum meruit before the Hearing Board. At the time she initially retained these fees, they were disputed, and Gilbert should have either returned them or placed them in trust and then sought recovery under quantum meruit through litigation. Therefore, since Gilbert did not return all of her clients' advanced and unearned fees until at least thirteen months after her termination,[3] she violated RPC 1.16(d)'s requirement that she timely return any advance fees that had "not been earned" upon termination. Colo. RPC 1.16(d); see also In re Sather, 3 P.3d 403, 415 (Colo. 2000).

¶48 Quantum meruit permits an attorney to recover through litigation fees for the reasonable value of services provided when a contract fails, either from the client or from an appropriately established trust fund in which disputed funds are kept, see Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C., 2012 CO 61, ¶ 19, 287 P.3d 842, 847—not to unilaterally withhold or retain such funds in their own accounts. Black's Law Dictionary alternately defines "recovery" as "[t]he obtainment of a right to something (esp. damages) by a judgment or decree" and "[a]n amount awarded in or

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[3] The Hearing Board's undisputed findings of fact indicate that Gilbert obtained the court order granting her motion to withdraw by December 26, 2011—the latest point at which her representation could be considered fully terminated—and she did not return the full advance fees until February 11, 2013.

collected from a judgment or decree." Black's Law Dictionary 1466 (10th ed. 2014) (emphasis added). Here, however, Gilbert improperly relied on quantum meruit to justify her unilateral withholding of her clients' advanced and unearned fees with no adjudication and no basis in her written fee agreement. This interpretation inverts the doctrine. Quantum meruit is not an affirmative defense against wrongful withholding of a client's funds upon termination. Rather, it provides an equitable cause of action for attorneys (and others) to seek compensation for work performed when the contract underlying that work fails. Melat, ¶ 19, 287 P.3d at 847.

¶49 Our recent discussion of quantum meruit in Melat highlights this distinction:

> Quantum meruit is an equitable theory of recovery that arises out of the need to avoid unjust enrichment to a party in the absence of an actual agreement to pay for services rendered. Quantum meruit allows a party to recover the reasonable value of the services provided when the parties either have no express contract or have abrogated it. To recover in quantum meruit, a plaintiff must demonstrate that (1) at plaintiff's expense, (2) defendant received a benefit, (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying. Whether retention of the benefit is unjust is a fact-intensive inquiry in which courts look to, among other things, the intentions, expectations, and behavior of the parties.

Id. (emphasis added) (citations omitted). Thus, proper application of the theory in the context of an attorney-client dispute requires that the attorney either return the unearned funds to the client or maintain the disputed funds in a neutral trust account, see Colo. RPC 1.15(c), 1.16(d), then seek to recover those funds by satisfying the three-prong test before a court, Melat, ¶ 19, 287 P.3d at 847.

¶50 Crucially, the burden to prove that funds have been earned under quantum meruit falls upon the attorney. But in this case, Gilbert never pursued recovery in

quantum meruit. Rather, under the guise of quantum meruit, she simply withheld—in her own business account—her clients' advance fees that she had not earned upon termination under the written agreement, and she then claimed quantum meruit as a defense against charges that she failed to return unearned fees as required by RPC 1.16(d). Such a reversal of the burden of proof under quantum meruit is not supported by our precedent, and by allowing Gilbert to unilaterally declare fees as "earned" in quantum meruit, the majority inverts the doctrine and destroys the procedural foundations upon which quantum meruit is erected. More importantly, the majority's approval of Gilbert's retention of these funds both grants attorneys unprecedented power over the advance fees of their clients and unjustifiably burdens those clients with the need to then seek recovery of funds that no one but the attorney herself has deemed "earned." This result strains the term "earned" to its breaking point and erodes an attorney's duties to her client as a fiduciary.

¶51 In fact, the concept of an attorney's need to actively seek recovery under quantum meruit is so ingrained in the doctrine that it explicitly underpins every case to which the majority cites except People v. Johnson, 612 P.2d 1097 (Colo. 1980) (addressed infra Part III). See LaFond v. Sweeney, 2015 CO 3, ¶ 27, 343 P.3d 939 ("[A] quantum meruit recovery action vis-à-vis the client never properly arose in this case. The underlying basis for applying this equitable doctrine regarding fee recovery is absent here." (emphasis added)); Melat, ¶ 20, 287 P.3d at 847 ("In the context of the attorney-client relationship, an attorney who withdraws before the close of a case may generally recover the reasonable value of his or her services under a quantum meruit theory."

