

Proposed Rule 1.5 [4-200] “Fees for Legal Services”

(Draft #11, 12/14/09)

Summary: Proposed Rule 1.5, together with proposed Rule 1.5.1 and to a limited extent, proposed Rule 1.8.1, regulates fee arrangements between lawyers and their clients. The principal difference between the proposed Rule and Model Rule 1.5 is the former’s retention of the “unconscionability” standard for imposing discipline relating to legal fees. See Introduction.

| Comparison with ABA Counterpart | |
|--|---|
| Rule | Comment |
| <input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart | <input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart |

Primary Factors Considered

- Existing California Law

Rules

RPC 4-200, 2-200

Statute

Bus. & Prof. Code §§ 6147, 6148

Case law

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].

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Washington Rule 1.5 (2008).

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption*

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 3

Abstain 0

Minority/Position Included on Model Rule Comparison Chart Yes No

[*NOTE: The above vote records the position of the Commission on the version of Rule 1.5 submitted to the Board of Governors for consideration at its January 7–9, 2010 meeting. The version of Rule 1.5 submitted by the Commission was modified by the Board at that meeting to include paragraph (f) and related comments. Although paragraph (f) and the related comments were not a part of the Commission’s recommended rule reflected in the above vote, they were adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Paragraph (f) and the related comments were drafted by a minority of the Commission to enhance protection for clients who might encounter proposed fee agreement modifications that are adverse to their interests.]

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

California Attorneys for Criminal Justice (Rickard Santwier); San Diego Criminal Defense Bar Association (Michael L. Crowley); National Association of Criminal Defense Lawyers (John Wesley Hall); and members of the California criminal defense bar. See Public Comment Chart for a complete list of those who commented on proposed Rule 1.5.

Very Controversial – Explanation:

During the public comment period, members of the California criminal defense bar and some of their representative organizations disagreed with the Commission’s proposed paragraph (f), which provided that a lawyer shall not charge, contract for or collect a non-refundable fee, except for a true retainer. After public comment, the Commission revised the Rule to also permit non-refundable flat fees, so long as certain requirements are met. See Introduction & Explanation for paragraph (e)(2). The Commission believes the changes made may assuage the concerns raised by the criminal defense bar.

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.5* Fees for Legal Services

February 2010

(Draft rule revised following consideration of public comment and conformed to Board action.)

INTRODUCTION:

Proposed Rule 1.5 diverges from Model Rule 1.5 in several important respects: (1) An unconscionability standard is incorporated into the Rule rather than the Model Rule's "reasonable" fee standard as the bench mark for imposing discipline on lawyers, thus carrying forward the standard in current California Rule 4-200; (2) Model Rule 1.5(b), which identifies requirements for fee agreements and Model Rule 1.5(c), which sets forth requirement for contingent fee agreements, have both been deleted because those topics are already covered in Business & Professions Code §§ 6148 and 6147, respectively [see Explanation of Changes for Model Rule 1.5(b) and (c)]; (3) Model Rule 1.5(e), which concerns fee divisions among lawyers, has been deleted because that topic is covered in a separate rule, proposed Rule 1.5.1 [see Explanation of Changes for Model Rule 1.5(e)]; (4) It adds new paragraph (e), which prohibits lawyers from contracting for, charging, or accepting a non-refundable fee, except for two exceptions, one for "true" retainers and the other for flat fees that conform to the strict requirements of subparagraph (e)(2) [see Explanation of Changes for paragraph (e), in part, explaining that fee arrangements used by criminal defense lawyers under the existing California rules could be perpetuated under the "flat fee" exception]; and (5) It adds new paragraph (f), which prohibits a lawyer from making a material fee agreement modification that is adverse to a client's interests unless: (i) the client is represented by an independent lawyer regarding the modification; or (ii) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so. New paragraph (f) was added by the Board to enhance public protection and was based upon a recommendation by a minority of the Commission [see Explanation of Changes for paragraph (f); see also, Introduction to proposed Rule 1.8.1].

* Proposed Rule 1.5, Draft 11 (12/14/09).

The Commission recommends that California retain the unconscionability standard for disciplining lawyers that is found in current rule 4-200. Seventy-five years ago, in a case seeking disbarment of an attorney, the California Supreme Court rejected a “reasonable fee” standard in discipline:

We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action. As was said by the Washington court in *Re Wiltsie*, 109 Wash. 261, 186 P. 848: “The board also found, as one of the grounds for his disbarment, that the charges made for these services were excessive. We do not feel like depriving a practitioner of his right to continue his profession on a question as debatable as the propriety of the amount of a fee. Such a question is so much a matter of individual opinion that it should not be the basis for disbarment, except in the most aggravated and extreme case. So far as the record discloses, the fees were voluntarily paid, and, were it the only charge here that such fees were excessive, the extreme penalty would not be merited.”

See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402-403 [49 P.2d 832] (citations omitted). The Court then went on to state what it believed was the appropriate test for imposing discipline on a lawyer:

In the few cases where discipline has been enforced against an attorney for charging excessive fees, there has usually been present some element of fraud or overreaching on the attorney's part, or failure on the attorney's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees.

Generally speaking, neither the Board of Governors nor this court can, or should, attempt to evaluate an attorney's services in a quasi-criminal proceeding such as this, where there has been no failure to disclose to the client the true facts or no overreaching or fraud on the part of the attorney. *It is our opinion that the disciplinary machinery of the bar should not be put into operation merely on the complaint of a client that a fee charged is excessive, unless the other elements above mentioned are present.* (Emphasis added) (Citations omitted).

Nothing in the intervening 75 years warrants changing that standard. The public is provided sufficient protection against avaricious lawyers through the civil court system and, in extreme cases such as those described in the preceding paragraphs, through imposing discipline on lawyers who charge, contract for or collect an unconscionable fee.

Minority. A minority of the Commission takes the position that proposed Rule 1.5 falls short of the Commission's charge to update the California Rules of Professional Conduct to "[a]ssure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended" and to "[p]romote confidence in the legal profession and the administration of justice." It contends that by retaining "unconscionability" as the standard for imposing discipline under the Rule, the majority sends a regrettable message to the public and profession alike that California tolerates lawyers charging their clients unreasonable fees. This is an area where the Commission and the Board of Governors should reassess the continued viability of the *Herrscher* decision, on which the Commission majority has placed great reliance. The concerns the Supreme Court expressed 75 years ago about the efficacy of inquiring into the reasonableness of fees should not control the debate for a self-regulating profession in this sensitive area of lawyer-client relations. Moreover, the proposed Rule is out of step with virtually all other states on the subject of lawyer's fees. Only California and Texas adhere to an "unconscionable fee" standard. A clear majority of the remaining jurisdictions states have adopted the more public protective Model Rule standard which prohibits lawyers from charging "unreasonable fees," while a handful have retained the "clearly excessive" standard from the 1969 ABA Code of Professional Responsibility.

The minority further contends that even if *Herrscher* remains sound public policy in modern practice, there is no support in the law or in the rules of any jurisdiction for the provision in proposed rule 1.5(a) that permits lawyers to make an agreement, charge and collect unreasonable or excessive expenses so long as the expenses are not "unconscionable." The prohibition against charging unreasonable expenses is generally accepted in all jurisdictions including California. See current rule 4-210 (lawyer may advance reasonable expenses of litigation or in providing any legal service to the client); ABA Formal Opinions 93-379. There is no sound reason for departing from the Model Rule on this important issue of public protection.

Non refundable fees. During the public comment period, members of the California criminal defense bar and some of their

representative organizations disagreed with the Commission's proposed paragraph (f), which provided that a lawyer shall not charge, contract for or collect a non-refundable fee, except for a true retainer. See Public Comment Chart, below, for a complete list of those who commented on the public comment draft of the Rule. The Commission believes that the commenters who disagreed with paragraph (f) of the public comment draft misinterpret current California law, which does make fixed and flat fees refundable. Nevertheless, to address the concerns stated by those in the legal community who opposed the revision, after public comment the Commission revised paragraph (f) [now lettered "(e)"] to also permit non-refundable *flat* fees, so long as the requirements set forth in paragraph (e)(2) are satisfied. See Explanation of Changes for paragraph (e)(2), below. Stating the requirements for a non-refundable flat fee in the Rule itself explicitly brings current California standards into the Rule. The Commission believes the changes made should assuage the concerns raised by the criminal defense bar.

Minority. A minority of the Commission believes that proposed paragraphs (e) and (e)(2) as drafted would be a source of overreaching and confusion. The minority argues that there are many different fee arrangements involving flat or fixed fees. While a lawyer may require advance payment of a fixed or flat fee, the lawyer remains obligated under the rules in all jurisdictions, including Washington, to return any unearned portion. See Model Rule 1.16(d); current California Rule 3-700(D)(2) and Washington Rule 1.5(f)(2). Washington Rule 1.5(f) is not intended to authorize lawyers to charge "non-refundable fees" as proposed rule 1.5(e) purports to do. Rather, Washington's rule provides that the client and the lawyer may agree in writing that a flat or fixed fee paid in advance is the lawyer's property and, therefore, need not be placed in the lawyer's client trust account, which Washington's rule would otherwise require. Unlike the rule in most jurisdictions, California does not required advance fee payments to be place in a client trust account. However, California law does not permit lawyers to make an agreement, charge or retain a "non-refundable" flat or fixed fee that has not been earned. *Matthew v. State Bar* (1989) 49 Cal. 3d 784, 787-788; *Matter of Lais* (Rev.Dept 1998) 3 Cal. State Bar Ct. Rptr. 907, 923; *Federal Sav. & Loan Ins. Corp. v. Angell, Holmes & Lea* (9th Cir. 1988) 838 F.2d 395, 397 (applying California law). A rule that authorizes lawyers to charge "non-refundable" flat or fixed fees is not good public policy. "Non-refundable" when used to signify a prepaid fee is misleading because the lawyer's fee is never truly nonrefundable until earned. When used in connection with a "true" or "classic" retainer, the term "nonrefundable" is redundant. Not only is the label not controlling, the term "non-refundable" retainer has been the source of confusion and should not be encourage in a rule of professional conduct. Most authorities are in agreement. See, Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where*

Should it be Deposited?, 1 Fla. Coastal L. J. 293 (1999), ABA Manual on Professional Responsibility 45:109 (1993), *In re Mance*, D.C. Ct. of Appeals, 06-BGT-890 (09-24-2009). Many criminal defense lawyers, including some who submitted comments to the earlier version of proposed Rule 1.5, said they would agree to refund a portion of a flat or fixed fee to a client who changed counsel shortly after paying the fixed fee or if charges were dismissed soon after the lawyer was retained.

