DRAFT REPORT AND RECOMMENDATIONS OF THE RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE

PROPOSING AMENDENTS TO D.C. RULE 1.15 (E) AND COMMENTS CONSISTENT WITH *IN RE MANCE* AND *IN RE PONDS*

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).

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, then-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 *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 practices areas such as criminal and immigration who otherwise 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 did not treat unearned portions of a flat fee as an advance, instead placing the fees directly into his operating account rather than into 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

[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.

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.

II. Committee's Proposed Revisions to Reflect *In Re Mance*

Following the Court's implicit directive, on March 1, 2022, 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 following proposed amendments to Rule 1.15 at its June 2022 meeting shown in red line below.[3]

Proposed draft amendment 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 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 1196 (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

[3] After the subcommittee had substantially drafted amendments to Rule 1.15(a) and Comment [9] consistent with *In re Mance*, but before presentation to the full committee, Yaida Ford, then-Chair of the Committee received a letter dated May 12, 2022, from Phil Fox, Disciplinary Counsel, Office of Disciplinary Counsel ("ODC"), recommending that D.C. Rule 1.5, Comment [3], and Rule 1.15 (a) and Comment [9] be amended consistent with *In re Mance*. ODC submitted specific language for the Committee's consideration. Although the subcommittee did not recommend amendments to Rule 1.5, Comment [3], it did fully consider the proposed language and the letter was also provided to the Committee before the approval of the draft language set forth above.

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).

III. Committee's Proposed Revisions in Response to *In Re Ponds*

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

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 Rule 1.15(d), hold the flat fee in escrow until it is earned by the lawyer's provision of legal services.

In re Mance, 980 A.2d 1196,1206-1207 (emphasis added).[5]

[4] 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))).

[5] 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."

In denying the petition'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."
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> "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).
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> 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 of entrustment of advance fees under Rule 1.15(e),[6] including flat and fixed fees, as set forth in *Mance*, including the requirement that such informed consent be confirmed in writing.

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[6] 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

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 subcommittee 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.* The subcommittee does not think it is realistic to expect that all lawyers read decisions of the Court of Appeals on disciplinary issues, but it is reasonable to expect lawyers to be familiar with the Rules of Professional Conduct and their Comments. Many discipline cases involve the misuse of client trust funds and clarifying the Rule to reflect *Mance's* writing and five-factor requirements 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.

Rule 1.15 Subcommittee's Final Recommendations

(New language 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

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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).

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).

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 knowing client consent to a different arrangement concerning the treatment of flat fees." These are 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 and the client understands this; (3) that the fee agreement delineates the terms of the benefit the client will receive; (4) that the client knows 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) the client be informed that, unless there is agreement otherwise, the attorney must, under Rule 1.15(e), hold the flat fee in escrow 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).

[move existing comment 10 to comment 11]