DISTRICT OF COLUMBIA BAR

RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE

REPORT TO THE BOARD OF GOVERNORS PROPOSING CHANGES TO D.C. RULE OF PROFESSIONAL CONDUCT 1.15(e) AND COMMENTS

MARCH 2023

AS APPROVED BY THE BOARD OF GOVERNORS AND TRANSMITTED TO THE D.C. COURT OF APPEALS (JUNE 2023)

Members
of the District of Columbia Bar
Rules of Professional Conduct Review Committee

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The Rules of Professional Conduct Review Committee ("Rules Review Committee" or "Committee") of the D.C. Bar proposes that Rule 1.15(e) and corresponding Comments be amended to expressly state (1) that a flat or fixed fee is an advance fee subject to entrustment consistent with the D.C. Court of Appeals holding in *In re Mance*, 980 A.2d 1196 (D.C. 2009), *as amended* (Oct. 29, 2009); and (2) that informed consent to waive entrustment of advance fees pursuant to Rule 1.15(e) must be "confirmed in writing" consistent with the Court's holding in *In re Ponds*, 279 A.3d 357 (D.C. 2022). The Committee also recommends adding a cross-reference to the commentary to Rule 1.5 to alert lawyers to the written obligations.

I. Introduction

Prior to 2000, D.C. Rule 1.15 (Safekeeping Property) provided that advances of legal fees for unearned work became the property of the lawyer upon receipt.[1] In 2000, Rule 1.15(d) was amended to require that "advances of unearned fees . . . shall be treated as property of the client pursuant to paragraph (a) [requiring such property to be kept separate from the lawyer's property in a trust account] until earned . . . unless the client gives informed consent to a different arrangement."[2]

In *In re Mance*, 980 A.2d at 1206, the D.C. Court of Appeals acknowledged that it "is not clear on its face" how amended Rule 1.15(e) applies to flat or fixed fees. The Court held, "unless there is an agreement otherwise, the attorney must . . . *hold the flat fee in escrow until it is earned*." *Id*. at 1207 (emphasis added). This holding was a significant departure for lawyers in certain practice areas such as criminal and immigration law who had always considered fixed or flat fees to be "non-refundable" or "earned upon receipt."

On February 24, 2022, the D.C. Court of Appeals decided *In re Haar*, 270 A.3d 286 (D.C. 2022), a disciplinary case in which Mr. Haar put the unearned portions of a flat fee directly into his operating account rather than into a trust. In *Haar*, the Court recognized that "proper interpretation of Rule 1.15(e) has been the subject of substantial confusion." *Id.* at 298. The Court concluded that a practitioner "could reasonably fail to perceive such a danger [of violating post-*Mance* Rule 1.15(e)]." *Id.* Notably, the opinion states twice that Rule 1.15(e) has not been updated to reflect *Mance's* clarification or implications. *Id*. at 291, 298

[1] D.C. RULE OF PROF. CONDUCT 1.15 (1991) ("Advances of legal fees and costs become the property of the lawyer upon receipt. Any unearned amount of prepaid fees must be returned to the client at the termination of the lawyer's services in accordance with Rule 1.16(d).")

[2] In 2010, D.C. Rule 1.15(d) became Rule 1.15(e) because of the adoption and insertion of a new Rule 1.15(b) related to trust accounts. Former Rule 1.15(d) is referred to as current Rule 1.15(e) throughout this report.

On August 4, 2022, a three-judge panel of the Court of Appeals issued *In re Ponds,* a disciplinary decision in which the Court held that D.C. Rule 1.15(e) requires both a writing and an oral communication to effectuate "informed consent" to deposit advance fees into a lawyer's operating account instead of a trust account as otherwise required by Rule 1.15(a).[3] On November 8, 2022, the Court further issued an order denying petitioner's request for rehearing or rehearing *en banc* in the *Ponds* matter.

II. Committee Proposes Revisions to Reflect *In Re Mance and In Re Ponds*

In March 2022, following the Court's implicit directive in *Haar* that Rule 1.15(e) be updated, the Rules Review Committee charged the Rule 1.15 subcommittee with drafting proposed language to Rule 1.15(e) and clarifying commentary consistent with *In re Mance*. The subcommittee drafted and, after discussion and revision, the Committee approved, the proposed amendments to Rule 1.15 in June 2022. However, in light of the *Ponds* decision, the Committee proposed additional revisions to the commentary of Rule 1.15 consistent with that opinion.

