

Rule 1.5 Fees for Legal Services. [Sorted by Commenter]						
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Randolph E. Daar	D	No	1.5(e)	I have used non-refundable retainers at various times in my practice. The rules that exist now adequately protect clients from excessive fees or failure of lawyers to refund fees upon withdrawal from representation. The new proposed rule deprives a client of the ability to formally retain an attorney in the circumstance in which, because of the nature of the scope of the proposed representation, it is necessary to secure the attorney services.	<p>TOTAL = ___ Agree = ___ Disagree = ___ Modify = ___ NI = ___</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: (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]**

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2	Joe Ingber	D	No	1.5(e)	To modify/abolish rule 1.5(e) re: non-refundable retainer agreements, would create chaos in an unnecessary manner. Please vote against this abolition.	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 the agreed-upon legal services have not been completed.
3	Beverly Hills Bar Association	D	Yes	1.5(e)	We write in opposition to subdivision (e) of the Proposed New Rule of Professional Conduct 1.5, "Fees for Legal Services." Subdivision (e) would subject lawyers to professional discipline for using the term "non-refundable"	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:

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

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					<p>in their retainer agreements. We do not believe that lawyers who mistakenly employ the wrong term for an otherwise-proper fee agreement should be disciplined. In addition, ABA Model Rule 1.5 does not impose discipline for use of the term “non-refundable.”</p> <p>Adoption of the Proposed Rule 1.5(e) would mean that a lawyer following public policy and using a written fee agreement, but selecting the term “non-refundable,” would be subject to discipline, whereas a lawyer working without a written fee agreement would not be disciplined. That result would provide a disincentive for using written fee agreements and would be contrary to the expressed policy of the State of California.</p> <p>The distinction between “non-refundable” and “true retainer” is subtle. Ethics experts can and often do disagree. Many criminal defense lawyers (and a host of other lawyers) do not know the nuanced issues that can be triggered by use of these terms, and in reality, many lawyers use the terms interchangeably. Lawyers are not and should not be subject to professional discipline for inadvertence or negligence.</p> <p>Use of a non-refundable fee is not</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> <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 Chart explanation of paragraph (e) of the rule.)</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>sanctionable in other jurisdictions. As a Louisville Bar Association article notes, “[m]any jurisdictions, including Kentucky, allow an attorney to refer to a fee as non-refundable.” A recent order from the Michigan Supreme Court validated a lawyer’s non-refundable fee agreement in a disciplinary case, and dismissed the charges against the lawyer. (attached) The Court cited the relevant rule, and stated that the “agreement is unambiguous because it clearly states that the \$4,000 minimum fee is non-refundable.” In addition, esteemed ethics professors Geoffrey Hazard and William Hodes conclude that “[s]everal situations may be imagined in which a substantial non-refundable fee—better understand as a minimum fee—might be justified.”</p> <p>While we do not support or endorse gratuitous use of the term “non-refundable,” we do oppose a rule that will discourage written fee agreements and subject to discipline numerous lawyers who misunderstand the sophisticated distinctions, particularly when this terminology is widely permitted throughout the United States.</p>	
4	Michael F. Perlis	D	No	1.5(e)	The Rule proposing the abolition of non-refundable retainers would only serve to further deprive the people of the ability to	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]**

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					<p>secure legal representation and/or compel attorneys who are already involved on behalf of those individuals to become involuntary pro bono advocates. Neither alternative is an appropriate avenue.</p> <p>In practice, the non-refundable retainer as it currently operates does not do a disservice to the client. Attorney overreaching is readily remedied and most attorneys would clearly be prepared to return unused portions of retainers where it would be inappropriate to retain them.</p> <p>Proposed Rule 1.5(e)(2) does not solve the problem. It requires attorneys and clients to make binding estimates of what may be complex legal proceedings, leaves open the possibility that government agencies could require termination of counsel and return of unused retainers, and could potentially lead to attorney/client conflict relative to an evaluation of what portion of a retainer need be returned relative to non-completed legal services.</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>
5	Frank J. Ragen	D	No	1.5(e)	I oppose the Proposed New Rule of Professional Conduct, Rule 1.5(e) (4-200), Abolishing Non-refundable retainers. A modification of the Proposed Rules of Professional Conduct which prohibits non-refundable retainers for legal service will do a	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

**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>disservice to the public, and create unnecessary litigation. Many times in my thirty-eight years of practice I have offered clients the option of a non-refundable retainer/flat fee for legal services or hourly billing. Many times the clients have selected the non-refundable retainer. The reason often voiced for choosing this option is that the amount of attorney fees is capped by the amount of the non-refundable retainer. When an hourly billing is selected there is no limit on what the attorney's fees might be. Attached hereto is an analysis of the Proposed Rule. I agree with the analysis and I incorporate it by reference. In my years of practice I have never had a problem with a client when a client chose a non-refundable retainer as an option.</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>
6	Martin James Martinez	M	No	1.5(e)	<p>The Proposed Rule is cause for concern in as much as it will have detrimental effects on criminal defense attorneys.</p> <p>The best solution would be to continue to allow criminal retainers to be placed in the general account as a classic true non-refundable retainer. If the rules committee is still determined to eliminate the use of non-refundable retainers, then a workable compromise would be an amendment 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 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>

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[Sorted by Commenter]**

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					<p>Proposed Rule that it is not a violation of the rules of professional responsibility to place the retained funds in the general account in criminal defense matters. This would alleviate concerns of the State Bar, of the chilling effects that a non-refundable retainer would have in the eyes of the client, thinking that they cannot change counsel. Yet, this amendment would allow criminal defense attorneys to continue to maintain an active law office. If the funds are placed in trust, it would hamper the everyday operations of the criminal law office.</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>
7	Mark Borden	D	No	1.5(e)	<p>If adopted, Paragraph (e) will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyer and their clients.</p> <p>Commenter's letter contains 14 examples of potential negative impacts concerning the Proposed Rule.</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: (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.
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						<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> <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 Chart explanation of paragraph (e) of the rule.)</p>
8	Kenneth G. Gordon	D	No	1.5(e)	My principal concern with the proposed change to Rule 1.5(e) has to do with the language of (e)(2) pertaining to flat fees. Assuming the attorney and client agree in writing, a flat fee is the lawyer's property on receipt. As such, the attorney should properly deposit this fee into his operating account and take it into income. In a tax sense, the attorney has dominion and control over the fee and should treat it as income. In the event that it is not the lawyer's property or is subject to a substantial risk of forfeiture, then	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.

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

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					<p>the tax treatment would be otherwise. The language of Proposed Rule 1.5(e)(2)(v) provides that the written fee agreement shall include a provision that the client may be entitled to a refund of a portion of the fee if the agreed upon legal services have not been performed. This language appears to introduce a substantial condition into the equation of the lawyer's dominion and control of the fee.</p> <p>I believe that there are sufficient remedies against abuses, such as the non-performance or incompetent performance of legal services, without the broad brush approach embodied in the Proposed Rule that not only alters property rights, but puts the interests of both the lawyer and client at risk in certain fact situations.</p> <p>The core issue under the Proposed Rule is one of property or interest in property. It appears that the Proposed Rule is confusing and inherently contradictory. If the flat fee is the lawyer's property upon receipt, then there should not be a basis for seizure. However, if the client has a right to a refund of fees attributable to services not completed, then the client has a property interest that can be seized by a taxing agency.</p>	<p>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>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 Chart explanation of paragraph (e) of the rule.)</p>

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					<p>My comments have addressed the proposed rule change within a very narrow range of my tax practice and focused on a particular civil tax issue. There are many other factual situations, including those within the criminal law context, that raise issues of legal exposure for both the attorney and client which have not been addressed in this letter. Hopefully, the Commission considering this rule change will reconsider its position regarding this Proposed Rule. Existing legal remedies and professional restraints on attorneys are, in my opinion, sufficient to protect clients. The obfuscation of property rights pertaining to flat fees appears counter-productive to the interests of clients.</p>	
9	Richard Moss	D	No	1.5(e)	<p>Abolishing non-refundable retainers will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation.</p> <p>Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of</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: (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</p>

**Rule 1.5 Fees for Legal Services.
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					<p>their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval.</p> <p>Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of California lawyers have used some form of the non-refundable retainer (that falls outside of the limited exceptions to Paragraph (e)'s ban on non-refundable retainers in (e)(1) and (2)).</p> <p>The Proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board approved/endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."</p> <p>Paragraph (e)(1) and Comment [8] prohibit the long-established practice of charging a</p>	<p>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>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 Chart explanation of paragraph (e) of the rule.)</p>

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

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					<p>minimum fee to ensure availability (true retainer) when the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received if she does any legal work.</p> <p>Paragraph (e)(2) and Comment [5] would often require that the proposed "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.</p> <p>Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the "flat fee" by representing that the fee "is the lawyer's property on receipt." The critical issue is not what the fee is called but who owns the funds.</p>	

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

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					<p>Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (see Proposed Rule 1.5(e)(2)(v)), Paragraph 1.5(e)(2) actually will deprive the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.</p> <p>Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims.</p> <p>Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many civil clients of their ability to retain counsel.</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>Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.</p> <p>The Proposal will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes, for example, when an attorney and a client cannot agree on the amount of funds that must be returned in an advance fee case even when an attorney is terminated without cause.</p> <p>Paragraph 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms that represent the "gold standard" for California lawyers.</p> <p>The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when</p>	