(emphasis added)); Mullens v. Hansel-Henderson, 65 P.3d 992, 995 (Colo. 2002) ("Generally attorneys may recover on an unenforceable contract on the basis of quantum meruit." (emphasis added)); Dudding v. Norton Frickey & Assocs., 11 P.3d 441, 446 (Colo. 2000) ("We have permitted quantum meruit recovery in the context of a non-contingent attorney-client contract when an attorney withdraws for a justifiable reason or a client terminates the attorney without cause." (emphasis added)); Sather, 3 P.3d at 409–10 ("Upon discharge, the attorney must return all unearned fees in a timely manner, even though the attorney may be entitled to quantum meruit recovery for the services that the attorney rendered and for costs incurred on behalf of the client." (emphasis added)); Olsen & Brown v. City of Englewood, 889 P.2d 673, 675 (Colo. 1995) ("There is no question that an attorney who withdraws for a justifiable reason or is terminated by a client without cause is entitled to compensation for services rendered. Generally, courts are in agreement that quantum meruit is an appropriate measure of recovery in such circumstances." (second emphasis added) (citation omitted)); Elliott v. Joyce, 889 P.2d 43, 44 (Colo. 1994) ("After the matter was settled, Elliott filed an attorney's lien . . . seeking recovery of attorney fees . . . based on time and effort for services rendered, under the theory of quantum meruit. . . . [T]he trial court accepted 'the proceeds of the settlement . . . to be held by the court until James Elliott's attorney's lien question is resolved.'" (first and third emphases added)). As these quotations illustrate, quantum meruit is a theory of recovery, and thus attorneys must seek and be granted recovery in a court before such fees can be properly considered "earned."

¶52 Furthermore, these quotes are mere examples—the majority of these cases refer to recovery dozens of times, and none refers to withholding funds under the doctrine or to an attorney being permitted to retain funds under the flag of quantum meruit.[4] Even the majority itself acknowledges multiple times that an attorney must recover fees in quantum meruit, see maj. op. ¶¶ 20–27, 37, but it nevertheless converts this affirmative cause of action into a defense against accusations of wrongfully withholding a client's advance fees, see id. at ¶¶ 20, 38-39. In transforming the potential availability of quantum meruit recovery into the right to unilaterally retain advance fees when a written contract fails, the majority relies heavily on misreadings of Sather and Johnson. I will now demonstrate that these authorities do not mandate the majority's conclusion.

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[4] The court in Melat does refer to "the conduct of Merat [sic] and Howarth in unjustly retaining all of the recovered attorney fees," ¶ 38, 287 P.3d at 851, but Melat and Howarth were the original defendant firms in the underlying quantum meruit suit in which the Hannon Law Firm sought recovery of fees that it felt it had earned as withdrawn co-counsel in quantum meruit, see id. at ¶¶ 1–3, 287 P.3d at 844.

Similarly, the Mullens court upheld a trial court decision allowing "Mullens to retain fees under quantum meruit." 65 P.3d at 994. In that case, however, the trial court found that Mullens did have an oral agreement for a forty-percent contingency on a bad faith claim, under which he kept his portion of the settlement, but that the agreement was unenforceable under Chapter 23.3's requirement that all contingency agreements be reduced to writing. Id. The court then determined that the amount kept by Mullens under the unenforceable agreement was earned in quantum meruit, so rather than require Mullens to return the fees to his client only to have the client immediately pass the funds back to Mullins under quantum meruit, the court simply allowed Mullens to "retain" the fees. Id. This judicial economy is significantly different from the case at hand, in which Gilbert unilaterally declared herself entitled to funds with no purported contractual basis and no adjudication.

III. Sather and Johnson Support Returning Fees

¶53 In Sather, in a line that should resolve this case, the court holds that "[u]pon discharge, the attorney must return all unearned fees in a timely manner, even though the attorney may be entitled to quantum meruit recovery for the services that the attorney rendered and for costs incurred on behalf of the client." 3 P.3d at 409–10 (emphasis added) (citing Colo. RPC 1.16(d)). While we also held that "an attorney earns fees by conferring a benefit on or performing a legal service for the client," this holding was intended to bolster the conclusion that the attorney violated RPC 1.15 by labeling advance fees as "non-refundable" and putting them directly into his account rather than maintaining them in trust. Id. at 405. As we observed, requiring that funds be kept in trust "protects the client's right to discharge an attorney." Id. at 409 (citing Colo. RPC 1.16(d) cmt.). Thus, Sather confirms that fees earned "by conferring a benefit on or performing a legal service for" a client do not include fees that could potentially be recovered in quantum meruit—at least not before the fees have actually been recovered through litigation. See id. at 410.