Although neither the text of Rule 1.15(e) nor the definition of "informed consent" in Rule 1.0(e) requires a writing, the Court had previously suggested the possibility of a writing requirement in Rule 1.15(e) in *In re Mance*:

> In order to ensure knowing client consent to a different arrangement concerning the treatment of flat fees, the Colorado Supreme Court has noted that the attorney must expressly communicate to the client verbally *and in writing* that the attorney will treat the advance fee as the attorney's property upon receipt; that the client must understand the attorney can keep the fee only by providing a benefit or providing a service for which the client has contracted; that the fee agreement must spell out the terms of the benefit to be conferred upon the client; and that the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client. *In re Sather*, 3 P.3d at 413. We agree, and add that the client should be informed that, unless there is agreement otherwise, the attorney must, under Rule1.15(d), hold the flat fee in escrow until it is earned by the lawyer's provision of legal services.

[3] 279 A.3d at 361 (stating that "[t]o satisfy this requirement in connection with a flat-fee agreement, the attorney must 'expressly communicate to the client verbally and in writing'") (quoting *Mance*, 980 A.2d at 1206 (quoting *In re Sather*, 3 P.3d 403, 413 (Colo. Sup. Ct. 2000), *opinion modified on denial of reh'g* (June 12, 2000))).

In re Mance, 980 A.2d 1196, 1206-1207 (emphasis added).[4]

In denying the petitioner's motion for rehearing or rehearing *en banc*, *Ponds* has the practical effect of requiring a lawyer to comply with an interpretation of the Rules of Professional Conduct that is not explicitly or implicitly required by the Rules or commentary.

In its amicus brief to the Court in support of rehearing or rehearing *en banc* in the *Ponds* matter, the D.C. Bar's Legal Ethics Committee explained,

> Contrary to the holding of the *Ponds* panel, the plain language of D.C. Rule 1.15(e) does not require oral disclosure *and* a confirmatory writing. Rule 1.15(e) states in relevant part, "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement."
>
> "Informed consent" is defined in Rule 1.0(e) as ". . . the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comments [2] and [3] to the Rule further clarify the meaning of "informed consent" and underscore that "[a] number of Rules require that a person's consent be in writing. *See* D.C. Rules 1.8(a)(3) and 1.8(g)." Comment [3] further indicates that the consent "may be inferred ... from client conduct." "Writing" is itself a defined term in D.C. Rule 1.0(s).
>
> When a D.C. Rule requires a writing, the language is specific and direct. Rule 1.8(a)(3) (conflict waiver for a business transaction with a client) requires, for example, that "[t]he client gives informed consent in writing thereto." Rule 1.8(f) (conflict waivers for certain joint representations) adds further requirements that the client *sign* a writing confirming a conflict waiver and that the informed consent to that waiver must occur *after consultation.* By contrast, Rule 1.2(c) (limits on scope of representation), like Rules 1.15(e) and 1.0(e), does not mention the manner in which a lawyer must communicate in order to obtain informed consent.

Notwithstanding the arguments set forth above, in denying rehearing in *Ponds*, the Court of Appeals has signaled its agreement to the elements required to secure informed consent to waiver

[4] In the context of the caselaw, Rules, and Comments discussed in this report, the Committee understands the term "verbally" to be synonymous with the term "orally."

of entrustment of advance fees under Rule 1.15(e),[5] including flat and fixed fees, as set forth in *Mance*, including the requirement that such informed consent be confirmed in writing.

To avoid the specter of future discipline for District lawyers unaware of disciplinary decisions of the D.C. Court of Appeals that, in effect, amend the text of the ethics rules, the Committee recommends swift revisions to Rule 1.15(e) and its Comments to codify the requirements of Rule 1.15 as interpreted by the Court of Appeals in *In re Mance* and *In re Ponds.* Many disciplinary cases involve the misuse of client trust funds and clarifying the Rule to reflect *Mance's* writing and five-factor requirement for informed consent will reduce such violations. Further, the proposed Rule amendment will help avoid the uncertainty that *Mance/Ponds* create by implying that whenever informed consent is required by the Rules, it must be in writing. Such an expansion of the requirement of informed consent would result in additional Rule violations by lawyers who are unaware of such a requirement and assume, based on the text of the Rules, that informed consent does not have to be in writing unless the Rule specifically requires it. The proposed Rule amendment avoids this risk by stating that Rule 1.15(e)'s writing requirement is limited to Rule 1.15.