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

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					received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determinative in an ongoing case, the Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled.	
10	Criminal Defense Lawyers Club of San Diego	D	Yes	1.5(e)	<p>This Proposed Rule puts in place a condition that essentially makes the fee "flat" only upon the client's wish as the case proceeds. If the work for the attorney is substantial, the client will be content with the flat fee arrangement. But if the attorney seems to be on the way to a result that will end the case on a favorable note for the client can pull out of the "flat fee" contract, fire the attorney, and demand a substantial refund.</p> <p>Specifically, paragraph (e) of Rule 1.5 prohibits non-refundable retainers for legal services except under the circumstances outlined in subpart (1) and (2). Yet, the latter Rule, while first stating the fee is the attorney's on delivery, then says the client may be entitled to a refund prior 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 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</p>

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

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					<p>“completion” of services. This paragraph adds uncertainty (which will certainly promote fee disputes) and promotes the problem identified in the preceding paragraph.</p>	<p>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>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 Chart explanation of paragraph (e) of the rule.)</p>
11	Barry Tarlow	D	No	1.5(e)	<p>Rule 1.5(e), essentially prohibiting non-refundable retainers for almost all legal services, will drastically impact the economics of practicing law in California as well as the ability of people in need of representation to obtain legal services.</p> <p>Considering the significance of the 2009 revisions to Rule 1.5(e)(1)-(2) I am especially concerned that in apparent violation of State Bar Rule 1.10(A) this novel version of Rule 1.5(e)(1)-(2) prepared by the Commission for the Revision of the Rules of Professional Conduct was neither publicized nor disseminated, in any manner prior to its</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>

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					<p>November 2009 approval by the Board of Governors. Therefore, the membership of the Bar was unaware of this new Rule or that it would be considered at the November 14, 2009 Board of Governors meeting and were unable to meaningfully respond or object and be heard at the RAC and Board of Governors' November meetings.</p> <p>The Commission has not published any comprehensive or detailed factual and legal analysis for enacting these extensive changes or demonstrated that a need exists to do so. Rule 1.5(e)(1)-(2) also clearly violates the "Commission Charter." The Commission has asserted that a principle reason for this Rule "is client protection." However, since 1991, I have asked the proponents of attempts to abolish non-refundable retainers for evidence supporting the claim that in California there is a pattern of unethical lawyers cheating clients by using non-refundable retainers. None has been forthcoming.</p> <p>It is also significant that this prohibition appears nowhere in the ABA Model Rules. Since the 19th Century non-refundable retainers have been used in California and are currently permitted in many states. In fact, in 1992 the Board of Governors of the</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> <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 Chart explanation of paragraph (e) of the rule.)</p>

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

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					<p>California Bar endorsed the continued use of “fixed fees,” “flat fees,” and “non-refundable retainers” so long as the written fee agreement explicitly spelled out the arrangement and that the fee was “earned when paid.” Their decision was widely publicized. As far as I can determine, the Commission has never provided written analysis of this persuasive authority, advised the current Board of Governors of its existence and certainly has not demonstrated why it should be ignored by those who now sit on the Board of Governors.</p> <p>Prohibiting nonrefundable retainers, see 1.5(e)(2), will make these fee payments the property of the client until the work is performed. This is so regardless of the inaccurate representation set out in Rule 1.5(e)(2) requiring a written agreement by the lawyer and client asserting that the “flat fee is the lawyer’s property on receipt.” The critical issue in fee forfeiture and restraining order situations is not what the fee is called but who owns the funds.</p> <p>Abolishing the nonrefundable retainer, that for years has protected clients and lawyers from fee restraints, fee forfeiture and jeopardy assessments, will expose lawyers performing</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>many types of legal work to great financial risk. It will facilitate the restraint or seizure of fees if the client has a potential problem involving, for example, securities law, bankruptcy, criminal law, tax law and even some creditors' claims. Why enact this novel and untested fee arrangement that will result in years of collateral litigation, when for more than 40 years the nonrefundable retainer has proved to be the best available fee agreement to protect the client and lawyer from fee restraint and/or fee forfeiture?</p> <p>The proposed Rule changes and Comments are also confusing and internally inconsistent. Rule 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee agreements presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It will also certainly cause clients to fire their lawyers without cause and demand a refund of fees that until now have been considered and were in fact earned when received. The result will be the filing of arbitration demands, State Bar complaints, and civil suits. Of course, if a lawyer has seriously underestimated the work involved in a complicated "flat fee" case, which often occurs, ordinarily he will never be discharged</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
					without cause.	
12	Arguedas, Cassman & Headley, LLP	D			<p>We are unaware of any pattern of attorneys abusing non-refundable fees to bilk their clients. Such misconduct is barred by already-existing rules, such as current Rule 4-200, which prohibits attorneys from charging or collecting unconscionable fees.</p> <p>Exception (e)(1) to the Proposed Rule purports to permit a “true retainer” fee to “ensure the lawyer’s availability to the client.” But the Proposed Rule would prohibit an agreement under which the retainer would constitute a minimum fee that ensures the attorney’s availability yet also serves as a credit against which the attorney charges her time until the fee is exhausted. Such arrangements are common and benefit both the client and the attorney.</p> <p>Proposed Rule 1.5(e)(2) purports to permit “flat fee” agreements under which the fee becomes the property of the attorney upon receipt, but the Rule will in fact make such arrangements impossible. Subsection (e)(2) requires a written agreement that states, among other things, “that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been</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.
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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>completed.” This is a contradiction – the fee cannot be the lawyer’s property upon receipt if it is also potentially refundable.</p> <p>The Proposed Rule would essentially bar flat fee arrangements by placing all the risk on the attorney – under the Proposed Rule, if the case requires less work than anticipated at the time of the agreement, the attorney will be required to refund a portion of the fee, but if the case requires more work, the attorney will be stuck with the flat fee. Few attorneys will enter into such an arrangement.</p> <p>It is a matter of concern that the Proposed Rule has proceeded this far toward approval without proper notification to the Bar’s membership. Many attorneys and organizations opposed previous efforts to make similar amendments to the rules governing non-refundable fees, yet this Proposed Rule was conditionally approved by the Board of Governors without any meaningful opportunity for public comment. This procedure seems to violate the terms of Rule of the State Bar 1.10, and in any case is not advisable when, as here, the proposal at issue is likely to be the subject of significant controversy.</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 Chart explanation of paragraph (e) of the rule.)</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>

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
13	The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (PREC)	M	Yes	1.5(e)(2)	The proposal discourages lawyers from efficiently resolving matters given the potential it creates for a client to request a refund because “the agreed-upon legal services have not been completed.” For example, if a lawyer settles a matter before trial, a fee agreement that provided that the fee would cover representation through trial could be construed to require a partial refund, even though the case was favorably resolved. This would be unfair, and is contrary to the longstanding treatment of what constitutes an earned fee.	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

**Rule 1.5 Fees for Legal Services.
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					<p>Sub-parts (e)(2)(i), (ii) and (iv) are equally applicable to all types of retainer agreements. Including them in a sub-part that pertains only to flat fee agreements creates the misleading negative inference that these requirements may not apply to hourly or contingency fee agreements. If it is desirable to mandate that fee agreements contain additional provisions, this should be accomplished through the existing statutory framework in the B&P Code. The Legislature could choose to amend sections 6147 and 6148 to specifically address flat fees, but attorneys who use flat fee arrangements should not be singled out for discipline for failing to have details in a fee agreement that are not required for other type of fee arrangements.</p> <p>Sup-part (e)(2) provides that the fee is the “lawyer’s property on receipt,” but also requires the attorney to state that the client “may be entitled to a refund” under certain circumstances. This is confusing. Also, stating that a fee is the lawyer’s property on receipt suggests the creation of substantive law. Isn’t the intent simply to clarify that a flat fee need not be placed in the client trust account? To describe the fee as the “lawyer’s property” increases the likelihood of future</p>	<p>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.
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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>litigation over who owns the fee, especially when combined with the mandate that counsel state that the client may be entitled to a refund. Ambiguities in fee agreements are construed against the lawyer, and this draft rule mandates an ambiguity.</p> <p>The proposed language in sub-part (e)(2) is unnecessary in light of the prohibition on charging unconscionable fees, a traditional and well established standard which sufficiently safeguards clients from unscrupulous lawyers who overcharge clients, and which provides a uniform standard regardless of the type of retainer agreement involved.</p> <p>The language of (e)(2) may discourage the attorney from providing details in the fee agreement regarding the extent of the work for which a flat fee is being paid because of the potential it creates for a client to request a refund because “the agreed-upon legal services have not been completed.” The proposed language will foment greater discord over fee agreements, which is not in the interests of either clients or the legal profession.</p> <p>This proposal likely will lead to litigation in the</p>	

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

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					<p>context of an injunction, jeopardy assessment or forfeiture. It may lead to substantial problems in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace. The reason for this is that persons or entities with a claim against a client will seek to seize and forfeit a client's potential interest in obtaining a refund based on the client's possible right to "be entitled to a refund of a portion of the fee." How would a creditor of the client know whether the agreed upon services were or were not provided?</p> <p>This proposal has no counterpart in the ABA Model Rules. Thus, it does not advance the intended goal of national uniformity that is among the purposes for revising California's existing rules of professional conduct.</p> <p>Finally, PREC is aware that some practitioners have expressed concern that this provision was presented to the State Bar Board of Governors without the prior public comment that is required by State Bar Rule 1.10. If there has been a failure to comply with any procedural rule, PREC believes that the Rules Revision commission should consider recommending necessary corrective</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>

