

Rule 1.5 Fees For Legal Services
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.
- (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
- (c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:
 - (1) the amount of the fee or in-house expense in proportion to the value of the services performed;
 - (2) the relative sophistication of the lawyer and the client;
 - (3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (5) the amount involved and the results obtained;
 - (6) the time limitations imposed by the client or by the circumstances;
 - (7) the nature and length of the professional relationship with the client;
 - (8) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (9) whether the fee is fixed or contingent;
 - (10) the time and labor required;
 - (11) whether the client gave informed consent to the fee or in-house expense.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

- (1) a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A true retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt.
 - (2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.
- (f) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

COMMENT

Unconscionability of Fee

- [1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Business and Professions Code section 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Rev. Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.)
- [1B] Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

- [2] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement, and provide consequences for a lawyer's failure to comply with the requirements. (See, e.g., *In re Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266.)

Modifications of Agreements by which a Lawyer is Retained by a Client

- [3] Paragraph (f) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (f). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.
- [3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (f). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (f). A modification that extends the time within which a client is obligated to pay a fee ordinarily is not material and adverse

to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

- [3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in paragraph (f). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.g., *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915].) Depending on the circumstances, other Rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.
- [3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

Terms of Payment

- [4] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. See Rule 1.16(e)(2). A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.

Prohibited Contingent Fees

[6] Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances past due under child or spousal support or other financial orders because such contracts do not implicate the same policy concerns.

Payment of Fees in Advance of Services

[7] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (e)(1) or (e)(2), is subject to Rule 1.5(a) and may not be unconscionable.

[8] Paragraph (e)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (e)(1). The written true retainer

agreement should specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt.

[9] Paragraph (e)(2) describes a fee structure that is known as a "flat fee". A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be treated as an advance for fees. See Rule 1.15.

[10] If a lawyer and a client agree to a true retainer under paragraph (e)(1) or a flat fee under paragraph (e)(2) and the lawyer complies with all applicable requirements, the fee is considered the lawyer's property on receipt and must not be deposited into a client trust account. See Rule 1.15(f). For definitions of the terms "writing" and "signed," see Rule 1.0.1(n).

[11] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2) of this Rule, the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

[12] A division of fees among lawyers is governed by Rule 1.5.1.