III. Call for Public Comment

On December 14, 2022, the Committee published a Draft Report and Recommendations on Proposed Revisions to Rule 1.15(e) for a 45-day comment period that ended on January 31, 2023. The Committee received five (5) comments, four (4) in support of the Committee's proposals and one (1) in opposition. The four comments in support of the Committee's proposal each recommended additional revisions to the Committee's proposed amendments. As detailed below, the Committee considered each of the comments and revised the initial proposal based on the recommendations of the commenters.

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[5] It is not the understanding of this Committee that either *Mance* or *Ponds* remotely suggests that the definition of "informed consent" under Rule 1.0(e) is inadequate for purposes of any other Rule of Professional Conduct requiring informed consent. Indeed, the *Ponds* decision specifically limits the reach of its analysis to Rule 1.15(e):

> On the issues raised in this case, though, *In re Mance* is quite clear: (1) flat fees paid in advance are client property and must be treated accordingly unless the client gives informed consent to a different arrangement; (2) informed consent requires an attorney to discuss the "material risks of and reasonably available alternatives to the proposed course of conduct"; and (3) *to obtain informed consent in this context,* an attorney must "expressly communicate to the client verbally and in writing" five specific pieces of information.

279 A.3d at 361 (emphasis added).

A. Summary of Comments in Support of the Committee's Proposal

A Bar member noted that neither the current rule nor the proposed changes offer guidance on when a fixed or flat fee may be considered "earned" and suggested that the Committee add language to the commentary of Rule 1.15 along the lines of language suggested in *In re Mance.* [6]

Another Bar member suggested that a cross-reference to Rule 1.15(e) be added to the commentary of Rule 1.5. Because lawyers look to Rule 1.5 when formulating fee agreements, "it is more likely that all lawyers who use advanced fee agreements will see and take heed of [the *Mance*] requirements."

The Board on Professional Responsibility (BPR) supports the Committee's proposal and suggests three additional revisions. The Board's comments are provided in their entirety as Appendix A to this report. The BPR's suggestions are summarized here:

1) The proposed revisions identify the five factors articulated in *Mance* to ensure informed consent to the treatment of fees. However, the BPR notes that such factors do not help identify risks that might be present if a lawyer fails to hold a client's money in a trust account, namely that the money may be spent or attached by the attorney's creditors before earned and thus may not be available to provide a refund if the lawyer or client prematurely terminates the relationship. Thus, the BPR recommends that the commentary to Rule 1.15 clarify that informed consent in this context requires at a minimum a disclosure of the possibility that the attorney may not be able to provide an immediate refund of unearned fees upon termination of the representation.

2) *Mance* states that attorneys and clients may agree on "milestones" to define when a lawyer has earned a specific portion of a flat fee. The BPR suggests the following language be added to the commentary: "When charging a flat fee, it is prudent for the client and the lawyer to reach agreement on when fees will be considered earned—whether upon the completion of the representation or in increments linked to the completion of tasks or other milestones."

3) The Board proposes that Comment [10] consistently use the term "informed consent" instead of "knowing client consent."

[6] *In Re Mance* states that a fee agreement may specify how and when the attorney is deemed to earn the flat fee or specified portions of the fee. The Opinion suggests that the lawyer include language in a fee agreement that the lawyer may withdraw fees according to milestones "based upon passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and client."

The Office of Disciplinary Counsel (ODC) supports the Committee's proposal, agrees with the three additional recommendations of the BPR and offers one additional suggestion. ODC's comment is provided in its entirety as Appendix B to this report. ODC's suggestion is to provide a cross-reference to the written requirements of Rule 1.15(e) in the commentary to Rule 1.5 when lawyers wish to place unearned advanced fees in a non-trust account.

B. Summary of Comment in Opposition to the Committee's Proposal

A Bar member submitted comments in opposition to the Committee's proposal, stating that the D.C. Rule should either presumptively treat flat fees as earned on receipt or allow a de minimis exception for cases with a value of $5000 or less.