¶54 The majority disregards this plain reading of Sather. Initially, it ignores the interrelationship between the rules at issue and dismisses this clear language prohibiting Gilbert's behavior as relating only to "a separate part of the opinion discussing an attorney's obligation under [RPC] 1.15(f) to maintain advance fees in a separate trust account until the fees are earned." Maj. op. ¶ 32. Thus, the majority concludes, this plain language citing 1.16(d) is meaningless when considering an attorney's duties under 1.16(d). Instead, the majority focuses on the fact that we

sanctioned the attorney in Sather for failing to return the unearned portion of his fees, as is prohibited by 1.16(d), and infers that this ruling "implicitly recognized that the attorney 'earned' and rightfully retained" some portion of the funds in quantum meruit "even though nothing in the opinion suggested that his 'non-refundable' flat fee agreement provided for quantum meruit recovery (or an hourly fee) upon early termination." Id. at ¶ 30. To the majority, the fact that we did not "require the attorney to refund all advance fee payments and then separately seek quantum meruit recovery from his former client" means that we considered quantum meruit fees to have been earned at the moment the attorney decided he should be entitled to them. See id. at ¶ 32.

*55 The majority infers too much. In Sather, the court simply took the term "unearned" from the language of 1.16(d), and since the court determined that the attorney did violate 1.16(d) because some portion of the fees retained as "non-refundable" was clearly unrecoverable under either quantum meruit or contract, 3 P.3d at 407, 415, the court had no reason to reach the question of whether an attorney violates 1.16(d) by keeping funds in her own account as "earned" under quantum meruit before the funds were adjudicated as such. Additionally, the attorney retained these fees not under the guise of quantum meruit but rather under an unenforceable "non-refundable" fee agreement, and the Hearing Board then validated a portion of the funds as deserved under quantum meruit. See id. at 407-08. The mere fact that the court did not then perform the legal fiction of requiring the attorney to return all the advance fees and then immediately requiring the client to return the funds that the

board had adjudicated as deserved in quantum meruit merely reflects judicial efficiency—it does not destroy the clear language of this case recognizing that an attorney must return advance fees and then pursue recovery in quantum meruit if she so chooses. Hence, the majority's reading of Sather misconstrues the holding to elevate what are at best dicta and at worst unsubstantiated inferences to the status of a substantive holding. In doing so, it ignores the plain language of the holding that directly prohibits the exact misfeasance that Gilbert committed.

¶56 Similarly, Johnson never actually holds that an attorney has a right to retain funds under quantum meruit simply because she feels that she earned them. In that case, an attorney entered into an oral agreement to represent a criminal defendant and received an advance payment of $1500 before the client terminated representation. Johnson, 612 P.2d at 1098. Because there was no written agreement and no agreement regarding what would happen in the event of early termination, the court determined that the "fee arrangement by necessity was upon a quantum meruit basis." Id. The court then agreed with a grievance committee determination that the attorney "expended no more than 8 or 9 hours on the case" and that the attorney was therefore "entitled on a quantum meruit basis to $500 and that a refund of $1000" was due to his client. Id. at 1099. Notably, this case did not address the procedural requirements of quantum meruit but rather allowed the attorney to retain $500 in quantum meruit of the $1500 advance payment he had been withholding after his client terminated him. Because the attorney failed "to return that portion of the $1500 payment which was unearned," the court found that he violated DR-2-110(A)(3), which was an older

iteration of RPC 1.16(d) and required "the prompt refund of unearned parts of a fee when a lawyer withdraws from employment." Id.; see also Canon 2 of Colorado Disciplinary Rules, DR 2-110(A)(3) (Withdrawal from Employment) (adopted and effective Mar. 18, 1976).