A separate minority of the Commission takes the position that by limiting an availability fee only to circumstances where the lawyer will additionally bill fully for his or her services when working on the engagement without giving any credit to the client for the “availability fee” payment, the proposed Rule changes existing law, limits the availability fee to situations which rarely if ever occur in real life, makes other “advance fees” subject to third party sequestration, and serves neither client nor lawyer well. The minority concludes that there are alternative means of protecting a client who becomes entitled to return of all or part of an advance fee, as explained in the attached dissent, below.

Variations in Other Jurisdictions. Forty-one jurisdictions have adopted a reasonable fee standard. Eight jurisdictions have retained the “clearly excessive or illegal” standard from the 1969 ABA Model Code of Professional Responsibility. Two jurisdictions have the “illegal or unconscionable” standard. See also State Variations, below.

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p> | <p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|---|--|
| <p>(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:</p> | <p>(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable amount for expenses. The factors to be considered<u>unconscionable or illegal</u> fee or an unreasonable amount for expenses. The factors to be considered<u>unconscionable or illegal</u> in determining the reasonableness of a fee include the following: <u>house expense.</u></p> | <p>The first sentence of paragraph (a) has been revised to substitute the recommended standard – unconscionable or illegal – for the Model Rule’s “reasonable” standard. See Introduction.</p> <p>The second sentence has been similarly revised and moved to paragraph (c) as that paragraph’s introductory clause.</p> <p>The limitation in paragraph (c) on charging an unconscionable or illegal expense is limited those expenses charged that incurred in-house by a lawyer, over which the lawyer has control. The Commission was concerned that some expenses incurred, for example from retaining consultants and experts, might be viewed as unconscionable. However, the cost of such expenses are often beyond the ability of a lawyer to control.</p> |
| | <p>(b) <u>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.</u></p> | <p>The Commission recommends including a definition for “unconscionable” fee, a definition not provided in current rule 4-200. The language of the definition is taken from California decisional law, including two Supreme Court cases. See <i>Herrscher v. State Bar</i> (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; <i>Goldstone v. State Bar</i> (1931) 214 Cal. 490 [6 P.2d 513]. Paragraph (b) is intended to be used in conjunction with the factors set forth in paragraph (c) as an analytical framework for determining whether a fee is unconscionable. The last sentence specifies the time at which the conscionability of a fee is to be determined.</p> |

* Proposed Rule 1.5, Draft 11 (12/14/09). Redline/strikeout showing changes to the ABA Model Rule