The writer, a self-described advocate for solo and small firm lawyers, noted that flat fees when earned upon receipt can make solos and small firms more sustainable and set forth the following additional arguments: 1) other jurisdictions treat them as such including Massachusetts, Georgia, Florida and North Carolina without harm to clients; 2) trust accounts increase risk opportunity for hackers; and 3) the proposed rule puts D.C. lawyers at a competitive disadvantage from lawyers in jurisdictions where flat fees are earned upon receipt. While the commenter recognizes that the D.C. rule permits a lawyer to deposit fees into an operating account, it does so only after a lawyer provides a complicated five-part disclosure to clients. The commenter suggests most lawyers are unlikely to explain the provision and most clients are unlikely to read it concluding that, "the new requirement is at best theater, an empty formality designed to appear protective but that unnecessarily complicates the engagement agreement without any benefit to the client."

IV. Committee Revisions to the Initial Proposal in Light of Comments

The Committee generally agreed with all of the suggestions recommended by the commenters in support of the Committee's proposal and incorporated the following changes in the final proposed rule as shown below in red line:

1) The revised draft commentary to Rule 1.15 provides guidance on when a flat fee may be considered "earned" as recommended by a Bar member and the BPR and supported by ODC;

2) A cross-reference to the written obligations of Rule 1.15 is recommended to be added to the commentary of Rule 1.5 as recommended by a Bar member and ODC;

3) Draft language was added to the commentary to Rule 1.15 to clarify that informed consent in this context requires at a minimum a disclosure of the possibility that the attorney may not be able to provide an immediate refund of unearned fees upon

termination of the representation as recommended by BPR and supported by ODC;

4) Comment [10] was revised to consistently use the term "informed consent" instead of "knowing client consent" as recommended by BPR and supported by ODC.

   Although the Committee does not agree with the comments of the Bar member who wrote in opposition to the proposed revisions, the comment did cause the Committee to make further clarifying revisions to proposed Comment [9] to make the required language easier to understand for both clients and lawyers.

On February 13, 2023, the Committee approved the final proposed revisions to Rule 1.15 and commentary and to the commentary of Rule 1.5 as set forth below.

V. Committee's Revised Final Recommendations

(New language from existing rule shown in red line; deleted language ~~struck through~~)

Proposed draft amendments to Rule 1.15(e)

1.15(e) Advances of unearned fees, including flat or fixed fees, and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent, confirmed in writing, to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

Proposed draft amendments to Comment [9] to Rule 1.15:

[9] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer. ~~,but a~~Absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). When an attorney receives an advance flat or fixed fee, the fee is an advance of unearned fees and the property of the client until earned, unless the client provides informed consent to a different arrangement. *See In re Mance*, 980 A.2d 1197 (D.C. 2009). Alternative fee structures such as flat or fixed fees are those in which the fee paid is fixed, regardless of the time required to perform the service. In any case, at the termination of an engagement, ~~advances against fees that have not been incurred~~ the unearned portion of an advance fee, including of a flat or fixed fee, and the unincurred portion of advanced costs must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e). When charging a flat fee, it is prudent for the lawyer and client to reach agreement on when fees will be considered earned—whether upon the completion of the representation or in increments linked to the completion of specific tasks, the passage of time, or other reasonable milestones.

Proposed new Comment [10] to Rule 1.15:

[10] For purposes of this Rule, "informed consent" must be "confirmed in writing." *In re Mance*, 980 A.2d 1197, 1206 (D.C. 2009) delineates five (5) factors "to ensure" informed consent "to a different arrangement concerning the treatment of flat fees." These factors are that the attorney clearly communicates to the client verbally and in writing: (1) that the attorney will treat the advance fee as the attorney's property upon receipt; (2) that the attorney can retain the fee only if he or she provides a benefit or service for which the client has contracted; (3) that the fee agreement delineates the benefit the client will receive; (4) that the attorney is required to refund any amount of advance funds to the extent that they are unreasonable or unearned if the client terminates the representation; and (5) that, unless there is agreement otherwise, the attorney must, under Rule 1.15(e), hold the flat fee in a trust account until it is earned by the lawyer's provision of legal services. *Id*. at 1206-1207; *In re Sather*, 3 P.3d 403, 413 (Colo. Sup. Ct. 2000), *opinion modified on denial of reh'g* (June 12, 2000). As part of obtaining informed consent, a lawyer must disclose to the client the risk that funds in a non-trust account may not be available to provide a refund, in spite of the lawyer's obligation to return unearned fees upon termination of a representation. For example, any funds not held in a lawyer's trust account could have been attached by the attorney's creditors before they were earned.