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					action in order to ensure that all of California's new Rules of Professional Conduct are lawfully adopted.	
14	San Diego County Bar Association	D	Yes		CA should adopt ABA Model Rule 1.5(a) with the addition of the factors in rule 4-200 to determine reasonableness.	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.
15	Michael Pancer	D	No		<p>I believe that the "flat fee" can play an important role in maximizing the availability of legal services, especially to those who can least afford it.</p> <p>Many clients prefer to have a "flat fee" arrangement. Unless a client is extremely wealthy, a client is concerned about the cost of legal services and often does not want to enter into an agreement where the amount is indefinite. And while there may be attorneys who would take advantage of the "flat fee" opportunity, certainly there now exists sufficient safeguards to prevent "unconscionable" fees. But if "flat fee" contracts are not going to be enforced and therefore not entered, many potential clients will find themselves unable to avail themselves of legal services that they request and require.</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</p>

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

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						entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.
16	Charles Sevilla	D	No	1.5(e)(2)	<p>Subpart (2) adds uncertainty to the Rules. While the Rule states that the fee is the property of the attorney on receipt, this is contradicted by the addition of the clause stating the client, upon termination of the relationship, can demand a refund. A fee cannot be both an attorney's property if it is also subject to a client right of refund. This makes the fee status uncertain and has direct implications in matters of creditor rights and government forfeiture claims.</p> <p>The client's interest in fee contracts are already protected in a number of areas: (1) B&P Code section 6148; (2) CRPC Rule 3-300; <u>Hawk v. State Bar, In re Corona</u>; (3) CRPC Rule 3-700(D)(2); and (4) CRPC 4-200, <u>Bushman v. State Bar</u>.</p> <p>Many criminal defense lawyers are sole practitioners who regularly charge flat fees for routine criminal matters. This Rule unnecessarily puts in place a condition that essentially makes the fee fixed (or "flat") only at client sufferance. If the work for the attorney is substantial, the client will be content with a fixed fee. But if the attorney</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>

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					seems to be on the way to a speedy result that will end the case on a favorable note for the client, the client can pull out of the "flat fee" contract, fire the attorney, and demand a substantial refund. There is no such thing as a "flat" fee when one party to the contract can void it at will.	

May 5, 2010 McCurdy E-mail to Drafters (Vapnek & Ruvolo), cc RRC:

Rule 1.5 Codrafters (VAPNEK, Ruvolo):

The public comments received to date on this rule are attached in a combined PDF. I've also provided a Word copy of the draft public commenter chart with the comment synopses filled in. To keep pace with the comments being received, please consider beginning to add the RRC responses, and if desired, modifications to the synopses.

Of course, more comments continue to be received each day, and we will convey updated information periodically in order to keep abreast of the public comment review in anticipation of the work being carried out at your June 4 & 5, and June 25 & 26 meetings.

Attached:

RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT1 (4-22-10).doc
RRC - 4-200 [1-5] - Public Comment Complete - REV (05-05-10).pdf

May 14, 2010 McCurdy E-mail to Drafters, cc RRC:

Rule 1.5 Codrafters (VAPNEK, Ruvolo):

Three additional public comments have been received for this rule, bringing the total comments to 15. I've attached an updated comment compilation which is current. An updated public commenter chart, but the SDCBA comment has not yet been added to the public commenter chart.

Here are the instructions from the assignment agenda for all post public comment rules:

INSTRUCTIONS: For each rule listed below that has received three or more comments/testimony, the codrafters are assigned to review the comments/testimony received and to prepare a revised draft rule, if any revisions are recommended, and a Public Commenter Chart with RRC responses, for submission to staff by 12 noon on Tuesday, May 25, 2010 to distribute with the June 4 & 5 meeting agenda materials. An updated Dashboard, Introduction, and Model Rule comparison chart are also needed to complete the rule; however, the codrafters have the discretion of waiting until the end of the public comment period (on June 15th) to begin work on these documents. Additional comments will be sent to each drafting team by e-mail as they are received. Where three or more comments have been received, materials are enclosed for codrafters. Rules that have received less than three comments/testimony will not be considered until the June 25 & 26 meeting.

Attached:

RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT1.1 (05-14-10).doc
RRC - 4-200 [1-5] - Public Comment Complete - REV (05-14-10).pdf

May 19, 2010 McCurdy E-mail to Drafters, cc RRC:

Two additional comments have been received for this rule since my last message, bringing the total number of comments to 17. Here's an updated comment compilation and an updated public commenter chart.

Attached:

RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT1.2 (05-19-10).doc
RRC - 4-200 [1-5] - Public Comment Complete - REV (05-19-10).pdf

May 19, 2010 Difuntorum E-mail to Drafters, cc RRC:

Rule 1.5 Codrafters (Vapnek, Ruvolo):

Below is some information that you might find helpful in analyzing the many comments received that oppose adoption of Rule 1.5(e). –Randy D.

(1) Link to a Minnesota State Bar rules revision committee memorandum explaining that committee's proposal for regulating "flat fees." Like the Commission's proposed rules, Minnesota's proposal is based on the rationale that labeling flat fees as "nonrefundable" is inaccurate and potentially misleading. The memorandum is a very helpful summary of the public protection concerns at stake in the regulation of "flat fees."

<http://www.mnbar.org/committees/rules/NonrefRPCprop.pdf>

(2) Link to a December 2009 D.C. Bar Counsel article describing the D.C. approach to applying the D.C. version of ABA Model Rule 1.15 which requires advance fees to be deposited into a client trust account and withdrawn only when they are earned. (Note that the Commission's proposed rules would continue to permit lawyers to use "true retainer" and "flat fee" arrangements as fees that are earned on receipt and not required to be deposited into the client trust account.)

http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/december_2009/barcounsel.cfm#note6

(3) Pasted below is a recent Daily Journal article entitled "The Truth About Retainers." Also pasted below is the State Bar Fee Arbitration Advisory mentioned in the article. The Arbitration Advisory also is found on the Bar's website at this link:

http://calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Mandatory_Fee_Arbitration_Advisories.gif&sCategoryPath=/Home/Attorney%20Resources/Special%20Services/Mandatory%20Fee%20Arbitration/Arbitration%20Advisories&sHeading=01-02&sFileType=HTML&sCatHtmlPath=html/MFA_Advisory_01-02.html

The Truth about True Retainers

Daily Journal California Lawyer Article April 01, 2010 by Leigh Chandler and Aaron Shechet

At the outset of an attorney-client relationship, it is crucial to define the scope of the engagement and establish payment terms. Lawyers commonly refer to a client's opening payment as a "retainer" and often state that it is "nonrefundable." However, that can be a big mistake. Indeed, many attorneys are confused about the proper treatment of retainers and, specifically, whether a particular retainer payment really is nonrefundable. An

examination of leading authority reveals that only "true retainers" are nonrefundable—and these are very, very rare.

Governing Rule

When a client discharges an attorney, the Rules of Professional Conduct require the attorney to "[p]romptly refund any part of a fee paid in advance that has not been earned." The rules also state that a refund is unnecessary if the money is "a true retainer fee ... paid solely for the purpose of ensuring the availability of the member for the matter." (Rule 3-700(D)(2).) That is, money advanced by a client but not earned by the lawyer must be refunded, unless it constitutes a true retainer.

Why is it crucial to understand the difference? Improper retention of client funds can result in discipline, even disbarment. Moreover, an attorney may face civil liability for breach of fiduciary duty, which may be determined as a matter of law based on a breach of the rules of professional conduct which "help define the duty component of the fiduciary duty which an attorney owes to his [or her] client." (*Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086 (1995).) Avoiding these consequences depends on accurately structuring the attorney-client relationship.

Retainer Problems

The State Bar addressed the issue of retainers in Arbitration Advisory Opinion 01-02 (calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=11337&id=6493). The opinion states that "unless the attorney and client have contracted for a 'true retainer' (also known as a 'classic retainer'), the attorney must refund any portion of the advance fee that the attorney has not yet earned."

The key characteristic of a true retainer is that it is paid solely to secure the availability of the attorney over a given period of time and is not paid for the performance of any other services. When a valid true retainer exists, if the attorney's services are eventually needed, those services are billed and paid for separately, and no part of the retainer is applied to pay for them. Thus, any fee arrangement in which the attorney bills against the retainer is not a true retainer.

As explained in Advisory Opinion 01-02, a true retainer may be nonrefundable because it takes the attorney out of the marketplace and precludes him or her from undertaking other work. Such an arrangement requires that the attorney be generally available for consultation and legal services to the client. A true retainer may be a single, up-front payment to guarantee that the attorney will be available for a specified period of time, or it may be a recurring payment, where, for example, the client pays a monthly fee solely to ensure the attorney's availability to represent the client for that month.

Scarcer than Hen's Teeth

Although true retainers once were common, the State Bar does not contemplate many appropriate situations for them today. In fact, Opinion 01-02 speculates that there are probably only a handful of situations in which a client would want to pay a true retainer. Such an arrangement may be appropriate to secure the availability of an attorney whose reputation could cause a threatened lawsuit to vanish. In addition, a true retainer may be a reasonable way to ensure that an especially talented attorney is available to handle a matter; it may also be used to prevent the attorney from representing an adverse party. The

opinion goes on to note that "[o]ther than these examples ... true retainers would seem to be of little use to clients in everyday legal matters."

Cases have also helped to define the true retainer. Consistent with the State Bar opinion, cases identify two main characteristics of a true retainer: the money is (1) paid to reserve the availability of a specific attorney and (2) not used to pay hourly fees. Note also that the language of Rule 3-700 (D)(2) and the cases interpreting it indicate that a true retainer reserves the time of only a specific attorney at a firm, and not the firm in general.