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p> | <p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|---|---|
| | <p>(c) <u>Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:</u></p> | <p>Paragraph (c) is based on the second sentence and subparagraphs of Model Rule 1.5(a), revised by substituting the recommended “unconscionable” standard.</p> |
| | <p>(1) <u>the amount of the fee or in-house expense in proportion to the value of the services performed;</u></p> | <p>Subparagraph (1) has no counterpart in the Model Rule. Carried forward from current rule 4-200(B)(1), subparagraph (1) recognizes that a lawyer should assess the costs and benefits of the lawyer’s services in determining what tasks to perform.</p> |
| | <p>(2) <u>the relative sophistication of the lawyer and the client;</u></p> | <p>Subparagraph (2) has no counterpart in the Model Rule. Carried forward from current rule 4-200(B)(2), subparagraph (1) recognizes that the experience of a client in using legal services can be relevant in determining the conscionability of a fee.</p> |
| <p>(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;</p> | <p>(13) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;</p> | <p>Subparagraph (3) is identical to Model Rule 1.5(a)(1), except that the phrase “the time and labor required” has been given status as a separate factor for consideration. See subparagraph (10).</p> |
| <p>(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;</p> | <p>(24) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;</p> | <p>Subparagraph (4) is identical to Model Rule 1.5(a)(2).</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p> | <p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|---|---|
| <p>(3) the fee customarily charged in the locality for similar legal services;</p> | <p>(3) the fee customarily charged in the locality for similar legal services;</p> | <p>The Commission recommends that Model Rule 1.5(a)(3) be rejected because the identified factor, while relevant to determining the reasonableness of a fee, is not relevant to determining the conscionability of a fee.</p> |
| <p>(4) the amount involved and the results obtained;</p> | <p>(4⁵) the amount involved and the results obtained;</p> | <p>Subparagraph (5) is identical to Model Rule 1.5(a)(4).</p> |
| <p>(5) the time limitations imposed by the client or by the circumstances;</p> | <p>(5⁶) the time limitations imposed by the client or by the circumstances;</p> | <p>Subparagraph (6) is identical to Model Rule 1.5(a)(5).</p> |
| <p>(6) the nature and length of the professional relationship with the client;</p> | <p>(6⁷) the nature and length of the professional relationship with the client;</p> | <p>Subparagraph (7) is identical to Model Rule 1.5(a)(6).</p> |
| <p>(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and</p> | <p>(7⁸) the experience, reputation, and ability of the lawyer or lawyers performing the services; and</p> | <p>Subparagraph (8) is identical to Model Rule 1.5(a)(7).</p> |
| <p>(8) whether the fee is fixed or contingent.</p> | <p>(8⁹) whether the fee is fixed or contingent¹;</p> | <p>Subparagraph (9) is identical to Model Rule 1.5(a)(8).</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p> | <p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|---|---|
| | <p><u>(10) the time and labor required;</u></p> | <p>Subparagraph (10) consists of language that has been moved from Model Rule 1.5(a)(1) and given its own subparagraph.</p> |
| | <p><u>(11) whether the client gave informed consent to the fee or in-house expense.</u></p> | <p>Subparagraph (11) has no counterpart in the Model Rule. It is carried forward from current rule 4-200(B)(11), which provides: “(11) The informed consent of the client to the fee.”</p> |
| <p>(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.</p> | <p>(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.</p> | <p>The Commission recommends deletion of Model Rule 1.5(b), which prescribes what a lawyer is obligated to communicate to a client about the scope of representation and basis or rate of the fee. Those requirements are already addressed in Business & Professions Code § 6148. Under that statute, the client already has a remedy for a lawyer’s violation of the statute: having the contract voided. Section 6148(c). The Commission does not recommend that a violation of section 6147 subject a lawyer to discipline under this Rule in addition to the remedy provided in the statute.</p> |
| <p>(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue</p> | <p>(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue</p> | <p>The Commission recommends deletion of Model Rule 1.5(c), which prescribes a lawyer’s duties when the lawyer is retained on a contingent fee basis. Those requirements are already addressed in Business & Professions Code § 6147. Under that statute, the client already has a remedy for a lawyer’s violation of the statute: having the contract voided. Section 6147(b). The Commission does not recommend that a violation of section 6147 subject a lawyer to discipline under this Rule in addition to the</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p> | <p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|---|---|
| <p>to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.</p> | <p>to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.</p> | <p>remedy provided in the statute.</p> |
| <p>(d) A lawyer shall not enter into an arrangement for, charge, or collect:</p> <p>(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or</p> <p>(2) a contingent fee for representing a defendant in a criminal case.</p> | <p>(d) A lawyer shall not enter into an arrangement for, charge, or collect:</p> <p>(1) any fee in a domestic relationsfamily law matter, the payment or amount of which is contingent upon the securing of a divorcedissolution or declaration of nullity of a marriage or upon the amount of alimonyspousal or child support, or property settlement in lieu thereof; or</p> <p>(2) a contingent fee for representing a defendant in a criminal case.</p> | <p>Paragraph (d) is based on Model Rule 1.5(d), except that the language in subparagraph (1) has been revised to conform to the language used in that area of law in California, e.g., "family law" in place of "domestic relations".</p> <p>The Commission recommends adoption of Model Rule 1.5(d) as revised. The Commission recognizes that there are other kinds of contingent fee cases that might be prohibited, for example, the representation of a governmental entity by a private lawyer or firm on a contingent basis, (see, e.g. County of Santa Clara v. Superior Court (2008) 74 Cal.Rptr.3d 842, review granted, 80 Cal.Rptr.3d 629 (7/23/2008)). However, the two kinds of cases regulated under Model Rule 1.5(d) have traditionally been viewed as implicating important Constitutional rights or public policy. See, e.g., Restatement (3d) Law of Lawyers § 35, comments f.(i), f.(ii) and g.</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p> | <p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|--|--|
| | | <p>In the family law matters, California has a strong public policy of promoting reconciliation and maintaining the family unit. Because a lawyer who is being paid on a contingent basis would recover a fee only if the marriage is dissolved and property apportioned, permitting contingent fees in these cases would undermine the California policy.</p> <p>In criminal cases, a lawyer who is being paid on a contingent basis would recover a fee only if the client is found not guilty. That would create a conflict for a lawyer if the best interests of the client, in light of the evidence, warrant the client entering a plea.</p> |
| <p>(e) A division of a fee between lawyers who are not in the same firm may be made only if:</p> <p>(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;</p> <p>(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and</p> <p>(3) the total fee is reasonable.</p> | <p>(e) A division of a fee between lawyers who are not in the same firm may be made only if:</p> <p>(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;</p> <p>(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and</p> <p>(3) the total fee is reasonable.</p> | <p>The Commission recommends deletion of Model Rule 1.5(e) because the subject of fee divisions between lawyers is addressed in a separate rule. See proposed Rule 1.5.1. The Commission determined that fee divisions should be addressed in a free-standing rule because: (i) proposed Rule 1.5.1 is a substantial departure from the Model Rule (ii) the Commission is recommending several revisions to current rule 2-200 to impose more obligations on lawyers and enhance client protection, and (iii) of the large amount of litigation this Rule has traditionally engendered. See proposed Rule 1.5.1, Introduction, ¶. 8.</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p> | <p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|---|---|---|
| | <p><u>(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:</u></p> | <p>Paragraph (e) has no counterpart in the Model Rule. The Commission recommends its adoption because charging a non-refundable fee is inimical to California's strong policy of client protection. The prohibition stated in the introductory clause of paragraph (e) is subject to two traditional exceptions, as discussed below. Much of the language used in this paragraph is taken from Washington Rule 1.5(f).</p> |
| | <p><u>(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.</u></p> | <p>Subparagraph (1) provides one exception to the non-refundable fee prohibition in paragraph (e): a true retainer, which carries forward an exception traditionally recognized in the profession and already found in current rule 3-700(D)(2). Much of the language used in this subparagraph is taken from Washington Rule 1.5(f).</p> |
| | <p><u>(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</u></p> | <p>Subparagraph (2) provides the second exception to the non-refundable fee prohibition in paragraph (e): a flat fee that satisfies the requirements set forth in the subparagraph. Subparagraph (1) was added following public comment to address concerns raised by members of the California criminal defense bar that prohibiting such earned-on-receipt flat fees and requiring all such fees paid to criminal defense lawyers to be advance fees, could result in the government impounding the fee advance, thereby preventing a criminal defendant from retaining the defendant's counsel of choice. The Commission believes the conditions marked by</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p> | <p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|---|--|---|
| | <p><u>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 client-lawyer 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.</u></p> | <p>romanettes in the subparagraph will operate to prevent abuses of the flat fee exception and avoid the problems envisioned by the defense bar. As with subparagraph (1), much of the language used in subparagraph (2) is derived from Washington Rule 1.5(f). See the Public Comment chart for a complete list of the members of the California criminal defense bar who submitted public comment on proposed Rule 1.5.</p> |
| | <p><u>(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.</u></p> | <p>Paragraph (f) addresses fee agreement modifications that occur during the course of a representation. Paragraph (f) has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. In response to Board member concerns about the Commission's initial proposal for limited applicability of Rule 1.8.1 to fee agreement modifications, paragraph (f) was drafted and garnered the support of a minority of the Commission. The minority drafted paragraph (f) to afford new public protection by prohibiting a lawyer from making a material fee agreement modification that is adverse to a client's interests unless: (1) the client is represented by an independent lawyer regarding the modification; or (2) the lawyer advises the client in writing to seek the advice of an independent lawyer and is provided a reasonable opportunity to do so. Fee agreement modifications that are not adverse to a client's interests are not prohibited by paragraph (f) and, in this regard, there are new comments that provide guidance for applying the rule. See also Explanation of Changes for Comments [3] – [3C].</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|---|---|---|
| <p><i>Reasonableness of Fee and Expenses</i></p> <p>[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. . . .</p> <p>[COMMENT [1] is continued in the next row]</p> | <p>Reasonableness<i>Unconscionability</i> of Fee and Expenses</p> <p>[1] Paragraph (a) <i>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 (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; In re Harney (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 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 (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.)</i></p> | <p>The title for this section of the Rule has been revised to reflect the standard being recommended.</p> <p>The Commission recommends that Model Rule 1.5, cmt. [1] be rejected because it addresses the reasonable fee standard, which the Commission has recommended be rejected. See Introduction.</p> <p>In its place, the Commission has proposed Comment [1] and [1B], which clarifies paragraphs (a) and (b) and provides additional guidance for their application by citing to California decisional law concerning illegal or unconscionable fees.</p> |
| <p>[COMMENT [1] continued]</p> <p>. . . . The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses</p> | <p>[1B] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances<i>defines an unconscionable fee. (See Herscher v. State Bar (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; Goldstone v. State Bar (1931) 214 Cal.</i></p> | <p>Comment [1B] emphasizes that the eleven factors in paragraph (c) are not exclusive, and that not all of them will necessarily be relevant in every instance. The next-to-last sentence observes that contingent fees are subject to the same unconscionability standard as other fee arrangements. Finally, the last sentence</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|---|---|
| <p>for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.</p> | <p><u>490 [6 P.2d 513].</u> The factors specified in <u>paragraphs (c)(1) through (811) that are to be considered in determining whether a fee is conscionable</u> are not exclusive. Nor will each factor <u>necessarily</u> be relevant in each instance. <u>Paragraph <i>Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a)</i> also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in this Rule. In-house, such as copying, or for other expenses incurred in-house, such as telephone</u> charges, <u>either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred</u> by the lawyer <u>or firm as opposed to third-party charges.</u></p> | <p>explains what is meant by an “in-house expense.”</p> |
| <p><i>Basis or Rate of Fee</i></p> <p>[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total</p> | <p><i>Basis or Rate of Fee</i></p> <p>[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total</p> | <p>The Commission recommends that Model Rule 1.5, cmt. [2] be rejected for the reasons given in the Explanation of Changes for Model Rule 1.5(b).</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|--|---|
| <p>amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.</p> | <p>amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the fee terms of the engagement reduces the possibility of misunderstanding.</p> | |
| <p>[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.</p> | <p>[3] <i>Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.</i></p> | <p>The Commission recommends that Model Rule 1.5, cmt. [3] be rejected for the reasons given in the Explanation of Changes for Model Rule 1.5(c).</p> |
| | <p><u>[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., <i>In re Harney</i> (1995) 3 Cal. State Bar Ct. Rptr. 266.)</u></p> | <p>Comment [2] has no counterpart in the Model Rule. It contains cross-references to Bus. & Prof. Code §§ 6147 and 6148, which govern contingent and other fee agreements in California. See also Explanation of Changes Model Rule 1.5(b) and (c).</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|--|---|
| | <p><u><i>Modifications of Agreements by which a Lawyer is Retained by a Client</i></u></p> <p><u>[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.</u></p> | <p>See above explanation of paragraph (f). Comment [3] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3] clarifies that the Paragraph (f) prohibition applies only to a material fee agreement modification with a current client that is adverse to the client's interests, provides a standard for determining whether a modification is material, and clarifies a common agreement that would not be material.</p> |
| | <p><u>[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</u></p> | <p>See above explanation of paragraph (f). Comment [3A] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3A] addresses the issue of whether a particular fee agreement modification is "material" and "adverse." It provides an example of a modification that is material and adverse and an example of a modification that is not material and not adverse.</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|---|---|--|
| | <p><u>adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.</u></p> | |
| | <p><u>[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. <i>Setzer v. Robinson</i> (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., <i>Ramirez v. Sturdevant</i> (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; <i>Berk v. Twentynine Palms Ranchos, Inc.</i> (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; <i>Carlson, Collins, Gordon & Bold v. Banducci</i> (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.</u></p> | <p>See above explanation of paragraph (f). Comment [3B] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the Commission. Comment [3B] clarifies that while only certain fee agreement modifications are subject to paragraph (f), lawyers still have professional responsibilities to clients with respect to all fee modifications. In general, these responsibilities arise from the lawyer's fiduciary duties and are addressed in ethics opinions and case law. The Comment is intended to alert lawyers about the existence of such duties and to direct lawyers to examples of current law on the subject. The Comment also provides cross references to Rule 1.4 regarding client communication, Rule 1.7 regarding conflicts of interests, and the statutory prohibition against conduct constituting moral turpitude found in the State Bar Act.</p> |
| | <p><u>[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</u></p> | <p>See above explanation of paragraph (f). Comment [3C] has no counterpart in the Model Rule and was adopted by the Board of Governors based upon a recommendation of a minority of the</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|---|---|---|
| | <p>when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.</p> | <p>Commission. Comment [3C] explains that Rule 1.8.1 applies to a fee agreement modification that confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client. Such fee modifications would be subject to the full rigorous protocol of Rule 1.8.1.</p> |
| <p><i>Terms of Payment</i></p> <p>[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.</p> | <p><i>Terms of Payment</i></p> <p>[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. (See Rule [1.16(d)-(2)]) A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client1.8.1.</p> | <p>Comment [4] is based on Model Rule 1.5, cmt. [4]. The second sentence has been deleted because it concerns Model Rule 1.8(i), which the Commission has not recommended be adopted. The other changes are to correct the cross-references to the appropriate proposed Rule or provision of a proposed Rule.</p> |
| <p>[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</p> | <p>[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</p> | <p>Comment [5] is identical to Model Rule 1.5, cmt. [5] except that the last, hortatory sentence of the Model Rule comment has been deleted.</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|---|--|--|
| <p>a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.</p> | <p>a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.</p> | |
| <p><i>Prohibited Contingent Fees</i></p> <p>[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.</p> | <p><i>Prohibited Contingent Fees</i></p> <p>[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision (1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances <u>past</u> due under <u>child or spousal</u> support, alimony or other financial orders because such contracts do not implicate the same policy concerns.</p> | <p>Comment [6] is based on Model Rule 1.5, cmt. [6]. The first sentence has been deleted because it simply restates the prohibition in paragraph (d)(1) and uses terminology different from that used in California. See Explanation of Changes for paragraph (d). The second sentence has been revised to substitute terminology used in California for the Model Rule terminology.</p> |
| | <p><u><i>Payment of Fees in Advance of Services</i></u></p> <p>[7] <u>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.</u></p> | <p>Comment [7] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [10].</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|---|--|
| | <p><u>[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.</u></p> | <p>Comment [8] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [13]. It carries forward the substance of the definition for "true retainer" in current rule 3-700(D)(2). The Comment also provides guidance on determining whether a particular fee arrangement is a true retainer.</p> |
| | <p><u>[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.</u></p> | <p>Comment [9] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [14]. The Comment clarifies that if all the requirements set forth in subparagraph (e)(2) are not satisfied, the flat fee must be treated as if it were an advance fee under Rule 1.15.</p> |
| | <p><u>[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</u></p> | <p>Comment [10] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [15]. The Comment clarifies the legal effect of satisfying the requirements set forth in paragraphs (e)(1) and (2). Brackets have been placed around</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|---|--|---|
| | <p>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).</p> | <p>"1.0(n)" pending the Commission's final recommendation on whether to adopt that rule.</p> |
| | <p>[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).</p> | <p>Comment [11] has no counterpart in the Model Rule. Comment [11] points lawyers to Rule 1.15(d)(2) for their obligations when disputes arise concerning fees advanced under paragraph (e)(1) or (e)(2).</p> |
| <p><i>Division of Fee</i></p> <p>[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 (e) 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</p> | <p><i>Division of Fee</i></p> <p>[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 (e) 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</p> | <p>Model Rule 1.5, cmts. [7] and [8] have been deleted because they relate to fee divisions, which are covered separately under proposed Rule 1.5.1. See also Explanation of Changes for paragraph (c).</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|--|---|
| <p>representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.</p> | <p>representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.</p> | |
| <p>[8] Paragraph (e) 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.</p> | <p>[8] Paragraph (e) 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</p> | <p>See Explanation of Changes for Model Rule 1.5, cmt. [7].</p> |
| <p><i>Disputes over Fees</i></p> <p>[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.</p> | <p><i>Disputes over Fees</i></p> <p>[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.</p> | <p>The Commission has recommended that Comment [9] be deleted because arbitration of fee disputes in California is largely governed under the Mandatory Fee Arbitration Act, Bus. & Prof. Code § 6200 et seq.</p> |