¶57 The majority reads this as impliedly finding that the attorney did not violate DR 2-110(A)(3) by retaining funds that he was eventually deemed to have earned in quantum meruit by the court. See maj. op. ¶¶ 28, 32. Much like in Sather, however, the Johnson court never held that the attorney at issue was permitted to make his own determination regarding his entitlement to retain advance fees under quantum meruit; rather, it held that he did violate DR-2-110(A)(3) by not returning the portion of the funds that the court deemed unearned. Johnson, 612 P.2d at 1099. Hence, the court simply ruled that DR 2-110(A)(3) forbade retaining unearned fees, and since some of the fees were clearly unearned, the attorney violated the rule.

¶58 Moreover, even if this case is read to have affirmatively approved of the attorney's retention of fees because his unspoken agreement "by necessity was upon a quantum meruit basis," see id. at 1098, this ruling was made before attorneys were required to reduce fee arrangements with new clients to writing under RPC 1.5(b). Compare Colo. RPC 1.5(b) (titled "Fees" and requiring that the basis and rate of fees are communicated to clients that the attorney has not represented regularly in writing), with Canon 2 of Colorado Disciplinary Rules, DR 2-106 (Fees for Legal Services) (reciting the then-existing fee regulations and mirroring RPC 1.5(a)'s prohibition on excessive fees, but never prohibiting oral fee agreements regardless of the attorney's

prior business relations with the client). Therefore, this reading of Johnson's holding does not comport with the current iteration of the rules requiring that attorneys communicate "the basis or rate of the fee . . . to the client, in writing." Colo. RPC 1.5(b). Thus, even if the court intended to affirmatively endorse retention of fees under the flag of a silent oral agreement regarding quantum meruit, the rules of professional conduct have evolved significantly since this case was decided, rendering the court's logic obsolete.

¶59 In sum, neither Sather nor Johnson had any reason to reach the question of whether unilateral retention of the portion of fees that the court eventually deemed earned in quantum meruit also violated the rule. That question was not essential to the resolution of either case. Furthermore, the majority's contention that it "would be a waste of resources in these circumstances to force attorneys to return money to which they are entitled and then bring suit against the client to recover it" misses the point. Maj. op. ¶ 32. It would absolutely be a waste of resources for the hearing boards in Sather and Johnson—which had already determined that an attorney improperly retained advance fees but was entitled to a portion of the advance fees in quantum meruit—to then require the parties to perform the legal fiction of "exchanging" those funds that the boards deemed earned. But this is only true after a hearing board has already made the quantum meruit determination. It is by no means a waste of judicial resources for an attorney to be required to prove her quantum meruit case before keeping the funds in quantum meruit. Presiding over such litigation is exactly what the

judiciary does, and the majority's alternative of requiring clients to sue their attorneys will both consume the same judicial resources and unjustly burden clients.

IV. Conclusion

¶60 The majority's assertion that viewing Gilbert's misfeasance here as a violation of RPC 1.16(d) would effectively foreclose the remedy of quantum meruit in cases where flat-fee contracts fail misunderstands Regulation Counsel's central contention. See maj. op. ¶ 34. Regulation Counsel does not contend that attorneys cannot recover in quantum meruit when a flat-fee agreement fails, but rather that they must recover in quantum meruit before such fees can be considered "earned."[5] Instead, the majority permits Gilbert and similarly situated attorneys to put the cart before the horse and declare fees as earned under quantum meruit when no quantum meruit proceedings have been held. In so doing, the majority misses the overarching point of this case.

¶61 This case is not about whether Gilbert was entitled to recover in quantum meruit had she followed the proper procedure. I take issue not with the Hearing Board's eventual determination that Gilbert proved the elements of quantum meruit, but with Gilbert retaining the fees under the guise of quantum meruit before the Board considered her claim. Nor is it about punishment. Gilbert does not contest the

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[5] Regulation Counsel's contention that attorneys do not "earn" a portion of flat-fee agreements merely by "conferring a benefit on or performing a legal service for the client" relates only to earned fees in the context of RPC 1.16(d). Regulation Counsel concedes that Gilbert would have been permitted to "return the entire advance fee and then separately seek quantum meruit recovery against her former clients if she wished," maj. op. ¶ 18, and deciding that Gilbert violated 1.16(d) would in no way eliminate quantum meruit as a remedy in failed flat-fee agreements.

punishment that she received for her other rule violations, and Regulation Counsel did not request any additional punishment had we held that Gilbert violated RPC 1.16(d). Rather, this case is about whether an attorney is entitled under RPC 1.16(d) to retain fees in her own business account to which she unilaterally determined that she was entitled without any basis in her written agreement with her client and without a court order granting her those fees in quantum meruit. I would hold that an attorney is not so entitled. To deem fees "earned" when an attorney believes she has a viable claim in quantum meruit turns the doctrine on its head, and had Gilbert's clients not pursued their claim, no legal determination would ever have been made regarding whether these fees were earned under quantum meruit or not.