In one case, the court defined a true retainer, as "a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client." (*Baranowski v. State Bar*, 24 Cal. 3d 153, 164 n. 4 (1979).)

Another court discussed the circumstances under which a law firm may retain client funds, identifying three types of payment arrangements: (1) the classic/true retainer, (2) the security retainer, and (3) the advance payment retainer. The court concluded that only a true retainer is earned upon receipt by the attorney; all other retainers must be placed in a client trust account and refunded to the client if unearned. (See *T & R Foods v. Rose*, 47 Cal. App. 4th Supp. 1, 7 (1996).)

Securing Availability

In *T & R Foods*, the court identified a true retainer as the payment of a sum of money to secure availability over a period of time, finding that the attorney is entitled to the fee whether or not services are ever rendered (*T & R Foods*, 47 Cal. App. 4th Supp. at 6).

The court went on to observe that a "security" retainer, in contrast, is a sum of money held by the attorney to secure payment of fees for future services that the attorney is expected to render. It is important to note that a security retainer remains property of the client until the attorney applies it to fees and costs for services actually rendered, and that any portion of the funds that are not earned must be returned to the client.

An "advance payment" retainer occurs when the client pays in advance for some or all of the services that the attorney is expected to perform. In such a case, the court said, "ownership of the funds is intended to pass to the attorney at the time of payment." (47 Cal. App. 4th Supp. at 7.) However, the court also found the law unsettled as to whether funds can be retained by the attorney if unearned. Ultimately, the court concluded that there was an intent expressed in the State Bar rules that funds "retain an ownership identity with the client until earned." (See *T & R Foods*, 47 Cal. App. 4th Supp. at 7.)

The fee agreement in the *T & R Foods* case did not create a true retainer because it stated that the attorneys would charge their services against the retainer, which was to be replenished by the client each month to assure that the attorneys were always holding \$25,000 on their books to cover ongoing fees. The court properly found that the \$25,000 deposit was in fact "an advance payment retainer." The court required the attorneys to segregate the funds until they had been earned (*T & R Foods*, 47 Cal. App. 4th Supp. at 6).

In cases where counsel has not properly structured a true retainer, the State Bar repeatedly finds that clients are due a refund of unearned fees, even if a payment is denominated as

nonrefundable in the parties' agreement. In other words, the actual treatment of the funds trumps the language of the retainer agreement.

In an earlier case (*Matthew v. State Bar*, 49 Cal. 3d 784 (1989)), an attorney was retained to handle a real estate fraud matter. The attorney required his client to provide a nonrefundable retainer "to ensure that his client would 'work with him on the case.'" The fee agreement required \$5,000 up front, with a \$10,000 ceiling on fees, and stated that the attorney would "bill for his time at the rate of \$70 per hour until the bill reached \$5,000." (49 Cal. 3d at 787.) The attorney represented the client for seven months, and the client paid more than \$6,000 in attorneys fees during that time. The attorney kept no time records and provided no billing statements, but he estimated he spent 32 to 40 hours on the case. After unsuccessfully seeking a refund, the client took the attorney to arbitration to recover unearned fees. The arbitration panel found in the client's favor, but the attorney still did not refund the money.

In another fee agreement, the same attorney provided for a \$1,000 nonrefundable retainer. After the client terminated that representation, a dispute arose as to unearned fees. The attorney failed to perform needed work, provided no billing statements, was unavailable, and "admitted that he was not diligent in this matter and that he was unable to work on the matter in a timely fashion due to his caseload." (49 Cal. 3d at 789.)

The California Supreme Court emphasized the seriousness of the attorney's misconduct, identifying failure to refund "unearned fees as serious misconduct warranting periods of actual suspension, and in cases of habitual misconduct, disbarment." (49 Cal. 3d at 791.) In addition to being disciplined, the attorney was required to return all unearned fees, notwithstanding the nonrefundable language in the retainer agreements (49 Cal. 3d at 792).

Proper Language

To be valid, an agreement calling for a true retainer should show that the client is purchasing something valuable. For example, the agreement may refer to specific blocks of time when a specific attorney will be available, or state that the payment guarantees the attorney will refrain from taking adverse clients. The agreement might also state that the payment secures the attorney's availability for a future engagement.

In addition to having a proper written agreement, the attorney also should be prepared to demonstrate that he or she has provided real value. For the average attorney, a true retainer is unlikely to be appropriate unless the lawyer is setting aside specific blocks of time for the client. A highly experienced or specialized attorney may justify a true retainer more easily, as long as the attorney arranges to be available and the retainer agreement reflects that. It may be appropriate to outline the attorney's specialized reputation or experience in the agreement to demonstrate the value purchased by the client.

In drafting an effective true retainer, attorneys should state as specifically as possible the time that the client is buying and what the attorney will do with that time. The attorney may agree to sit in the office and wait for the client's weekly phone calls between 10 a.m. and noon on Tuesdays. In this situation, office records should demonstrate that the attorney was available (perhaps by entering data in a time log).

True retainer funds should be placed in an attorney's general account and not in a trust account. If the attorney places funds in a trust account and bills against them, the

arrangement collapses and loses its status as a true retainer no matter what the fee agreement says.

Alternative Fee Agreements

Many clients wish to avoid hourly billing rates and prefer to pay a flat fee. Such an arrangement can be valuable to clients who want to avoid surprise bills and stay within a budget. Attorneys who perform work for a flat fee should be careful in how they structure the client relationship so as to comply with the rules governing true retainers.

A flat fee is not necessarily a true retainer; in fact, based on State Bar Opinion 01-02, in a true retainer situation attorney services (as opposed to availability) would be charged to the client separately, and no part of the retainer would be applied to pay for actual services. A flat fee for services may be acceptable if it is tied to the accomplishment of a specific milestone and refunded if the milestone is not reached.

For example, to form a limited liability company a lawyer may charge a flat fee of \$1,000 that is advanced by the client; the parties may stipulate that the fee is earned after the attorney files articles of organization and delivers the completed operating agreement to the client. Under these circumstances, the fee should be deposited in the attorney's trust account. If the attorney does not complete the specified tasks, the fee has not been earned and must be refunded.

A well-drafted flat fee agreement should state exactly what services will be performed and when the fee is considered earned. If several services are involved, a portion of the fee should be earned after each service is completed. Not only is this fair to both parties, but it also avoids confusion if the attorney's services are terminated short of the final milestone.

For clients who seek to economize, there are alternatives to the flat fee. For example, an attorney may choose to bill the client by the hour but cap the fee at a specific amount within the client's budget.

In large part, the true retainer seems to be a vestige of days gone by. Today it is rarely used correctly, although many attorneys continue to insist on collecting nonrefundable retainers. Such agreements are risky and must be structured carefully.

Not only must a nonrefundable retainer fit within the narrow definition of a true retainer, it also must be appropriate to the client's situation. The State Bar will scrutinize the arrangement to determine whether the fee is unconscionable—that is, if a client receives little or no value at all by ensuring the availability of the attorney; if the attorney has no particular reputation or expertise to justify a nonrefundable payment; or if there is "an abundance of other competent attorneys available to handle the client's matter." (See Opinion 01-02 at subsection C (Unconscionability).)

True retainers exist, but they are not very common. In most cases, advance payments are just that: advances that cover fees to be earned in the future. And remember that if the fees are not earned, they must be returned to the client at the conclusion of the engagement.

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ARBITRATION ADVISORY 01-02

ARBITRATION ADVISORY RE: ENFORCEMENT OF "NON-REFUNDABLE" RETAINER PROVISIONS May 16, 2001

Points of view or opinions expressed in this document are those of the Committee on Mandatory Fee Arbitration. They have not been adopted or endorsed by the State Bar's Board of Governors and do not constitute the official position or policy of the State Bar of California.

INTRODUCTION

Arbitrators are frequently called upon to evaluate the provisions of a fee agreement that characterizes a payment by the client as "non-refundable" or "earned upon receipt." There are important differences, however, as to how attorneys are required to treat such payments, depending on the true nature of the payment and regardless of the language used in the fee agreement. Principally, these differences concern (1) the attorney's obligation, if any, to refund some or all of an advance payment upon discharge or withdrawal and (2) whether the advance payment should be placed in the attorney's client trust account or in the attorney's own proprietary account. This advisory will provide guidance to arbitrators in dealing with the enforceability of "non-refundable retainer" provisions in fee agreements and the rules pertaining to the placement of different forms of advance payments.

OBLIGATION TO REFUND

A. Distinction Between "True" Retainers and Other Advance Payments.

Rule 3-700(D)(2) of the Rules of Professional Conduct¹ provides that when the attorney-client relationship has concluded the attorney must:

"Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter."

Under Rule 3-700(D)(2), unless the attorney and client have contracted for a "true retainer" (also known as a "classic retainer"), the attorney must refund any portion of an advance fee that the attorney has not yet earned. This raises the question of how to distinguish a "true retainer" from other forms of advance payments. Rule 3-700 (D)(2) itself suggests that a "true retainer" is one that is paid "solely for the purpose of ensuring the availability of the member." This definition of a "true retainer" was adopted by the California Supreme Court in *Baranowski v. State Bar* (1979) 24 Cal.3d 153.

In *Baranowski*, an attorney was disciplined for failing to return advance payments to three clients. The court explained that:

"An advance fee payment as used in this context is to be distinguished from a classic retainer fee arrangement. A [classic] retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client." [*Id.*, at 164 fn.4].

