

Rule 1.5 [4-200] Fees for Legal Services

(Commission's Proposed Rule Adopted on September 25 – 26, 2015 – Clean Version)

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.
- (b) 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. The factors to be considered in determining the unconscionability of a fee include without limitation the following:
 - (1) whether the lawyer engaged in fraud* or overreaching in negotiating or setting the fee;
 - (2) whether the lawyer has failed to disclose material facts;
 - (3) the amount of the fee in proportion to the value of the services performed;
 - (4) the relative sophistication of the lawyer and the client;
 - (5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (7) the amount involved and the results obtained;
 - (8) the time limitations imposed by the client or by the circumstances;
 - (9) the nature and length of the professional relationship with the client;
 - (10) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (11) whether the fee is fixed or contingent;
 - (12) the time and labor required;
 - (13) whether the client gave informed consent* to the fee.
- (c) 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.
- (d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “non-refundable,” or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer 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, but not to any extent as compensation for legal services performed or to be performed.
- (e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services as long as the lawyer performs the agreed upon services. A flat fee is a fee which constitutes complete payment for legal fees to be performed in the future for a fixed sum regardless of the amount of work ultimately involved and which may be paid in whole or in part in advance of the lawyer providing those services.

Comment

Prohibited Contingent Fees

[1] Paragraph (c)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under child or spousal support or other financial orders.

Payment of Fees in Advance of Services

[2] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2).

Division of Fee

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

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.5
(Current Rule 4-200)
Fees For Legal Services

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 4-200 (Fees for Legal Services) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.5 (Fees). The result of the Commission’s evaluation is proposed rule 1.5 (Fees for Legal Services). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

A fundamental issue posed by this proposed rule is whether to retain the longstanding “unconscionable fee” standard used in California’s current rule 4-200. Nearly every other jurisdiction has adopted an “unreasonable fee” standard for describing a prohibited fee for legal services.¹ The Commission determined to retain California’s unconscionability standard as this standard carries forward California’s public policy rationale which was stated over 80 years ago by the Supreme Court in *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402-403:

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).

The Commission believes that if the foregoing policy was prudent in 1934, it is even more sound today because currently consumer protection against lawyers who charge unreasonable fees is provided through both the civil court system and California’s robust mandatory fee arbitration program. (See Bus. & Prof. Code § 6200 et seq.) Under the statutory fee arbitration program, arbitration of disputes over legal fees is voluntary for a client but mandatory for a lawyer when commenced by a client. Accordingly, California’s current approach to fee controversies is

¹ Only California, Massachusetts, New York, North Carolina and Texas have not adopted the Model Rules’ standard of “unreasonable,” the latter four having adopted (or more accurately continued from the ABA Code of Professional Responsibility) an “excessive” or “clearly excessive” standard. Michigan, Ohio and Oregon have also carried forward the “excessive” standard but define “excessive” as in excess of reasonable, so they effectively have adopted an unreasonable standard.

two-fold: (1) disputes over the reasonable amount of a fee may be handled through arbitration; and (2) fee issues involving overreaching, illegality or fraud are appropriate for initiating an attorney disciplinary proceeding. The Commission is unable to perceive any benefit that would arise from changing to the “unreasonable fee” standard. The downsides of such a change include potential unjustified public expectations that a disciplinary proceeding is an effective forum for addressing routine disputes concerning the amount of a lawyer’s fee. Finally, with respect to the unconscionable fee standard, the Commission recommends adding two factors, proposed paragraphs (b)(1) and (b)(2), to those factors that should be considered in determining the unconscionability of a fee. Both factors are derived from considerations identified in the *Herrscher* decision for determining unconscionability.

In addition to retaining the “unconscionable fee” standard, proposed rule 1.5 adds three substantive paragraphs not found in the current rule. First, paragraph (c), which is derived from ABA Model Rule 1.5(d), identifies two types of contingent fee arrangements that are prohibited: contingent fees in certain family law matters; and contingent fees in criminal matters. Although there are other kinds of contingent fee cases that might be prohibited, these two types of contingent fee arrangements have traditionally been viewed as implicating important Constitutional rights or public policy. Second, paragraph (d) prohibits denominating a fee as “earned on receipt” or “nonrefundable” except in the case of a true retainer, i.e., where a fee is paid to assure the availability of a lawyer for a particular matter or for a defined period of time. (See *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1.) Paragraph (d) is intended to increase protection for clients by recognizing that except for specific circumstances, a fee is not earned until services have been provided. Paragraph (e) expressly provides that a flat fee is permissible only if the lawyer provides the agreed upon services. In part, these new provisions implement a basic concept of contract law; namely that, except for true retainers, an advance fee is never earned unless and until a lawyer provides the agreed upon services for which the lawyer was retained.

Three comments are included in the proposed rule. Comment [1] is derived from Model Rule 1.5 Comment [6] and explains that some contingent fee arrangements related to family law matters are permitted. Specifically, the comment recognizes that certain post-judgment contingent fee arrangements are permitted because they do not implicate the policies underlying the prohibition. Comment [2] provides a cross-reference to the rule governing termination of employment, including a lawyer’s voluntary withdrawal from representation. This cross-reference is intended to enhance client protection by helping assure that lawyers comply with the obligation to refund unearned fees when a representation ends. Comment [3] provides a cross-reference to the fee splitting rule. In many other jurisdictions, the provision that governs fee divisions among lawyers is found in a lettered paragraph in the jurisdiction’s counterpart to Model Rule 1.5. In California, the provision addressing division of fees is contained in a separate, standalone rule. Providing a cross-reference facilitates compliance.

Rule 1.5 [4-200] Fees for Legal Services
(Redline Comparison of the Proposed Rule to Current California Rule)

- (Aa) A ~~member~~lawyer shall not ~~enter into~~make an agreement for, charge, or collect an ~~illegal or~~unconscionable or illegal fee.
- (Bb) 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~~The factors to be considered, ~~where appropriate,~~ in determining the ~~conscionability~~unconscionability of a fee ~~are~~include without limitation the following:
- (1) whether the lawyer engaged in fraud* or overreaching in negotiating or setting the fee;
 - (2) whether the lawyer has failed to disclose material facts;
 - (43) ~~The~~the amount of the fee in proportion to the value of the services performed~~;~~;
 - (24) ~~The~~the relative sophistication of the ~~member~~lawyer and the client~~;~~;
 - (35) ~~The~~the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly~~;~~;
 - (46) ~~The~~the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the ~~member~~lawyer~~;~~;
 - (57) ~~The~~the amount involved and the results obtained~~;~~;
 - (68) ~~The~~the time limitations imposed by the client or by the circumstances~~;~~;
 - (79) ~~The~~the nature and length of the professional relationship with the client~~;~~;
 - (810) ~~The~~the experience, reputation, and ability of the ~~member or members~~lawyer or lawyers performing the services~~;~~;
 - (911) ~~Whether~~whether the fee is fixed or contingent~~;~~;
 - (4012) ~~The~~the time and labor required~~;~~;
 - (14) ~~The~~13) whether the client gave informed consent* ~~of the client~~ to the fee.
- (c) 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
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