*62 The majority insists that, in holding that Gilbert did not violate RPC 1.16(d), it does "not intend to suggest that attorneys may unilaterally determine what they believe they are owed in quantum meruit." Maj. op. ¶ 40. But that question is precisely what this case is about. If Gilbert was allowed to unilaterally retain fees as "earned" in quantum meruit prior to a court considering the question, then she did not violate RPC 1.16(d); if fees in quantum meruit are not earned until they are adjudicated as such, then Gilbert retained unearned fees and violated 1.16(d). Therefore, by determining that Gilbert did not violate 1.16(d), the majority necessarily holds that 1.16(d) permits attorneys to unilaterally withhold advance fees under quantum meruit based solely on their own estimations of their entitlement—at least in cases such as this where a hearing board eventually agrees with the attorneys' prior unilateral determinations. The majority's holding will only operate to encourage attorney overreach and

proportionally increase client allegations under RPC 1.16(d). Therefore, because the majority's holding will disserve the public, I respectfully dissent.

I am authorized to state that JUSTICE COATS and JUSTICE EID join in this dissent.

SUPREME COURT OF COLORADO
ATTORNEY REGULATION COMMITTEE
C/O Steven K. Jacobson, Chairperson
1300 Broadway, Suite 500
Denver, CO 80203

May 18, 2015

Marcy Glenn
Chairperson, Standing Rules Committee

Re: *Proposed Rule Changes*

Dear Marcy,

I am writing you on behalf of the Attorney Regulation Committee (ARC) to request that the Standing Rules Committee consider amendments to the Rules setting certain minimal standards for written fee agreements in Colorado. The ARC is requesting this change because of its belief that the interests of client protection would be best served by such amendments.

Repeatedly, the Committee is presented with investigations involving allegations of misconduct relating to fee agreements which contained provisions that violate the Rules or fail to address common and foreseeable events that would arise in the representation. Were lawyers aware of such minimal standards and were they aware they had to follow such standards in drafting their fee agreements, we believe the instances of this type of misconduct would be substantially reduced. The ARC is aware that lawyers must be allowed substantial leeway in drafting fee agreements, however, having minimal standards would not impede such latitude. A list of minimal standards would serve the profession as a checklist against which lawyers could measure their agreements.

The ARC believes that minimal standards would require all fee agreements to include provisions addressing the following (some of which are already in various rules or established by case law):

a. The base and rate of the fee.
b. That fixed/flat fees agreements must specify the benefits conferred on the client or specify the legal services performed in order for the fees to be earned.
c. The prohibition of the earning of fees deemed to be engagement or signing fees in circumstances where the lawyer is being hired to represent the client on an already identified matter versus being available for matters to be identified in the future.
d. That unearned non-fixed fees will be held in trust until such time as they are considered earned pursuant to a described billing period.
e. That unearned fixed/flat fees will be held in trust until such time as the occurrence of benchmarks/milestones relating to the nature of the case

involved. These benchmarks, might include for example, the movement from one stage of legal proceedings to another.

f. Provisions for the refunding of unearned fees, including a clear statement that a fee agreement may not contain provisions providing for nonrefundable fees and nonrefundable retainers.
g. Provisions detailing the client's and lawyer's rights to terminate the representation and a statement addressing the basis and rate at which any fixed/flat fees held in trust will be distributed. (See *Matter of Gilbert*, --- P.3d ----, 2015 WL 1608818, 2015 CO 22, Colo., April 06, 2015 (NO. 13SA254).
h. Provisions addressing if, how and when a lawyer may change the fee during the course of the representation.
i. Provisions addressing how expenses incurred during the representation will be handled.
j. Provisions relating to how fees and communications will be handled when the fee is to be paid by a person other than the client.
k. Provisions addressing ownership of "the file".

We are aware that the Committee would have to work out where such standards might fit into specific rules and whether or not they might be proposed as part of some standard fee agreement form. Whatever the mechanism, we want to make sure that lawyers know these are matters that new clients need to be made aware of in writing and under which new clients would gain protection under the Rules.

Sincerely,

Steven K. Jacobson
Chairperson, Attorney Regulation Committee

Cc: James Sudler