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

It is important to note that the key defining characteristic of a "true" or "classic" retainer is that it is paid solely to secure the availability of the attorney over a given period of time and is not paid for the performance of any other services. In a true retainer situation, if the attorney's services are eventually needed, those services would be paid for separately, and no part of the retainer would be applied to pay for such services. Thus, if it is contemplated that the attorney will bill against the advance payment for actual services performed, then the advance is not a true retainer because the payment is not made solely to secure the availability of the attorney. Instead, such payments are more properly characterized as either a security deposit or an advance payment of fees for services ([see footnote 2, below](#)).

A true retainer is earned upon receipt (and is therefore non-refundable) because it takes the attorney out of the marketplace and precludes him or her from undertaking other legal work (e.g., work that may be in conflict with that client). It also requires that the attorney generally be available for consultation and legal services to the client. Sometimes a true retainer will take the form of a single payment to guarantee the attorney's future availability for a specified period of time and other times as payments made on a recurring basis, such as a monthly retainer, to assure the attorney's availability to represent the client for that month. Sometimes this is referred to as having the attorney "on retainer."

As might be expected, true retainers are rare in today's legal marketplace. Due to the abundance of competent attorneys in virtually all fields of law, there are probably only a handful of situations in which a client would want to pay a true retainer. Nonetheless, true retainers do have a legitimate, if infrequent, use in the legal marketplace. As one court has noted, "A lawyer of towering reputation, just by agreeing to represent a client, may cause a threatened lawsuit to vanish." [Bain v. Weiffenbach (Fla.App. 1991) 590 So.2d 544]. In some cases, a client may perceive that only the retained attorney has the requisite skills to handle a particular matter and may want to guarantee that attorney's availability. In other cases, a true retainer may be used simply to prevent the attorney from representing an adverse party. Other than these examples though, true retainers would seem to be of little use to clients in everyday legal matters.

In other instances, a so-called "retainer" is effectively a security deposit or an advance payment of fees². A payment that represents a security deposit or an advance payment for services to be performed in the future remains the property of the client until earned by the attorney, and any unearned portion is to be returned to the client [Rule 3-700(D)(2); S.E.C. v. Interlink Data Network (9th Cir. 1996) 77 F.3d 1201]. An example of an advance payment for services would be where the attorney charges \$200 per hour and collects a "retainer" of \$2,000, giving the client credit for 10 hours of legal services to be performed in the future. If the attorney is discharged or the matter is otherwise concluded before the attorney has expended 10 hours of his or her time, the attorney must refund the balance of the advance payment that has not yet been earned. Thus, if the attorney had only expended four hours of time prior to being discharged, under Rule 3-700(D)(2) the attorney must promptly refund \$1,200 to the client. In S.E.C. v. Interlink Data Network, supra, the law firm's characterization of the fee as a "present payment for future work," which it alleged was earned when paid, was unsuccessful in avoiding a refund of the unused portion of the fee to the client's bankruptcy trustee.

B. Language of Fee Agreement Not Controlling.

Advance payments that are not "true" retainers are refundable under Rule 3-700(D)(2) to the extent they are unearned, no matter how the fee agreement characterizes the payment [Matthew v. State Bar (1989) 49 Cal.3d 784; see also Federal Savings & Loan v. Angell,

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

Holmes and Lea (9th Cir. 1988) 838 F.2d 395, 397-398]. In *Matthew*, two fee agreements provided for a "non-refundable" retainer payment. In each instance it was contemplated that the attorney would bill against the "retainer", but the attorney failed to fully perform the required services. The attorney was disciplined both for client abandonment and for failure to account for and return the unearned portion of the fees. Thus, the attorney's characterization of the retainer as "non-refundable" in the fee agreement did not abrogate the attorney's duty to return any portion of the fee that had not been earned. The Supreme Court emphasized that "Retention of unearned fees [is] serious misconduct warranting periods of actual suspension, and in cases of habitual misconduct, disbarment." [Id. at 791]. A member's failure to promptly account for and return the unearned portion of an advance fee warrants discipline [In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752].

Another case in which the language of the fee agreement did not control the characterization of the advance payment is *In re: Matter of Lais* (1998) 3 Cal. State Bar Ct. Rptr. 907. In the *Lais* case the attorney's fee agreement read as follows:

"Client agrees to pay attorney for his services a fixed, non-refundable retainer fee of \$2,750 and a sum equal to \$275 per hour after the first ten hours of work. This fixed, nonrefundable retainer is paid to the attorney for the purpose of assuring his availability in the matter."

Even though the language of the agreement stated that the advance was being paid to assure the attorney's availability and was nonrefundable, the advance was clearly also to be applied to the first ten hours of work. Therefore, the advance was not paid solely to assure the attorney's availability. The court held that the \$2,750 payment was not a true retainer and that the attorney was required to refund any amount that had not been earned.

C. Unconscionability

Civil Code section 1670.5 provides that a contract may be found to be unenforceable if its terms are unconscionable. In addition, Rule 4-200 of the Rules of Professional Conduct provides that an attorney may not charge or collect an illegal or unconscionable fee. In some cases, a payment that is properly characterized as a true retainer may nonetheless be unenforceable if it is found to be unconscionable.

The concept of unconscionability has both procedural and substantive elements [*Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1296]. Substantive unconscionability refers to the harshness of the contract terms. "Substantive unconscionability is indicated by contract terms so one-sided as to shock the conscience." [*American Software, Inc. v. Ali* (46 Cal.App.4th 1386, 1391; see also *Bushman v. State Bar* (1974) 11 Cal.3d 558, 563-566 (attorney's fee found unconscionable where it was "so exorbitant and wholly disproportionate to the services performed as to shock the conscience.")). Procedural unconscionability refers to the manner in which the contract was negotiated and the circumstances of the parties at that time [*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329]. Examples of issues relevant to a procedural unconscionability analysis are the inequality in bargaining power between the parties and the absence of real negotiation or meaningful choice [*American Software Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391].

Presumably, both substantive and procedural unconscionability must be present before a contract will be held unenforceable. However, a relatively larger degree of one will compensate for a relatively smaller degree of the other [*Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1296-1297]. Stated another way, "a

compelling showing of substantive unconscionability may overcome a weaker showing of procedural unconscionability." [Carboni v. Arrospide (1991) 2 Cal.App.4th 76, 86].

Rule 4-200 sets forth eleven factors to be examined in determining whether an attorney's fee is unconscionable. Some of these factors include: (1) the relative sophistication of the attorney and the client; (2) the amount of the fee in proportion to the value of the services rendered; and (3) the experience, reputation and ability of the attorney. One case held that a fee agreement requiring the client to pay a "minimum fee" upon discharge was unconscionable [In re: Scapa & Brown (1993) 2 Cal. State Bar Ct. Rptr. 635, 652].

Unconscionability in the context of a true retainer agreement would normally not be a consideration where the client is a sophisticated purchaser of legal services, a large insurance company or a corporation for example, or where the attorney's skill and reputation are well known. As previously noted, however, the situations in which a client may have a valid reason for paying a true retainer fee are not very common. True retainers should therefore be scrutinized to see if the fee is unconscionable. For example, a client may receive very little or no value at all by ensuring the availability of the attorney if the attorney has no particular reputation or expertise and if there is an abundance of other competent attorneys available to handle the client's matter. In cases such as this, a true retainer might be unconscionable, particularly if the amount charged is very high and the client is not a sophisticated purchaser of legal services.

In examining whether a true retainer withstands an unconscionability analysis, it is important to remember that an agreement may only be avoided on grounds of unconscionability based on the facts as they existed at the time the contract was formed [Civil Code section 1670.5; Rule 4-200(B)]. "The critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties, not whether it is unconscionable in light of subsequent events." [American Software Inc. v. Ali (1996) 46 Cal.App.4th 1386, 1391].

Thus, if a client enters into a true retainer agreement with a famous criminal defense attorney because the client fears that he will be indicted and wants to ensure the defense attorney's availability, the client could not avoid the contract on grounds of unconscionability merely because the indictment never occurred. On the other hand, if the same client entered into a true retainer agreement with an attorney who had no experience or reputation in handling criminal law matters, the retainer might be unconscionable depending upon the amount paid and the sophistication and bargaining power of the client, regardless of whether the indictment occurred or not.

PLACEMENT OF ADVANCE FEES AND TRUE RETAINERS

The issue of where attorneys should place advance payments depends on the nature of the payment. Rule 4-100 provides, in pertinent part:

"All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account", "Client Funds Account" or words of similar import.....No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled"

Because true retainers are earned upon receipt, they are not "funds held for the benefit of the client." Therefore, Rule 4-100's prohibition on commingling "funds belonging to the

member" means that true retainers should be placed in the attorney's proprietary account and not in the client trust account.

Two courts since Baranowski [Baranowski v. State Bar, supra] have declared that it is undecided in California whether, under Rule 4-100, an advance payment for services or a security deposit must be deposited into the client trust account [SEC v. Interlink Data Network (9th Cir. 1996) 77 F.3d 1201, n.5; Katz v. Worker's Comp. Appeals Bd. (1981) 30 Cal.3d 353, n.2]. Yet, in T & R Foods, Inc. v. Rose (1996) 47 Cal.App.4th Supp. 1, the Appellate Department of the Los Angeles County Superior Court held that under Rule 4-100 an advance fee must be deposited into an attorney's trust account, and that an attorney's failure to segregate the advance fee or security deposit from his general funds constituted a breach of fiduciary duties³. The T&R court reasoned that the language of 4-100 indicated "an intent by the State Bar that funds retain an ownership identity with the client until earned." [Id., at 7].