[move existing comment 10 to comment 11]

Rule 1.5

Comment [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(d). See also Rule 1.15 for additional written disclosure obligations in the event a lawyer accepts an advanced fee and intends to place such an advanced fee in a non-trust account. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise. However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

VI. Committee's Revised Final Recommendations (CLEAN) Proposed

Draft Amendments to Rule 1.15(e)

1.15(e) Advances of unearned fees, including flat or fixed fees, and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent, confirmed in writing, to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned

portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

Proposed draft amendments to Comment [9] to Rule 1.15:

[9] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer. Absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). When an attorney receives an advance flat or fixed fee, the fee is an advance of unearned fees and the property of the client until earned, unless the client provides informed consent to a different arrangement. *See In re Mance*, 980 A.2d 1197 (D.C. 2009). Alternative fee structures such as flat or fixed fees are those in which the fee paid is fixed, regardless of the time required to perform the service. In any case, at the termination of an engagement, the unearned portion of an advance fee, including of a flat or fixed fee, and the unincurred portion of advanced costs must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e). When charging a flat fee, it is prudent for the lawyer and client to reach agreement on when fees will be considered earned—whether upon the completion of the representation or in increments linked to the completion of specific tasks, the passage of time, or other reasonable milestones.

Proposed new Comment [10] to Rule 1.15:

[10] For purposes of this Rule, "informed consent" must be "confirmed in writing." *In re Mance*, 980 A.2d 1197, 1206 (D.C. 2009) delineates five (5) factors "to ensure" informed consent "to a different arrangement concerning the treatment of flat fees." These factors are that the attorney clearly communicates to the client verbally and in writing: (1) that the attorney will treat the advance fee as the attorney's property upon receipt; (2) that the attorney can retain the fee only if he or she provides a benefit or service for which the client has contracted; (3) that the fee agreement delineates the benefit the client will receive; (4) that the attorney is required to refund any amount of advance funds to the extent that they are unreasonable or unearned if the client terminates the representation; and (5) that, unless there is agreement otherwise, the attorney must, under Rule 1.15(e), hold the flat fee in a trust account until it is earned by the lawyer's provision of legal services. *Id*. at 1206-1207; *In re Sather*, 3 P.3d 403, 413 (Colo. Sup. Ct. 2000), *opinion modified on denial of reh'g* (June 12, 2000). As part of obtaining informed consent, a lawyer must disclose to the client the risk that funds in a non-trust account may not be available to provide a refund, in spite of the lawyer's obligation to return unearned fees upon termination of a representation. For example, any funds not held in a lawyer's trust account could have been attached by the attorney's creditors before they were earned.

[move existing comment 10 to comment 11]

Proposed Draft Amendments to Comment [4] of Rule 1.5

Comment [4] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. *See* Rule 1.16(d). See also Rule 1.15 for additional written disclosure obligations in the event a lawyer accepts an advanced fee and intends to place such an advanced fee in a non-trust account. A lawyer may accept property in payment for services, such as an ownership interest in an enterprise. However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

APPENDIX I

January 26, 2023

District of Columbia Bar
Rules of Professional Conduct Review Committee
c/o Hope C. Todd, Esquire
ethics@dcbar.org

Re: Comments on Proposed Amendments to Rule 1.15 of the District of Columbia Rules of Professional Conduct

Dear Ms. Todd:

In response to the D.C. Bar's solicitation of public comment on its Draft Report and Recommendations Proposing Amendments to D.C. Rule 1.15(e) and Comments Consistent with *In re Mance* and *In re Ponds*, I submit comments on behalf of the Board on Professional Responsibility.

The Board agrees with the Rules Review Committee that it will be helpful to amend Rule 1.15(e) and the Comments to account for *Mance* and *Ponds* and believes that the proposed amendments accurately reflect the Court's holdings regarding flat fees. We have three suggestions on the draft that we believe will clarify attorney obligations and aid in the implementation of *Mance* and *Ponds* to flat fees:

(1) Clarifying Risks

Proposed Comment [10] to Rule 1.15 includes the five factors articulated by *Mance* to "ensure knowing client consent to a different arrangement concerning the treatment of flat fees." However, the *Mance* factors do not help identify any risks that might be present in "a different arrangement," particularly a risk that *Mance* identified: that funds not in the trust account may be spent or attached by the attorney's creditors before they have been earned. Thus, if the client prematurely terminates the representation, the attorney may not have sufficient funds to provide an immediate refund. In fact, *Mance*'s requirement to notify the client of the attorney's immutable obligation under Rule 1.16(d) to refund any unearned fees upon termination of the representation (disclosure #4 in Comment [10]), may lead the attorney and client to believe that there are no risks to permitting counsel to treat the fees as his or her own before they are earned. *See, e.g.*, *In re Zamora*, Board Docket No. 21-BD-003 at 4-5 (BPR Dec. 13, 2022) (rejecting the respondent's argument that "there were no material risks at issue" when seeking his client's consent to treating advance fees as earned upon receipt "because he would have refunded any unearned fees"), *pending review*, D.C. App. No. 22-BG-943.

Therefore, the Board believes that it would be helpful for the Comments to clarify that informed consent in this context requires, at a minimum, a disclosure of the possibility that the attorney would not be able to provide an immediate refund of any unearned fee upon the termination of the representation.

(2) Encouraging Milestones

In addition to explaining the requirements for treating advance fees as earned, the *Mance* decision also noted that attorneys and clients may agree on "milestones" whereby the attorney earns specific portions of advance fees after completing specific tasks. 980 A.2d at 1204. The Board believes that the Comments to Rule 1.15 should mention that option, which has the benefit of providing clarity as to when fees are earned without going so far as having them be earned immediately. Including it in the Comments may also encourage attorneys to mention this "reasonably available alternative" when seeking informed consent to treat advance fees as earned. *See* Rule 1.0(e). Therefore, the Board proposes that the following language be added to Comment [9]: "When charging a flat fee, it is prudent for the lawyer and client to reach agreement on when fees will be considered earned—whether upon the completion of the representation or in increments linked to the completion of specific tasks or other milestones."

(3) Consistent Phrasing

Proposed Comment [10] begins: "For purposes of this Rule, '**informed consent**' must be 'confirmed in writing.' *In re Mance*, 980 A.2d 1197, 1206 (D.C. 2009) delineates five (5) factors 'to ensure **knowing client consent** to a different arrangement concerning the treatment of flat fees.'" (emphasis added). The Board proposes that Comment [10] consistently use the term "informed consent" instead of "knowing client consent" by using brackets or paraphrasing the quotation from *Mance*. It appears that the *Mance* Court used the terms interchangeably, but it may be helpful to use consistent phrasing throughout the Rule and Comments.

I hope that these comments are of assistance to the Rules Review Committee in making its recommendations to the Board of Governors.

We would be pleased to respond to any questions concerning these comments.

With best regards,

Lucy Pittman
Chair

cc: Ellen M. Jakovic, Esquire
President
District of Columbia Bar

Hamilton P. Fox, Esquire
Disciplinary Counsel

APPENDIX II

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January 31, 2023

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Re: Disciplinary Counsel's Comments on Proposed Amendments to Rule 1.15

Dear Ms. Todd:

Disciplinary Counsel supports the proposed amendments to Rule 1.15(e). We also agree with the suggestions of the Board on Professional Responsibility as set forth in Lucy Pittman's letter of January 26, 2023.

We offer one additional suggestion. We believe there should be a cross reference to the new Rule 1.15(e) in the comments to Rule 1.5. Rule 1.5(b) sets forth the requirements as to what must be set forth in writing when a lawyer is retained to represent a client whom the lawyer has not regularly represented. The amended Rule 1.15(e) would add additional written disclosure requirements in situations where the lawyer is charging a flat or fixed fee and is seeking informed consent from the client for the lawyer to convert some or all of the fee before the end of the representation. This constitutes an exception to the requirement of Rule 1.5(b) that only the basis or rate of the fee, the responsibility of the client for expenses, and the scope of the representation need be disclosed in writing.

Our suggestion is that the following be added to Comment [4] of Rule 1.5, immediately after the citation to Rule 1.16(d): "If a lawyer seeks to convert or take as revenue an advance fee or a flat fee prior to the conclusion of the representation, there are additional written disclosure obligations. *See* Rule 1.15(e)."

Do not hesitate to contact me if we can be of additional assistance.

Very Truly Yours,

s/ Hamilton P. Fox, III
Hamilton P. Fox, III
Disciplinary Counsel

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