| <p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p> | <p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|---|--|---|
| | <p>[12] A division of fees among lawyers is governed by Rule 1.5.1.</p> | <p>Comment [12] provides a cross-reference to Rule 1.5.1, the proposed Rule that governs fee divisions.</p> |

Rule 1.5 Fees For Legal Services

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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 ~~for purposes of~~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 ~~fraud~~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 ~~at stake~~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) ~~the informed consent of whether~~ the client gave informed consent to the fee or in-house expense.
- ~~(d) Expenses for which the client will be charged cannot be unconscionable.~~
- ~~(ed)~~ 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.

(fe) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except ~~that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.;~~

(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 client-lawyer 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 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* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. (e.g., *Birbrower, MontalbanoMontalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.) ~~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.~~

~~Non-refundable Fee~~

[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.

~~[2] This Rule prohibits a lawyer from making an agreement for, charging, or collecting a non-refundable fee. However, a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.~~

Basis or Rate of Fee

[32] 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.)

~~[4] With respect to modifications to the basis or rate of a fee after the commencement of the attorney-client relationship, see Rule 1.8.1, Comments [5], [6].~~

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

[54] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule 1.16(e) ~~[-3-700(De)(42)-]~~) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1 ~~[-3-300].~~

[65] 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

[76] Paragraph (e)(1) ~~prohibits a lawyer from charging a contingent fee in a family law matter when payment is contingent upon the securing of a dissolution or nullity of a marriage or upon the amount of spousal or child support or property settlement to be obtained. This provision~~ 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

- [812] ~~Division~~ A division of fees among lawyers is governed by Rule 1.5.1 ~~[2-200]~~.

Rule 4-2001.5 Fees for Legal Services
(Comparison of the Current Proposed Rule to Current California Rule)

- (A)(a) A ~~member~~lawyer shall not ~~enter into~~make an agreement for, charge, or collect an ~~illegal or~~unconscionable ~~or illegal~~ fee ~~or an unconscionable or illegal in-house expense~~.
- (B)(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. ~~Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:~~
- (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~~the amount of the fee or in-house expense in proportion to the value of the services performed.;
 - (2) ~~The~~the relative sophistication of the ~~member~~lawyer and the client.;
 - (3) ~~The~~the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.;
 - (4) ~~The~~the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the ~~member~~lawyer.;
 - (5) ~~The~~the amount involved and the results obtained.;
 - (6) ~~The~~the time limitations imposed by the client or by the circumstances.;
 - (7) ~~The~~the nature and length of the professional relationship with the client.;
 - (8) ~~The~~the experience, reputation, and ability of the ~~member~~lawyer or ~~members~~lawyers performing the services.;
 - (9) ~~Whether~~whether the fee is fixed or contingent.;
 - (10) ~~The~~the time and labor required.;
 - (11) ~~The informed consent of 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 client-lawyer 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* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 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* (Review 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.

Rule 1.5: Fees For Legal Services
(Clean version of the rule prepared by the Commission at its December meeting.)

- (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 client-lawyer 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* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 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* (Review 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.

Proposed Rule 1.5 Fees for Legal Services Rules Revision Commission — Minority Dissent

Availability Fees, Advance Fees, and Flat Fees Paid in Advance

First, availability fees are clearly earned by the lawyer upon receipt, not subject to trust account deposit, and nonrefundable. *Baranowski v. State Bar* (1979) 24 Cal. 3d 153, 163 et seq., plainly so held. However, since that decision the State Bar Court (not the Supreme Court, whose *Baranowski* case stands unassailed and has been cited elsewhere as authoritative, see, eg., *In re McDonald Bros. Const. Inc.* (Bk. N.D. Ill. 1990) 114 B.R. 989, 997-1002) has whittled away at its holding in *Matter of Fonte* (1994) 2 Cal. St. Bar Rptr. 752, and *In re Brockway* (2006) 4 Cal. St. Bar Rptr. 944. Thus, in practice, the protection a lawyer has on receipt of an availability fee under *Baranowski* has been eroded and scarcely exists.

Secondly, in real life there is no point or almost no point in an availability fee as we have narrowly defined that term, i.e., a fee purely for having the lawyer available – presumably, by refusing other work which may or may not come along – **but** where the lawyer is also required to charge the client separately for the work when the lawyer performs that work. Under what circumstances would a lawyer institute this arrangement, and what would be the required non-unconscionable level at which such a second fee could be established? Or how would one measure the value of time (i.e., of availability), except by the work to be done and separately billed for?

Yet, as criminal defense lawyers have made amply clear to the Commission. and as applies equally to lawyers representing bankrupts and certain other debtors, and perhaps other relationships which have not been brought forward to the Commission's attention, such lawyers need to have a fully earned fee upon engagement, because to the extent that the fee has not been fully earned (i.e., that it may be refunded), it does not wholly belong to the lawyer; and law enforcement or similar adverse parties may seize the funds from the lawyer, leaving the lawyer unpaid and, unless a court orders the lawyer to work without fee, leaving the client unrepresented.

Thus, one defect in the proposed Rule is that in the praiseworthy effort to protect clients against certain potential improprieties – the lawyer's being paid and then not performing the work, or the client changing her mind and not being able to recover an advance fee so that she can pay a successor – we are creating another, serious trap for lawyer and client alike.

The same fault underlies the proposed Rule that provides that when a lawyer accepts an availability fee, there must also be a separate charge for the work being done, beyond the availability fee: if that is not the case, it is not a true availability fee. The availability fee may thus never be used to pay the lawyer for actual work on the client's matter.

This concept comes out of early case law; and indeed, in the early days of California jurisprudence, there may have been situations where a client came to a lawyer to say that the client would pay the lawyer just to be able to call on him if needed. However, this was before the rise of the billable hour; and there is no authority and to my knowledge no anecdotal experience which indicates that more recent history (say, since WW II) actually shows such situations, where an availability fee was followed by hourly or other pro rata charges for the work when done.

So, the Commission is either carrying forward into the 21st century a formulation which has had no meaning since the 19th, or ignoring the true meaning of an availability fee.

The motive behind this approach is client protection – as is true with the post-*Baranowski* cases cited above. However, lawyers in fact use the availability fee, or a

“fully earned at the time of payment” version of a flat fee, for legitimate and client-beneficial purposes. The Commission’s formulation undercuts both points of this established practice, which is allowed under the current California Rule. In the interest of one aspect of client protection, the proposed Rule deprives both client and lawyer of an important and necessary means to allow clients to retain lawyers, and lawyers to accept certain engagements, in socially valuable situations.

There are other ways to solve this problem. One, but not necessarily the only one, is **not** to limit or forbid “true retainer” fees or fully earned advance fees which also include payment for work to be done, **but rather** to require that lawyers may not willfully (a) fail to do the work whose value is included in the flat fee or availability retainer, or (b) refuse to refund a prorated portion if the contemplated work is not done.