Importantly, the T&R opinion noted that attorneys who commingle advance fees or security deposits with their own funds are not only subject to discipline by the State Bar, but also subject to civil liability for professional negligence and breach of fiduciary duty. Although the T&R opinion may not be binding on California's appellate courts, it is currently the only opinion that decides the issue one way or the other. Therefore, unless a higher court disapproves the T&R opinion, an event that is by no means certain, California attorneys are required to follow its' holding.

CONCLUSION

In the context of a fee arbitration, when presented with circumstances where the client has made an advance payment and claims entitlement to a refund of all or a portion of the advance, arbitrators should carefully consider the following issues:

- (1) Whether the retainer is a "true retainer" or a "classic retainer" that was paid solely to ensure the attorney's availability and not paid for the performance of any particular legal services;
- (2) Whether the retainer merely represents an advance payment or security deposit for actual legal services to be performed in the future. A provision that the attorney will charge an hourly rate to be billed against the retainer is a conclusive indicator that the payment is an advance payment or a security deposit that is refundable unless fully earned;
- (3) If the payment represents a true retainer fee paid solely to ensure the availability of the attorney, whether the fee is unconscionable in light of the facts as they existed at the time the agreement was formed; and
- (4) To the extent it may bear upon the fees, costs, or both to which the attorney is entitled [See Business & Professions Code section 6203(a)], whether the attorney complied with Rule 4-100(A) in placing the advance payment in the appropriate account.

Footnotes

1. All references to a "Rule" or "Rules" refer to the California Rules of Professional Conduct.

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

2. An "advance payment" would typically be applied toward the client's bill at the end of the current billing period. A "security deposit" is one held by the lawyer throughout the representation and refunded to the client once all services are completed and the attorney has been paid. For convenience, a security deposit is sometimes applied to the final invoice.

3. Note that all advances for costs and expenses must be placed in a client trust account because they are funds held for the benefit of the client [Stevens v. State Bar (1990) 51 Cal.3d 283].

See also:

RRC - 4-200 [1-5] - 11-30-09 Cooperstein (Minn) Memo re Flat Fees, etc.

RRC - 4-200 [1-5] - D.C. Bar Counsel re Flat Fees (12-2009).doc

May 19, 2010 Sondheim E-mail to RRC:

I have been reviewing the many adverse comments received regarding this rule and offer the following thoughts:

1. This is the easy one. The Dashboard refers to the Washington rule, but it is not listed in the State Variations. Shouldn't we include it so those reading the Dashboard know what we relied upon? In addition, in light of Randy's link to a Minnesota memorandum, should we also include some rules of other states listed in that memorandum which prohibit a fee from being called "non-refundable"?

2. One of the commentators appears to think that the flat fee goes into the trust account. I suggest we make it clear that not only is it the lawyer's property on receipt, but also that it should not be placed into the trust account.

3. I perceive that one of the major problems with subparagraph (e) that is of concern to commentators is item (v). Perhaps it could be removed from (e) and a comment be added stating that a flat fee may also be subject to other rules relating to legal services. For example, the fee may become unconscionable or the fee agreement may be modified if the lawyer decides to credit the flat fee against hourly work. By putting this principle in the comment we help eliminate the sting which many commentators feel from its placement in the rule and, in any event, we are not changing the principle under which flat fees currently operate.

May 21, 2010 KEM E-mail to RRC:

Greetings:

1. In response to Harry's point #1, below, I've attached a recently-issued Missouri Formal Opinion 128 (5/18/10) concerning non-refundable fees. The link for the opinion is:

<http://www.mo-legal-ethics.org/modules.php?name=News&action=view&id=64&PHPSESSID=f96c1be7f56dc7617efd7c2555ce6517>

2. Also, here's an interesting exchange from December that appears on lawyers.com:

<http://community.lawyers.com/forums/t/92422.aspx>

This is precisely the kind of situation that paragraph (e) is intended to avoid.

3. As to Harry's item #3, I recommend against moving (e)(2)(v) into the Comment. Paragraph (e)(2) provides:

(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.** (Emphasis added).

There is no reason to remove (e)(2)(v), which is at the heart of the protection afforded clients under the provision, except as an attempt to offer an olive branch to the criminal defense bar. However, it will have as much effect on their opposition to the provision as the Commission's attempt to revise the notice requirement in 1.11(e)(2) had on the position of George Cardona's office. Our whole point is that the fee is not non-refundable until it is earned. Requiring lawyers to state in the fee agreement that the client might be entitled to a refund is the only provision that will catch a client's attention. The other four subparagraphs are fine, but the only one that will have any meaning to the client is item (v). More important, I don't think that moving (v) into the Comment will have any effect on the opposition; they don't want to be regulated in this regard, period. We've been told by the public commenters that honorable criminal defense lawyers will naturally return any part of a fee that is not earned. However, it is not the honorable lawyers for whom the rules are written.

Attached:

RRC - [1-5] - Missouri Formal Ethics Op. 128 (Nonrefund Fees) (05-18-10).doc

May 21, 2010 Sondheim E-mail to KEM, cc RRC:

The problem with the Missouri Opinion is that it goes to far. It requires the fee to be placed in the trust account, a requirement that the Commission rejected. We need language used in states where the fee cannot be called "non-refundable," but need not be placed in the trust account.

With regard to your reference to 1.11(e)(2), as I recall RAC removed this provision entirely. I would not want to have the same thing happen to 1.5 (e)(2)(v). I think one of the concerns with (e)(2)(v) is that the language permits an argument that the fee is subject to seizure for bankruptcy and by IRS because it may be deemed to still be property of the client. We need to deal with this issue in some way to make it clear that we are not changing the status of such fees under current law and current rules, other than prohibiting them being called "non-refundable."

May 21, 2010 KEM E-mail to Sondheim, cc RRC:

1. As far as I know, California is the only state that does not require that an advance fee be placed in the trust account, so I don't think we will find any authority in other jurisdictions similar to the California approach. Ellen will have a better read on that but when I looked at this a few years ago, that was my conclusion.

2. As to the other point, if we take (v) out of 1.5(e)(2), then the key component of that provision is gone. First, I was part of a panel on bankruptcy when I noted the California position on advance fees being placed in a trust account. The BK judge on the panel took exception when I pointed out that the Cal. Rule does not require that advance fees be placed in a trust account. He said that his approach (and from what I gathered, also the approach of the 75+ lawyers in the room who viewed me with something bordering on contempt) was that any advance fees, regardless of how denominated, were to be placed in the trust account. I'm not sure that we should look to the BK cases from the 1990's as a reflection of what is actually occurring in the BK field. If members of the Commission are aware of different practices elsewhere (i.e., outside of Orange County), please let me know. However, I note that we haven't heard any complaints from the BK bar to date. The only criticisms have come from the criminal defense bar. I'm not sure this is an issue for BK lawyers and, unless we know with certainty that it is, we should not be including this in our arguments.

3. Second, as to the criminal defense bar, my point is that deleting subparagraph (v) will not convince the criminal defense bar to withdraw their criticisms (just as our revisions of 1.11(e)(2) did not convince the U.S. Atty to withdraw its criticisms of 1.11(e)). I also think that removing subparagraph (v) -- which requires criminal defense lawyers to place in their fee agreements a statement that if the services are not completed, then the client MAY be entitled to a refund -- is the only part of 1.5(e)(2) that has meat on its bones. In effect, it let's the client know up front that if the lawyer doesn't do the work that was agreed to at the outset of the relationship, that's unconscionable, and the client should get something back. Putting the provision in the fee agreement up front is disclosure, and will enable the client to make an informed decision as to whether the client wants to go the route of a large up front fee to cover everything, or a smaller fee with add ons that might arise down the road. The members of the criminal defense bar in their public comments repeatedly state that the client is permitted to make a decision to go w/ the flat fee or not. This disclosure ensures it is an informed decision. Instead of our proposed revision, however, the public commenters argue that Rule 4-200, which prohibits charging an unconscionable fee, is the solution. But how will the client know about Rule 4-200 (or 1.5)? Requiring up front disclosure will at least give the client a heads up that he or she has a remedy against the lawyer if the lawyer expends little or no effort, notwithstanding the lawyer's statement that the fee belongs to the lawyer upon receipt.

a. As to the public commenters' argument that 1.5(e)(2) will permit seizure of the fee, the money is earned on receipt UNLESS an eventuality occurs (e.g., charges dropped or an early plea deal) that would render the fee received unconscionable because the lawyer provided only a fraction of the services contemplated at the beginning of the representation. The client is paying consideration. It is still the lawyer's money and not subject to seizure unless and until it can be shown that the lawyer's services fell short of what the client and lawyer agreed to at the beginning of the representation. We are not changing the law by prohibiting non-refundable fees. The key point is that it is earned on receipt -- and is thus the lawyer's money -- unless an event occurs afterwards that might require a refund. Call it a condition subsequent (even if the Restatement (2d) Contracts struck that term).

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

b. If we make any change, it should not be to move subparagraph (v) into a comment. Rather, we might consider a new comment that explains what we mean when we state "the agreed-upon legal services have not been completed." That seems to be the real concern, i.e., the fear that a client might come after them after they've provided substantial services that warrant full payment, but may not have included ALL of the services that possibly might have been rendered when the parties signed the fee agreement. The comment could state something along the following lines:

"Subparagraph (e)(v) requires that a lawyer retained on a flat fee basis must include in the fee agreement a statement 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.' Subparagraph (e)(v) does not require a refund if all of the possible services that the lawyer might have been provided under the agreement were not necessary. For example, if the lawyer had agreed to represent the client for a flat fee to the conclusion of a trial on the matter, but was able to negotiate a settlement or plea agreement after expending substantial effort on the client's behalf, the client would not be entitled to a refund. On the other hand, if the lawyer and client entered the same agreement but the matter was terminated before the lawyer had expended any effort, or after little effort by the lawyer, then it is likely that the client would be entitled to a refund of at least part of the fee. See paragraphs (b) and (c) of this Rule concerning unconscionable fees."

