

Matter of Larry Douglas Sather, Case No. 99 SA 72, Original Proceedings in Discipline before the Supreme Court of Colorado, Opinion issued May 22, 2000, amended June 12, 2000.

The Colorado Supreme Court held that an attorney earns fees only by conferring a benefit on or performing a service for a client, and must segregate any advance fees until such fees are earned, and may not label such fees as non-refundable.

The attorney in this disciplinary action treated as his own property the \$20,000 he received as a “non-refundable advance fee” before earning the fee, in violation of Colorado Rule of Professional Conduct 1.15(a). Further, in labeling the fee “non-refundable”, even though he knew it was refundable in some circumstances, the attorney violated R.P.C. 8.4(c). He also failed promptly to return all of the unearned portion of the fee after being discharged by his client, in violation of R.P.C. 1.16(d). The Court distinguished between an engagement retainer, where the retainer is earned upon receipt for such benefits as taking the case or moving the case to the top of the attorney’s priority list, an advance fee where the client agrees that the attorney may treat the fee as his property, with the understanding that it must be refunded if it is not earned or is unreasonable, and the advance fee presented in this case. The Court pointed out that in the first two instances, the fee agreement would clearly specify the nature of the benefit which rendered the engagement retainer earned upon receipt or the advance fee able to be spent by the attorney in certain circumstances. Failing such specific agreements, an attorney must segregate any fees received as an advance fee. The Court stated that labeling advance fees as non-refundable misleads clients and impermissibly burdens their right to discharge an attorney for any reason. The Court recognized that the Rules of Professional Conduct do not currently provide guidelines regarding the segregation of advance fees, and did not impose discipline for that failure. However, the Court suspended the attorney for six months and required him to undergo reinstatement proceedings pursuant to C.R.C.P. 251.59, because he knowingly mishandled client funds and deceived a client, and because he had a history of similar disciplinary actions.