Rule 1.5: Fees for Legal Services

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew Perlman. The text relevant to proposed Rule 1.5 is highlighted)

Arizona: Rule 1.5(b) requires lawyers to enter written fee agreements “before or within a reasonable time after commencing the representation.” Arizona adds Rule 1.5(d)(3), which provides that when a lawyer denominates a fee as “earned upon receipt” or “nonrefundable,” the client must be informed “in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).” Finally, Comment 6 says that Rule 1.5(d) allows a contingent fee “for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns” as other domestic relations matters.

Arkansas: Rule 1.5(d)(1) adds that in a domestic relations matter, “after a final order or decree is entered a lawyer may enter into a contingent fee contract for collection of payments which are due pursuant to such decree or order.”

California: Rule 4-200 forbids lawyers to “enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Unconscionability is determined based on facts “existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.” The rule contains 11 factors to weigh in determining

conscionability, many of them derived from the Model Rules. In addition, see Business & Professions Code §§ 6147-6149 (governing contingency fee contracts and other fee arrangements), and Business & Professions Code §§ 6200-6206 (establishing a system and procedures for arbitrating fee disputes).

Colorado: Rule 1.5(b) requires a lawyer who has not regularly represented a client to communicate the basis or rate of the fee and expenses “in writing.” Rule 1.5(b) also provides: “Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a),” which imposes stringent requirements on business transactions with clients. Colorado Rule 1.5(c) also requires more elaborate disclosures in contingency fee cases than ABA Model Rule 1.5.

Delaware: Rule 1.5(e) does not require that the client know how lawyers in different firms are dividing a fee. Delaware adds Rule 1.5(f), which allows the lawyer to require the client to pay fees in advance, provided that the lawyer gives the client “a written statement” explaining, among other things, that “the fee is refundable if not earned.”

District of Columbia: D.C. Rule 1.5(b) requires a written fee agreement where the lawyer has not “regularly represented” the client. Rule 1.5(d) forbids contingent fees in

criminal cases but not in matrimonial cases. Rule 1.5(e) does not require that the client be told how much each lawyer is to receive when fees are divided between lawyers not in the same firm, but the client must be told “the effect of the association of lawyers outside the firm on the fee to be charged.”

Florida: Rule 4-1.5(a) prohibits any fee “generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar” or that is “clearly excessive.” A clearly excessive fee includes (1) a fee that exceeds a reasonable fee by so much that it constitutes “clear overreaching or an unconscionable demand,” or (2) a fee sought or secured “by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.” Florida also caps the percentage amount of any contingent fee.

Regarding fee sharing between lawyers in different firms, Rule 4-1.5(f)(2) requires that each participating lawyer “shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved.” Florida also tightly controls the terms on which lawyers in different firms may share fees. Rule 4-1.5(f)(4)(D) provides that “the lawyer assuming primary responsibility for the legal services” must receive “a minimum of 75% of the total fee,” and “the lawyer assuming secondary responsibility” can receive “a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.” But if two or more lawyers expect to “accept substantially equal active participation in the providing of legal services,” then they may seek court authorization to divide the fee however they propose “based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed.”

Florida Rule 4-1.5(g) provides that if lawyers in different firms share fees on a basis not in proportion to the amount of work done, then each lawyer must not only agree to assume “joint legal responsibility for the representation” but must also agree “to be available for consultation with the client.

The Florida Supreme Court may also order any lawyer found guilty of violating the fee rules “to forfeit the fee or any part thereof,” either by returning the excessive part of any fee to the client or by forfeiting all or part of an otherwise improper fee to the Florida Bar Clients' Security Fund. See Florida Supreme Court Rule 3-5.1(h).

Finally, Rule 4-1.5(i) provides that, if a retainer agreement includes a mandatory arbitration clause, the agreement must include a verbatim, bolded recitation of the notice that appears at the end of Rule 1.5(i).

Georgia adds to Rule 1.5(c) that a lawyer must include in the written statement at the conclusion of a contingent fee matter the amount of the attorney's fee and “(D) if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.” Georgia also adds to Rule 1.5(e)(2) that the client must be “advised of the share that each lawyer is to receive” when lawyers in different firms share a fee.

Illinois provides that “the prohibition set forth in Rule 1.5(d)(1) shall not extend to representation in matters subsequent to final judgments in such cases.” Illinois also adds the following subparagraphs:

(e) Notwithstanding Rule 1.5(c), a contingent fee agreement regarding the collection of commercial accounts or of insurance company subrogation claims may be made in accordance with the customs and practice in the locality for such legal services....

(g) A division of fees [between lawyers not in the same firm] shall be made in proportion to the services performed and responsibility assumed by each lawyer, except where the primary service performed by one lawyer is the referral of the client to another lawyer and

(1) the receiving lawyer discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit, and

(2) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer....

(i) For purposes of Rule 1.5 “economic benefit” shall include:

(1) the amount of participation in the fee received with regard to the particular matter;

(2) any other form of remuneration passing to the referring lawyer from the receiving lawyer, whether or not with regard to the particular matter; and

(3) an established practice of referrals to and from or from and to the receiving lawyer and the referring lawyer.

(j) Notwithstanding Rule 1.5(f), a payment may be made to a lawyer formerly in the firm, pursuant to a separation or retirement agreement.

Massachusetts: Rule 1.5(c) does not require a contingent fee to be in writing if it concerns “the collection of commercial accounts” or “insurance company subrogation claims,” but all other contingent fee agreements must be in writing and must

contain greater detail than ABA Model Rule 1.5(c) requires. Rule 1.5(e) permits a lawyer to pay a fee to a referring lawyer even when the referring lawyer does not perform any services or take joint responsibility for the matter. Although the client must consent to such a referral fee, the client's consent need not be in writing, and a comment indicates that the lawyer does not have to disclose the size of the referral fee unless the client asks.

Michigan: Rule 1.5(d) forbids contingent fees in “a domestic relations matter” without qualification. In personal injury and wrongful death claims, Michigan Court Rule 8.121 sets a maximum contingent fee of “one-third of the amount recovered” and provides that receiving, retaining, or sharing a larger contingent fee “shall be deemed to be the charging of a ‘clearly excessive fee’ in violation of” Rule 1.5(a). Michigan omits ABA Model Rule 1.5(e)(1).

New Hampshire: Rule 1.5(e) permits fee sharing between lawyers in different firms if the division is made “either: (a) in reasonable proportion to the services performed or responsibility or risks assumed by each, or (b) based on an agreement with the referring lawyer,” provided that in either case the lawyers obtain the client's signed written agreement to the division of fees and the total fee charged by all lawyers “is not increased by the division of fees and is reasonable.”

New Jersey: Rule 1.5(b) requires a fee agreement to be in writing if the lawyer has not regularly represented the client. In addition, New Jersey has adopted various court rules that tightly control contingent fees, especially in tort cases.

New York: DR 2-106 forbids an “illegal or excessive fee” and lists eight factors to determine whether a fee satisfies the rule. New York provides heightened protection for clients in domestic relations matters, including a prohibition on nonrefundable fees.

In civil matters, New York lawyers must resolve fee disputes “by arbitration at the election of the client” pursuant to 22 N.Y.C.R.R. Part 137, which requires New York attorneys to offer fee arbitration to clients in most civil matters, and to submit to fee arbitration if a client in a civil matter requests it. Under §137.1(b), the fee arbitration program does not apply to (1) criminal matters; (2) fee disputes involving “less than \$1,000 or more than \$50,000” (unless an arbitral body and the parties all consent); (3) “claims involving substantial legal questions, including professional malpractice or misconduct”; (4) claims for relief other than adjusting a legal fee; (5) disputes over a legal fee set by a court; (6) disputes where no legal services have been rendered for more than two years; (7) disputes with out-of-state attorneys who either have no office in New York or did not render any material portion of the services in New York; and (8) disputes where the person requesting arbitration is neither the client nor the client’s legal representative.

Moreover, 22 N.Y.C.R.R. Part 1215 provides as follows:

Part 1215 Written Letter of Engagement

§1215.21 Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term “client” shall mean the entity that engages the attorney. Where there is a

significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney’s fees to be charged, expenses and billing practices; and,

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

§1215.2 Exceptions

This section shall not apply to

(a) representation of a client where the fee to be charged is expected to be less than \$3000;

(b) representation where the attorney’s services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

North Carolina: Rule 1.5(a) forbids a “clearly excessive fee” but otherwise substantially tracks ABA Model Rule 1.5(a). North Carolina adds Rule 1.5(f), which provides as follows:

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bars program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

Ohio: Rule 1.5(b) requires fee agreements to be in writing unless the lawyer has “regularly represented” the client and is charging on the same basis or the fee is \$500 or less. Any change in the basis of a fee previously communicated must be “promptly communicated to the client in writing.” Rule 1.5(e), in permitting division of fees, does not require that the client be informed of the amount each lawyer is receiving.

Oregon: Among other variations, Rule 1.5(d) permits a division of fees between lawyers in different firms if “(1) the client gives informed consent to the fact that there will be a division of fees, and (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.”

Pennsylvania: Rule 1.5(a) prohibits an “illegal or clearly excessive fee” (rather than an “unreasonable” one) and makes

no reference to expenses. Rule 1.5(b) requires a fee agreement to be “in writing” if a lawyer has not “regularly represented a client.” Pennsylvania Rule 1.5(e) requires only that “(1) the client is advised of and does not object to the participation of an the lawyers involved, and (2) the total fee of the lawyers is not illegal or clearly excessive....”

Rhode Island: Rule 1.5(b) provides that if a lawyer has not regularly represented a client, the basis or rate of the fee “shall be communicated to the client in writing.” The same rule requires lawyers to send quarterly bills unless the client agrees to a different billing schedule or the fee is fixed or contingent.