That's done on the fly. It can be improved substantially but the general idea is to assuage the real concerns of the criminal defense bar.

May 23, 2010 Kehr E-mail to KEM, cc RRC:

I've been looking around for an explanation for the reaction described in your paragraph 2, and I think the attached provides it. The bankruptcy judge and lawyers present didn't recognize the difference between a rule applicable only in bankruptcy and the disciplinary rule applicable in all situations.

Attached:

RRC - [1-5] - Guidelines re Retainers - Trustee - C.D.Cal.pdf

May 23, 2010 KEM E-mail to Kehr, cc RRC:

Your attachment is helpful and is what I understood to be the case, i.e., that the BK lawyers are subject to BK court rules on retainers (and that the BK court -- or at least the U.S. Trustee that issued the attachment -- apparently doesn't recognize a "true retainer" or is misusing the term; what is described is an advance fee). At any rate, regardless of what the California Rule provides, it appears that BK lawyers still must conform their conduct to the BK court rule if they want to continue to practice before the BK court. Therefore, we shouldn't expect that they will complain about 1.5(e); they already are limited in the property interests they can claim in advances that their BK clients might make to them. Do you agree?

My principal point is that the BK lawyers have not complained so we probably should not group them with the criminal defense bar as lawyers who might be adversely affected by proposed Rule 1.5(e).

May 23, 2010 Sondheim E-mail to KEM, cc RRC:

In an effort to clarify my views, I offer these additional comments.

1. For me the basic reason for 1.5(e) was to (a) clarify what constitutes a true retainer and (b) prohibit clients from being deceived by an attorney stating that a fee is "non-refundable." Attorneys should not be permitted to do the latter. Thus the lawyer cannot term a fee as "non-refundable," but can call it a flat fee which becomes the lawyer's property upon receipt. This purpose is accomplished by the first two sentence of (e)(2) regardless of what is required in (e)(2), items i-v. Thus, contrary to what you deem the "heart of the protection afforded to clients," I deem the "heart of the protection" to be prohibiting a deceptive designation of the fee. Indeed, some parts of i-v might be appropriate for all written fee agreements, whether for a flat fee or other type of fee, but they are not essential. Items i-v may, in the view of some, be additional protections which it might be nice to have, but are not necessary to what needs to be accomplished, any more than having screening in a number of our confidentiality rules. Screening might be helpful, but, in the view of some persons, was not essential to the underlying principle of imputation. While I can live with items i-iv, I believe v needs to be removed.
2. My suggestion to remove item v is not to offer "an olive branch to the criminal defense bar," which is how you view it. Indeed the comments received regarding this rule do not just come from the criminal defense bar, but also include comments from bar associations (L.A. and San Diego County bar associations). Rather than offering an olive branch, I think we need to assess whether this item has either inherent flaws or creates issues which need to be avoided.
3. As pointed out in the comment received from Charles Sevilla, (e) (2) "adds uncertainty to the rules." On the one hand, this provision says the flat fee is the property of the lawyer and, on the other hand, it may not be the property of the lawyer if, as indicated by Mr. Sevilla's comment, it may be "subject to a client right of refund." There is a tension between these two concepts which I think should be avoided in the rule itself because it does not tell the client the whole story which is dependent upon the applicability of other rules. Leaving out the aspect of refund makes the rule neutral on this issue and leaves the client in the same position as he or she would be in under the current rules, except that the client would not have been told that the fee is non-refundable. It may or may not be refundable and there is no need to raise this possibility at the outset of an attorney-client relationship because it can lead to other serious problems which I discuss below. Indeed, the Sample Fee Agreement provision set forth by the State Bar (see Tarlow, p. 6, fn. 3 for the cite) suggests that, instead of being neutral, the fee agreement might provide that "unless the attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under this Agreement, the fee will be earned in full and no portion of it will be refunded once the agreed-upon legal services have been performed." (Slight changes made to the provision to reflect our language.)
4. Although you seem comfortable with the idea that " it is still the lawyer's money and not subject to seizure unless and until it can be shown that the lawyer's services fell short of what the client and lawyer agreed to at the beginning of the representation," I do not have the same comfort level. By putting v in the rule we are raising the level of controversy between lawyers and the IRS, the SEC, bankruptcy proceedings, etc. (Incidentally, I did not raise the issue of bankruptcy because of a concern that the bankruptcy bar would find the provision objectionable, but because the fee paid to a non-bankruptcy lawyer may be impacted in bankruptcy proceedings by being deemed assets of the client who ends up in bankruptcy.) The language of v raises the risk of the fee being subject to arguments for its seizure or forfeiture, irrespective of whether these arguments will ultimately prevail. (See the comments of Mr. Gordon regarding

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

tax matters and Mr. Perlis, a former Assistant Director of Enforcement at the SEC.) Of course, I recognize that this risk exists at the present time, but we are increasing the risk for all lawyers by using the specific proposed language in v in our effort to alert clients who may be entitled to a refund from those lawyers (and I like to believe there are not too many) who do not perform what they are obligated to do. The language provides the IRS, SEC, etc. with one more arrow in their quiver.

5. Furthermore, the language also may create thoughts by any client regarding how to get back part of the flat fee, i.e. a claim that not all the "agreed-upon legal services have ... been completed." A client hires a lawyer in the belief that the lawyer will provide legal services to resolve a matter in the best manner possible and is willing to pay a flat fee to achieve that end; but at the same time we are telling the client the lawyer may not provide you with all the legal services you expected. Talking about "legal services that have not been completed" raises issues at the inception of the relationship which need not be raised. The fee agreement should spell out what services the client can expect.

6. Your proposed comment, which I realize "was done on the fly," suggests that there should be a weighing between "substantial effort" and "little effort." Yet the lawyer's entitlement to the flat fee is not dependent upon the amount of effort it has taken to resolve the matter, but whether the lawyer has done whatever is required (whether substantial or little) to either resolve the matter or to competently represent the client up to the point agreed upon.

Although this e-mail may appear to be a comprehensive presentation of my views, it too was done "on the fly" as I am presently swamped with other matters, including looking after my grandchildren whose parents are out of town for a few days. So I may have other thoughts when I get a chance to review this e-mail and further reflect upon the matter.

May 23, 2010 Martinez E-mail to Sondheim, cc RRC:

The refund aspect is a large part of the Rule. Removing it would not make the rule neutral because the Rule already tips the scales in favor of the lawyer by stating that the flat fee is the lawyer's property. If the lawyer fails to perform the called upon services the client should get a refund. We need to spell it out. Failure of consideration should be available to the client under appropriate circumstances which can be addressed in a comment. "Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. Among other situations, the failure may arise from the wilful breach of the promise." *Bliss v. California Cooperative Producers* (1947)30 Cal.2d 240, 248.

As for the uncertainty pointed out by Mr. Sevilla and LACBA, I suggest that the concept in (v) be merged into (iii) so that (iii) reads:

(iii) that the fee is the lawyer's property immediately on receipt, subject to the right of the client to a refund of all or a portion of the fee if the agreed-upon legal services are not performed.

The remaining concerns can be addressed in a comment, as Kevin suggests. But leaving the refund aspect out of the rule would too strongly suggest that the fee is the lawyer's property and that the client has no recourse.

May 24, 2010 Difuntorum E-mail to Sondheim, cc RRC:

Here are links to rules that could be cited as supportive of the Commission's proposed approach. These are the rules mentioned on page 7 of Minnesota Bar memo in describing jurisdictions that permit advance flat fees to be considered the property of the lawyer.

Wisconsin Rule 1.15(4)(m)

<http://www.wisbar.org/am/template.cfm?template=/cm/contentdisplay.cfm&contentid=65735>

D.C. Rule 1.15(d)

http://www.dcbart.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/rule_one/rule01_15.cfm

Washington Rule 1.5(f)(2) [This one is already cited on the 1.5 Dashboard.]

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garp_c1.05

May 25, 2010 Sondheim E-mail to KEM, cc RRC:

Having reflected upon this rule some more, I suggest the following as a fall back position in an effort to find a middle ground between you and me.

Raul has suggested that (iii) and (v) be combined. Following through on this suggestion, (iii) could read as follows:

"(iii) that, **unless the lawyer withdraws** before the completion of the services or otherwise fails to perform services contemplated under this Agreement, the fee will be earned in full and no portion of it will be refunded once the agreed-upon legal services have been performed."

This wording is more supportable than what we propose for the following reasons, while at the same time alerting the client to the protection that we seek to provide:

1. It is the language currently suggested in the Sample Fee agreement set forth by the State Bar (see my earlier email), slightly amended to fit into what we propose. Thus there is already precedent for this language.

2. A number of the commenters refer to this language by adopting Tarlow's analysis of our proposal (see Ragen's Exhibit 1, at p. 11; Borden, item 13; Moss, item 13). Tarlow states that this fixed fee clause is "widely-used." Thus we are not changing anything that members of the criminal defense bar and others are currently using and there should be no basis for objecting to our using this language. Whatever problems there may be relating to seizure or forfeiture of the lawyer's fee are already inherent in the current "widely-used" language.

Why reinvent the wheel?