South Carolina: Rule 1.5(d)(1) expressly permits a lawyer to charge a contingency fee “in collection of past due alimony or child support.”

Texas: Rule 1.04(a) forbids “illegal” or “unconscionable” fees and lists the same considerations as in ABA Model Rule 1.5. The Texas Rules do not forbid contingent fees in family law matters but the Comment says they are “rarely justified.” Rule 1.04(f), which governs the division of fees between lawyers in different firms, generally parallels ABA Model Rule 1.5(e) but requires client consent “in writing to the terms of the arrangement prior to the time of the association or referral proposed...”

Virginia: Rule 1.5(b) provides in part: “The lawyer’s fee shall be adequately explained to the client.” Rule 1.5(d)(1) forbids contingent fees in “a domestic relations matter, except in rare instances.” Comment 3a says that those rare instances include situations where “the parties are divorced and reconciliation is not a realistic prospect.” Rule 1.5(e) requires full disclosure to the client when lawyers are dividing a fee. The “terms of the division of the fee” must be “disclosed to the client,” the client must consent, the total fee must be reasonable, and the fee division and client consent must be

“obtained in advance of the rendering of legal services.”
However, while a writing is said to be preferable, none is required.

Wisconsin: Rule 1.5(e) permits lawyers in different firms to divide a fee only if the total fee is reasonable and the lawyers satisfy several other specific requirements.

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

TOTAL = 42 Agree = 3
Disagree = 39
Modify = 0
NI = 0

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|--|--|
| 1 | Anonymous | D | | | <p>Criminal practitioners are often unable to collect fees as it is.</p> <p>Defendants have options should they be misrepresented.</p> <p>Agrees with Barry Tarlow's comments.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------------|-----------------------|-----------------------------|----------------|--|--|
| 2 | Bloom, Allen | D | | | <p>Non-refundable and fixed fee arrangements (1) provide certainty to the client; (2) provide better and full service to the client because the client need not weigh the benefits of pursuing a particular meritorious motion or legal task against what it would cost; (3) increase access to the attorney because a client will not be billed for communications with the attorney.</p> <p>A non-refundable fee agreement is not something the client must accept; the client is always free to hire a different lawyer.</p> <p>A client may refuse arbitration in a dispute regarding a refundable fee agreement while an attorney must accept an arbitration in a dispute regarding a non-refundable fee agreement.</p> <p>The problem of unscrupulous attorneys can occur in any billing system.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |
| 3 | Boltax, Jack J. | A | | | 1.5(f) will prevent predatory practice of retained attorneys refusing to refund a fee after subbing in for a court appointed attorney who has already negotiated a plea bargain. | No response necessary. |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|---------------------|-----------------------|-----------------------------|----------------|---|--|
| 4 | Borden, Mark | D | | | 1.5(f) singles out criminal defense attorneys, usually one or two person firms who use non-refundable retainers to assure availability. | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |
| 5 | Brodsky, Stephen R. | D | | | Non-refundable fee agreement confers benefits on both attorney and client. Supports Barry Tarlow's position. | To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--|-----------------------|-----------------------------|----------------|--|---|
| | | | | | | <p>payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |
| 6 | California Attorneys for Criminal Justice (Rickard Santwier) | D | | | <p>Commission has not cited evidence of problems, abuse, or adverse impact that warrants such a sweeping change to the way fees have historically been negotiated.</p> <p>Non-refundable fixed fees provide certainty to the client and simplified administration to the</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|----------------|-----------------------|-----------------------------|----------------|---|--|
| | | | | | <p>lawyer.</p> <p>Rule would prohibit informed agreements even when in both lawyer and client believe it to be in their best interest.</p> <p>Since the fee will be retained in a trust, it will be subject to claims from collateral sources.</p> <p>Net effect of increasing costs of services for clients across the board.</p> <p>Some attorneys will not be able to survive in the economic environment created by the proposal.</p> | <p>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 client-lawyer 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.</p> |
| 7 | Chodos, Rafael | D | | | <p>1.5(f) if interpreted literally would mean that every fee except for "true retainer fees" would have to be refundable, even fees charged for work done and completed.</p> <p>The real issue the proposed rule is trying to address is not the nature of the fee agreement, but the obligation of the attorney to refund any unearned portion of the fee, which is already addressed in 3-700(d).</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------------|-----------------------|-----------------------------|----------------|---|---|
| | | | | | <p>Nonrefundability of the fee should not be affected even if some of the work ends up not having been done (e.g. quick settlement or client changes his mind after attorney has declined other employment opportunities to make himself available for the client).</p> | <p>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 client-lawyer 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.</p> |
| 8 | Clarence, Nanci | D | | | <p>Proposal has not been sufficiently publicized in a manner that permits members to respond.</p> <p>Exposes lawyers to financial risk. Will result in increased legal fees and limit</p> | <p>The proposal was issued for a 90-day public comment period posted on the State Bar website and was also the subject of a public hearing in Sacramento that was noticed by several methods, including: a posting at the State Bar website; public notices in the <i>Daily Journal</i>, the <i>Daily Recorder</i>, and the <i>Sacramento Bee</i>; e-mail notifications to approximately 14,000 interested persons; and a press release to the media.</p> <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|---|--|
| | | | | | <p>availability of low, fixed fee services. 1.5(f) will adversely affect attorney-client relationships.</p> | <p>payments in paragraph (e) of the Rule to provide as follows: (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 client-lawyer 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.</p> |
| 9 | COPRAC | A | | | <p>Some practitioners may not be familiar with the distinction between a "non-refundable fee" and a "true retainer". Commission should include reference to case law to provide additional guidance in Comment [2], including possible citation to:</p> | <p>Commission revised the rule comments to include a discussion of advance fee payments and "true retainer" fees (see Comments [7] – [11].</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-------------|-----------------------|-----------------------------|----------------|--|---|
| | | | | | Baranowski v. State Bar, 24 Cal.3d 153; In the Matter of Fonte, 2 Cal. St. Bar Ct. Rptr. 752, 757; S.E.C. v. Interlink Data Network of Los Angeles, Inc, 77 F.3d 1201; Matter of Lais, 3 Cal. St. Bar Ct. Rptr. 907, 923; Matter of Brockway, 4 Cal. St. Bar Ct. Rptr 944, 950-51. | |
| 10 | Cron, Steve | D | | | Bar should not eliminate fixed fee agreements completely, but instead focus on fixed fee agreements calling for unconscionable fees or cases where lawyer clearly does not deserve the fees charged based on the services rendered. | To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows: (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 client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--------------------|-----------------------|-----------------------------|----------------|---|--|
| | | | | | | the agreed-upon legal services have not been completed. |
| 11 | Diamond, Roger Jon | D | | | <p>Under 1.5(f), fees paid at the beginning of the case are not earned and the attorney is faced with the possibility of having the government seize the funds held in trust while the lawyer is forced to remain on the case.</p> <p>1.5(f) will impose overwhelming record keeping burdens on attorney and will disproportionately affect sole practitioners.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-------------------|-----------------------|-----------------------------|----------------|---|--|
| 12 | Feldman, Steven | D | | | None | |
| 13 | Garza, Florentino | D | | | <p>1.5(f) will affect the ability of individuals in need of representation to obtain legal services.</p> <p>Similar proposals were rejected in 1991 and 1997.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--------------------|-----------------------|-----------------------------|----------------|---|--|
| | | | | | The proposal has not been adequately publicized. | The proposal was issued for a 90-day public comment period posted on the State Bar website and was also the subject of a public hearing in Sacramento that was noticed by several methods, including: a posting at the State Bar website; public notices in the <i>Daily Journal</i> , the <i>Daily Recorder</i> , and the <i>Sacramento Bee</i> ; e-mail notifications to approximately 14,000 interested persons; and a press release to the media. |
| 14 | Greenberg, Stanley | D | | | <p>Proposed rule would have detrimental effect on defendants accused of crimes, their ability to retain counsel to assure representation throughout the matter.</p> <p>Agreement to pay a flat fee represents a negotiated compromise in which both sides assume certain risks.</p> <p>Agrees with Barry Tarlow's comments.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|---------------|-----------------------|-----------------------------|----------------|--|--|
| | | | | | | fee agreement does not alter the client's right to terminate the client-lawyer 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. |
| 15 | Harris, David | D | | | <p>Proposal prevents an informed client from entering into a fee agreement that can often reduce the cost of representation.</p> <p>Proposal interferes with attorney client relationships, generates increased client bar complaints, economically impacts small and large firms, increases unnecessary accounting and record keeping, results in increased legal fees, restricts availability of legal services to consumers of fixed fee services, and restricts the constitutional right of the criminally accused to retain a lawyer of one's choice.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------------------|-----------------------|-----------------------------|----------------|--|--|
| | | | | | | the agreed-upon legal services have not been completed. |
| 16 | Hermansen, Kurd David | D | | | None | |
| 17 | Hughes, Peter J. | D | | | Adopts and supports positions advocated by Barry Tarlow and John Phillips. | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|------------------|-----------------------|-----------------------------|----------------|---|--|
| | | | | | | been completed. |
| 18 | Jenness, Evan A. | D | | | <p>1.5(f) would prohibit a common form of retention in criminal cases and could result in many clients of limited means being unable to hire a lawyer.</p> <p>It is not the form of retainer but a lawyer's lack of integrity that causes over-billing, and provision does not address that problem.</p> <p>Padded hourly billing is a more widespread problem.</p> <p>The "unconscionability" standard provides a suitable and uniform standard to use in addressing client complaints about over-billing and applies regardless of the form of a retainer.</p> <p>It is unclear what type of retainer is a "nonrefundable" fee agreement within the meaning of the proposed rule; the revisions do not define the term.</p> <p>If promoting national uniformity is a reason for the proposed revisions then subparagraph (f) should be rejected because it is not in the ABA Model Rules.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------------|-----------------------|-----------------------------|----------------|--|--|
| 19 | Johnson, Knut | D | | | <p>1.5(f) effectively eliminates any flat fees for criminal practitioners despite fact that many clients prefer the flat fee.</p> <p>Lawyers will charge higher fees because the proposal forces lawyers to absorb potential accounting costs, lose use of fees for overhead early in a case, and plan against the potential loss of fees if a client fires the lawyer.</p> <p>Hourly billing structure promotes fraud, inefficiency, overstaffing of cases, and prolonging rather than shortening litigation.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |
| 20 | Kahn, Robert A. | D | | | <p>Rule presents difficulty for law firms trying to arrange fee agreements with corporate clients who demand alternatives to hourly billing,</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|----------------|-----------------------|-----------------------------|----------------|---|---|
| | | | | | such as monthly, flat-fee payments. | <p>payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |
| 21 | Katz, Louis S. | D | | | <p>Non-refundable retainers useful when lawyer is unable to calculate how much time he or she is likely to spend on a case.</p> <p>Many individuals can only afford to pay a one time retainer.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|---------------------|-----------------------|-----------------------------|----------------|--|--|
| | | | | | | <p>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 client-lawyer 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.</p> |
| 22 | Kolodny, Stephen A. | D | | | <p>Insufficient notice was given to the members of the bar.</p> <p>Eliminating right to collect non refundable retainers will affect family lawyers' ability to not be unfairly conflicted out of cases.</p> <p>Result based and contingency fees are not allowed in family law except in limited circumstances. This rule will prevent lawyers in this field of law from earning a reasonable</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--------------------|-----------------------|-----------------------------|----------------|---|---|
| | | | | | <p>fee in many cases.</p> <p>Disallowing non-refundable fees works against the goal in family law of quick resolution of the case.</p> <p>Disproportionate negative impact on low income people.</p> <p>Fixed fee gives client certainty and permits retainer of a lawyer for an acceptable and affordable amount.</p> | <p>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 client-lawyer 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.</p> |
| 23 | Langford, Carol M. | D | | | <p>Rule 1.5(d) should not use the word "unconscionable" because it conflicts with sections 6147 and 6148 of the CA Bus & Prof Code, which set a "reasonable" standard for attorneys' fees.</p> <p>The "unconscionable" standard is inconsistent with the ABA Model Rules, which require attorneys' fees to not be "unreasonable".</p> <p>The "unconscionable" standard has not been applied consistently in California, as a number of courts have equated it with the "unreasonable" standard.</p> | <p>Commission's recommendation for paragraph (a) of the Rule is to retain the prohibition on an "unconscionable or illegal" fee, in part, because the Commission has considered existing California case law and supports the policy reflected in that case law. Sections 6147 and 6148 govern the enforceability of a fee agreement, which is a civil matter as the Supreme Court stated in <i>Herrscher v. State Bar</i>, while this Rule governs professional discipline.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|----------------------|-----------------------|-----------------------------|----------------|--|--|
| 24 | Levine, Hugh Anthony | D | | | 1.5(f) ignores possibility that an exceptional attorney charging a non-refundable fee may be able to obtain a superior result for a client despite spending only a small amount of time on the matter than a less capable, less accomplished attorney would achieve after spending numerous hours of unnecessary litigation. | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |
| 25 | Lincenberg, Gary | D | | | Non-refundable retainers help firms guard against being hired only briefly by a client before the client changes to another lawyer | To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--|-----------------------|-----------------------------|----------------|---|---|
| | | | | | <p>and conflicting the rest of the firm out of representing other potential clients involved in the case.</p> <p>Non-refundable retainers also benefit clients who prefer certainty of a flat fee to the uncertainty of hourly billing.</p> | <p>payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |
| 26 | Lombard, Matthew | D | | | None | |
| 27 | Los Angeles County Bar Association (Toby J. Rothschild) | D | | | 1.5(f) should be deleted entirely from the proposed rules. Alternatively, 1.5(f) and Comment [2] should employ a different and expanded definition of "retainer" to | To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|------------------|-----------------------|-----------------------------|----------------|---|---|
| | | | | | <p>acknowledge hybrid retainers and provide that the rule is not intended to prohibit contracting for, charging, or collecting a flat fee.</p> <p>1.5(a) fully protects against the risk of an unconscionable “non-refundable” fee without the unanticipated consequences and ambiguities created by 1.5(f).</p> <p>Flat fee arrangements represent a legitimate, bargained-for exchange, between lawyer and client.</p> <p>Prohibited non-refundable fees, as in 1.5(f), does not address the true concern, which is ensuring that unearned fees are returned to a client and that any non-refundable portion of a fee is not, under all the circumstances, unconscionable.</p> <p>ABA Model Rules do not prohibit flat fees or non-refundable fees.</p> | <p>follows:</p> <p>(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 client-lawyer 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.</p> |
| 28 | Martinez, Martin | D | | | <p>Attorneys have always engaged in the use of non-refundable retainers.</p> <p>Ambiguity about when a fee is “earned.”</p> <p>Rule ties the hands of the criminal defense bar by requiring the lawyer to place funds in trust that would otherwise be available to the</p> | <p>To address the commenter’s concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|---|-----------------------|-----------------------------|----------------|--|---|
| | | | | | <p>attorney to work on other matters.</p> <p>Funds held in trust accounts may be subject to seizure, preventing the attorney from being compensated adequately for work performed.</p> <p>Rule 4-200 provides enough protection for clients.</p> | <p>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 client-lawyer 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.</p> |
| 29 | National Association of Criminal Defense Lawyers (John Wesley Hall) | D | | | <p>Flat fee agreements are the most commonly used form of retainer in criminal cases, and they are critical to enabling clients of lesser means to retain defense counsel.</p> <p>Lawyers can seldom determine the exact potential length of a matter and clients of limited means cannot afford to pay a refundable retainer large enough to assure counsel a fair hourly rate.</p> <p>Legitimacy of non-refundable fees should</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|---|-----------------------|-----------------------------|----------------|--|--|
| | | | | | <p>depend on the facts. A lawyer with a strong reputation, just by agreeing to represent a client may cause a lawsuit to vanish and thereby obtain a substantial benefit for the client and should be entitled to keep the amount paid to him.</p> <p>Dishonest lawyers will attempt to overcharge a client regardless of the type of retainer.</p> <p>Use of “unreasonable fee” in Model Rules 1.5(a&b) could replace “unconscionable”.</p> | <p>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 client-lawyer 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.</p> |
| 30 | Orange County Bar Association (Trudy Levindofske) | D | | | None | |
| 31 | Phillips, John G. | D | | | Proposal has been inadequately publicized. | <p>The proposal was issued for a 90-day public comment period posted on the State Bar website and was also the subject of a public hearing in Sacramento that was noticed by several methods, including: a posting at the State Bar website; public notices in the <i>Daily Journal</i>, the <i>Daily Recorder</i>, and the <i>Sacramento Bee</i>; e-mail notifications to approximately 14,000 interested persons; and a press release to the media.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|--|--|
| | | | | | Attorneys should be able to deal with clients at arm's length regarding fees; clients have ample opportunity to shop around. | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--------------------|-----------------------|-----------------------------|----------------|---|--|
| 32 | Pollack, Randy Sue | D | | | Rule would unnecessarily interfere with the attorney client relationship and an attorney's ability to charge for the real value of his or her services. | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|------------------|-----------------------|-----------------------------|----------------|---|--|
| 33 | Russo, Daniel J. | D | | | <p>Many criminal law practitioners use a non-refundable retainer agreement.</p> <p>Many criminal defendants cannot guarantee payment of hourly fees because their resources are limited and a flat fee allows them to assess the costs ahead of time so they can marshal their resources.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|---|-----------------------|-----------------------------|----------------|--|---|
| 34 | Sall, Robert K. | D | | | <p>CA should adopt the “unreasonable” fee standard.</p> <p>With respect to the definition of “unconscionability” in paragraph (b), the reference to determining unconscionability “at the time the agreement is entered into” is problematic because many of the key elements in paragraph (c) (i.e. time spent, results obtained, nature of litigation and effort involved) are determined at the end of representation, not at the beginning.</p> <p>Supports paragraph (f) but better guidance is needed as to the definition of a “true retainer.”</p> | <p>Commission’s recommendation for paragraph (a) of the Rule is to retain the prohibition on an “unconscionable or illegal” fee, in part, because the Commission has considered existing California case law and supports the policy reflected in that case law.</p> <p>In addition to modifying the approach to advance fee payments fees in paragraph (e) of the Rule, Comment [13] was added to discuss what constitutes a “true” retainer</p> |
| 35 | San Diego County Bar Association (Heather L. Rosing) | D | | | <p>CA should adopt ABA Model Rule 1.5(a) with the addition of the factors in rule 4-200 to determine reasonableness.</p> | <p>Commission’s recommendation for paragraph (a) of the Rule is to retain the prohibition on an “unconscionable or illegal” fee, in part, because the Commission has considered existing California case law and supports the policy reflected in that case law.</p> |
| 36 | San Diego Criminal Defense Bar Association (Michael L. Crowley) | D | | | <p>Non-refundable retainers prevent “check-book defenses” in which the decision as to whether a meritorious motion or legal task should be undertaken is made based on funding. Criminal defense requires that every meritorious action be taken to provide zealous advocacy even when chances of success are</p> | <p>To address the commenter’s concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--|-----------------------|-----------------------------|----------------|--|---|
| | | | | | <p>slim.</p> <p>Non-refundable retainers are often made by savvy legal consumers in arms-length transactions. The consumer has the opportunity to reject or negotiate a different contract.</p> | <p>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 client-lawyer 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.</p> |
| 37 | Santa Clara County Bar Association (Christine Burdick) | A | | | <p>Paragraph (f) should read: "A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, or non-refundable retainer, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter".</p> <p>Comment [2] should explain the differences between an advance fee, flat fee, a non-</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|------------------|-----------------------|-----------------------------|----------------|---|--|
| | | | | | <p>refundable fee or non-refundable retainer and a true retainer.</p> <p>Comment [6] should include a clarification that the rule does not apply to the attorney withdrawing from representation for non-payment of attorney fees by the client, assuming the attorney complies with the rules for termination of the attorney-client relationship.</p> | <p>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 client-lawyer 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.</p> <p>In addition, Comment [13] contains discussion regarding what constitutes a "true" retainer and Comment [14] contains discussion regarding what constitutes a "flat fee."</p> |
| 38 | Sevilla, Charles | D | | | <p>Current rules on excessive fees are sufficient. Non-refundable fees are beneficial to a criminal defendant by providing certainty to the client while insuring access to attorney services.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--|-----------------------|-----------------------------|----------------|--|--|
| | | | | | | <p>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 client-lawyer 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.</p> |
| 39 | State Bar Office of the Chief Trial Counsel (OCTC) | D | | | <p>The OCTC is opposed to any attempt to specifically define the term "unconscionable" in paragraph (b) of proposed Rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague.</p> <p>We urge the Commission to consider adding two additional factors to the list set forth in paragraph (c). Those additional factors are: (1) whether the fee involves an element of fraud or overreaching on the attorney's part; and (2) whether there was any failure on the attorney's part to disclose the true facts to the client.</p> | <p>Commission did not delete the definition, in part, because the Commission believes the definition gives helpful guidance and is neither overbroad nor underinclusive.</p> <p>With regard to OCTC's first suggestion, the Commission believes that because paragraph (b) already identifies "fraudulent conduct or overreaching," there is no need to include the suggested factor.</p> <p>With regard to OCTC's second suggestion, the Commission believes the language "any failure . . . to disclose the true facts" is overbroad.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|---|---|
| | | | | | <p>The Commission may wish to more clearly state in the rule itself whether the factors set forth in paragraph (c) are intended to be the exclusive factors to be considered in determining whether a fee is unconscionable.</p> <p>The Commission should carefully consider case law interpreting the term “unconscionable” as used in Civil Code section 1670.5 regarding unconscionable contracts or clauses of contracts.</p> <p>We believe that the proposed definition of an “unconscionable fee” as currently drafted is inconsistent with case law. The proposed language suggests that all of the elements of civil fraud must be present to constitute unconscionability. However, under case law, it is sufficient that the negotiation, setting or charging of the fee “involves an element of fraud or overreaching,” which may not require proof of all of the elements required for civil fraud.</p> | <p>Commission did not make the requested the revision, in part, because Comment [1] expressly states the factors specified in paragraph (c) are not exclusive.</p> <p>Commission’s recommendation for paragraph (a) of the Rule is to retain the prohibition on an “unconscionable or illegal” fee, in part, because the Commission has considered existing California case law and supports the policy reflected in that case law.</p> <p>To clarify the rule, the Commission revised paragraph (b) to read “if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching.”</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|---|---|
| | | | | | <p>The rule is uncertain regarding the determination of the unconscionability of expenses. The proposed definition in paragraph (b) and the factors listed in paragraph (c) of proposed Rule 1.5, by their terms, apply only to the determination of whether a fee is unconscionable. What factors or considerations does the Commission intend for lawyers, State Bar prosecutors, the State Bar Court and the Supreme Court to apply in determining whether an expense is unconscionable?</p> <p>Concerned about the Commission's proposal in paragraph (e) of proposed Rule 1.5 to single out two types of contingent fees (Family Law and Criminal Law) as being improper. The concern is by singling out these two types of contingent fees there is an implication that all other types of contingent fees are appropriate, a result the Commission may not have intended.</p> <p>The impact of placing the distinction between non-refundable fees and true retainers in Rule 1.5 is that it will make members subject to discipline for charging or collecting a non-refundable retainer. Currently, the collection</p> | <p>The Commission revised paragraph (c) to read: "Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following." In addition, the Commission added "in-house" to modify "expenses" in paragraph (a).</p> <p>The Commission did not make the requested revision, in part, because the Model Rule counterpart specifically addresses Family Law and Criminal Law. (See also proposed Rule 1.5 Model Rule Comparison Chart explanation of paragraph (d) of the rule.)</p> <p>The Commission did not make the requested revision, in part, because the Commission believes that charging a non-refundable fee is inimical to California's strong policy of client protection. (See also proposed Rule 1.5 Model Rule Comparison</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|--------------------|-----------------------|-----------------------------|----------------|---|--|
| | | | | | or retention of a purportedly non-refundable fee is typically handled as either a fee arbitration matter or, in egregious cases where the legal employment has terminated, as a failure to return unearned fees in violation of current Rule 3-700(D)(2). | Chart explanation of paragraph (e) of the rule.) |
| 40 | Stepanian, Michael | D | | | 1.5(f) will require experienced criminal attorneys to jump through hoops for their fees by eliminating their ability to negotiate and resolve cases through the rapport they have established in the profession. | To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows: (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 client-lawyer |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|---------------|-----------------------|-----------------------------|----------------|--|---|
| | | | | | | 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. |
| 41 | Tarlow, Barry | D | | | <p>Subparagraph (f) is not in the ABA Model Rules and has not been sufficiently publicized, disseminated or explained in a manner that informs members of the bar of its existence and permits them to respond or object.</p> <p>Proposed rule would prevent fully informed client and attorney from entering into a non-refundable retainer agreement where this fee arrangement is in the client's best interest.</p> <p>Threatens economic viability of high volume, low fee practices.</p> <p>Under the proposal, any portion of fees for future legal services would be the property of the client and may be subject to restraint or forfeiture. This exposes attorneys to financial peril by facilitating restraint/seizure of fees if any client has potential criminal or bankruptcy problem or has a dispute with the IRS, SEC or even a vulnerability to creditor's claims.</p> | <p>The proposal was issued for a 90-day public comment period posted on the State Bar website and was also the subject of a public hearing in Sacramento that was noticed by several methods, including: a posting at the State Bar website; public notices in the <i>Daily Journal</i>, the <i>Daily Recorder</i>, and the <i>Sacramento Bee</i>; e-mail notifications to approximately 14,000 interested persons; and a press release to the media.</p> <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|---|---|
| | | | | | <p>Will generate more client bar complaints (e.g. attorney and client cannot agree on amount of funds to be returned in an advance fee case).</p> <p>Deprives criminal defendants of constitutional right to retain lawyer of their choice.</p> <p>Similar proposals were made by the Commission in 1991 and by COPRAC in 1997 and were rejected based on negative responses from CA lawyers.</p> <p>Non-refundable retainers are justified when there is a strong likelihood that taking on this client's case will preclude the attorney from accepting another present or future client.</p> <p>Disciplinary cases that may have been the reason for the Commission to propose subparagraph (f) (i.e. Matthew v. State Bar; 49 Cal.3d 784; In the Matter of Scapa, 2 Cal.State Bar Ct. Rptr. 635; In the Matter of Cooperman, 83 N.Y.2d 465.) do not warrant a per se ban of non-fraudulent and ethical use of non-refundable retainers. Those cases dealt with lawyers who committed fraud and theft and conduct that would already be controlled by Rule 4-200(A) prohibiting unconscionable fees.</p> <p>There are existing protections against misuse of non-refundable fees: (1) 4-200 preventing charging excessive fees and (2) State Bar Rule 1.16 requiring lawyer to refund unearned</p> | <p>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 client-lawyer 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.</p> |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|---|--------------|
| | | | | | <p>fees upon withdrawal.</p> <p>If fixed fees are required to be deposited into a trust account until portions of services are completed, fees will increase because of the time value of money (money today is worth more than money potentially available tomorrow).</p> <p>Non-refundable fixed fees provide client with assurance that they will not be charged more than a particular amount.</p> <p>Proposed rule forces a lawyer after a dispute arises to place those funds out of reach in a trust account, limiting attorney's ability to pay operating expenses.</p> <p>Proposal creates increased accounting costs and overhead.</p> <p>Fees in a trust account will be vulnerable to attachment by other potential creditors increasing the risk of nonpayment, and increasing fees to account for that risk.</p> <p>Non-refundable fee agreements might be the result of rational negotiation between attorney and client and/or in the client's best interest.</p> <p>Under federal law, attorneys' fees may be subject to restraint or forfeiture under a number of statutes, including 21 USC § 853, 18 USC § 981-82, or 18 USC § 1963 (RICO). Under these statutes, a lawyer must show an</p> | |

**Rule 1.5 Fees for Legal Services.
[Sorted by Commenter]**

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|---------------------|-----------------------|-----------------------------|----------------|--|--|
| | | | | | interest as an owner in the property to defend a forfeiture, which will not be possible if funds remain the property of the client. | |
| 42 | Troiano, Kenneth J. | D | | | <p>Non-refundable fees should be judged by a set criteria, not made per se unconscionable.</p> <p>Many less wealthy individuals who choose sole practitioners benefit from non-refundable fees by setting an amount and avoiding higher fees associated with hourly billing.</p> | <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(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 client-lawyer 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.</p> |