May 25, 2010 Martinez E-mail to Sondheim, cc RRC:

Harry, under your proposed version of (iii) the fee isn't earned until the services are performed. This means the fee is still the client's property until the services are performed and can be seized by third parties. Under my version, the fee is earned on receipt "subject to" a refund. Perhaps the fix is to add the words "on receipt" after "earned in full" in your version.

May 25, 2010 Melchior E-mail to RRC:

I am quite sure that I dissented from our treatment of advance fees but do not have the time to get involved in this argument at the moment.

I had a case recently in which the lawyer wrote an engagement letter which stated as clearly as possible that the fee was an availability fee, earned upon engagement. But he then added that he would not charge for some hours of time because of the availability payment, and the OCTC charged that it was NOT an availability fee despite its language. I had to study the field, and I concluded that the Review Department had undermined what I read as the Supreme Court's intent in the Baranowsky case, and that now, in California, there were availability fees in the abstract only -- i.e., if the client paid the lawyer ONLY for availability and NO work would be credited against that payment. Of course, in real life that doesn't happen.

I think that anything short of going back to Baranowsky undermines the positions which bankruptcy and criminal defense lawyers MUST take, and that we are engaging in (or in any event supporting) a destructive enterprise if we don't straighten this out. But I don't think that my views have a chance.

My apologies for not being able to get more involved; but client work comes first. This debate explains one more reason why our work is not helpful, though we have all certainly tried.

May 25, 2010 Martinez E-mail to Sondheim, cc RRC:

Harry, I'm fine with it but, I think we need a comment indicating that the rule is not intended to address all circumstances under which the client may be entitled to a refund. After all, this is a matter of contract law and there are other circumstances where the client might be entitled to a refund, such as where the lawyer performs the services negligently-- i.e., a failure of consideration. We are not overruling traditional contract defenses. Either way, I don't think it will appease Tarlow and others who insist there be no rule that prohibits non-refundable fees.

May 25, 2010 Sondheim e-mail to Martinez, cc RRC:

Then how about this:

"(iii) that, the fee is earned in full upon receipt and, unless the lawyer withdraws before the completion of the services or otherwise fails to perform services contemplated under this Agreement, no portion of it will be refunded."

While this is a variation of the Sample Fee agreement, I believe it is defensible as based upon the "gold standard" supported by Tarlow and others.

May 25, 2010 Difuntorum E-mail to Drafters, cc RRC:

Please consider the attached redraft of the rule. It contains my suggested revisions to the Commission's regulation of true retainers and flat fees. My objective was to address the concerns of the opposition comments as well as issues raised by the existing Commission minority dissent. My view is that there is a real issue of potential confusion when attempting to address the issue of "earned on receipt" and so my redraft backs off and takes a less is more approach. Note that my version of (e)(2) limits the required disclosures to only flat fees which are paid in advance.

In addition, attached for historical reference is the letter from the Supreme Court identifying issues of confusion in the Commission's 1992 submission.

Attached:

RRC - 4-200 [1-5] - Rule - DFT12 (05-25-10)RD - Cf. to DFT11 (12-14-09).doc
RRC - 4-200 [1-5] - 05-11-95 S.Ct. Letter re 3-700 & 4-100.pdf

May 25, 2010 Tuft E-mail to RRC:

Leave it to Randy to bring clarity to this muddled discussion. I am all too familiar with the Court's letter remanding the prior commission's submission of rules 3-700 and 4-200 since I was given the thankless task on COPRAC to come up with a rule in response to the court's letter that reconciles the treatment of advance fees with the requirement that all unearned fees be refunded to the client. Randy's draft is a step in the right direction. However, I personally favor deleting proposed rule 1.5(e), particularly in view of the comments received that demonstrate wide spread confusion over advance fees that this rule engenders. To return to basic principles, no advance fee paid by a client is the lawyer's property unless and until the fee is earned and that includes fixed or flat fees. A true retainer by definition is earned on receipt but fees paid in advance of rendering services for which the fee is paid are not earned on receipt and are refundable unless earned. Whether a fee is earned depends on the particular facts.

Washington's rule addresses flat fees in the context of a requirement that all advance fees be placed in a client trust account. California does not currently have that requirement and, thus, our proposed rule serves a different purpose than Washington by allowing lawyers to contract with clients to deem a flat fee paid in advance to be the lawyer's property whether or not the lawyer actually earns the fee. A rule that allows lawyers to contract in this manner may benefit lawyers but is not in the public interest. If we continue down this road to accommodate certain members of the criminal defense bar, we will likely receive another letter similar to the one the bar received in 1995.

May 25, 2010 Sondheim E-mail to Difuntorum, cc RRC:

I believe the portion of the rule I suggested in my May 25 email does not have the type of ambiguity that concerned the Supreme Court in 1995 because it indicates that if the lawyer withdraws before the completion of services or otherwise fails to perform the services contemplated there may be a refund. In 1995 the Supreme Court was concerned that the rule proposed seemed to exempt advance fees from the requirement of a possible refund.

While your crystal ball is as good as mine, I doubt if your proposal will be deemed to address "the concerns of the opposition comments" any better than what I propose. At least what I propose can be defended on the bases I set forth in my email since it relies upon something that the opposition comments indicate is currently "widely used."

May 26, 2010 Difuntorum E-mail to Sondheim, cc RRC:

To me, trying to key off Mr. Tarlow's approach is inherently flawed because it is a magic words approach. The Supreme Court's letter can fairly be read as a criticism of any magic words approach to regulating advance fees. As Mark points out, "no advance fee paid by a client is the lawyer's property unless and until the fee is earned and that includes fixed or flat fees." Using contract terms that say "earned on receipt" do not make the fee actually earned and will involve, as Raul emphasizes, issues such as a failure of consideration. It is fact dependent. For example, a failure of consideration could occur in circumstances not covered by your proposed language for (iii). A lawyer may fully perform and not withdraw before services are completed but the client may discover subsequently that a serious violation of ethics occurred (ala Pringle v. La Chappell), such as a fee split or a conflict, and that may void some or all of the lawyer's entitlement to the fee. It is problematic to try to craft a rule that comprehensively captures all possible situations where a purported "earned on receipt" fee must be refunded.

Instead, a rule on flat fees paid in advance could avoid the magic words approach and attempt to add client protection by: (1) taking the term "nonrefundable" out of the fee agreement lexicon; (2) requiring a writing (under penalty discipline unlike the State Bar Act provisions); and (3) requiring notice to clients that a flat fee paid in advance does not alter the client's right to terminate a representation and does alter the client's right to claim a refund (with the issue of whether a refund actually is warranted to be determined by the facts of the particular situation). My redraft attempts to redirect the rule to this type of client protection and steer away from the challenge of explicating the difficult oxymoron of the refundable earned on receipt fee. My approach will not satisfy Mr. Tarlow but it will undercut his complaint that a rule of discipline is tackling the legal issue of fee entitlement in an incomplete and confusing manner.

By the way, the sample written fee agreements are not a held out by the State Bar as a "gold standard." To the contrary, there is an express disclaimer stating that: "This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code Section 6147 but may not address varying contractual obligations which may be present in a particular case. The State Bar makes no representation of any kind, express or implied, concerning the use of these forms." Mr. Talow, however, cites the Bar's sample fee agreement language because it fits his magic words approach to flat fees paid in advance.

Lastly, if there is no Commission consensus on revising the current proposed rule, then I recommend that the Commission reconsider the ABA approach of requiring all advance fees to be placed in a client trust account until earned, including fixed/flat fees consistent with the interpretation in some jurisdictions.

May 26, 2010 KEM E-mail to RRC:

A few points and questions in response to Randy's fine work:

1. I generally agree with Randy's approach but wanted to point out that it will fall flat in addressing the policy issue the criminal defense bar has raised, i.e., that if the fees are not

viewed as earned upon receipt, then they will be subject to seizure. The "earned upon receipt," while magic words and meaningless if the facts don't support it, nevertheless provides the criminal defense lawyers with some comfort and a defense against the government's attempt to seize the client funds that were used to pay the fee.

a. I'm not sure how to deal with this in light of the S.Ct.'s 5/11/1995 letter. In essence, we have been saying in former (e)(2) (i.e., pre-Randy's proposed modifications) that the fee is earned on receipt, . . . unless it is not. We don't say it quite that way; rather we achieve that by expressly stating that the flat fee is earned on receipt but then caution that the lawyer must explain in the fee K that the client might be entitled to refund if it turns out the agreed upon legal services were not completed. The "earned upon receipt" language addresses the seizure issue; the refund language -- and a refund can only be measured after the services have been provided or not -- addresses the client protection issue and S.Ct. concerns that a fee is not the lawyer's until earned.

b. Here is how Arizona has addressed the issue. Perhaps that is an approach we can take:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

* * *

(3) a fee denominated as "earned upon receipt," "nonrefundable" or in similar terms unless the client is simultaneously advised 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).

I think an important point in the Arizona language is the client's right to discharge the lawyer. One of the key rationales in New York's Cooperman opinion that rejected the concept of a non-refundable fee was that it interfered with the client's absolute right to discharge the lawyer (sure, the client can discharge the lawyer, but if the client has already paid a multi-K non-refundable fee, can the client afford to do so?) Accordingly, I also think that the "unless the lawyer withdraws" language in the form fee agreement and cited to by the criminal defense bar is wrong. The issue is not whether the lawyer "withdraws," the issue is the client's right to discharge the lawyer. The client should be entitled to a refund whether the lawyer withdraws or the client fires the lawyer before the lawyer has completed the agreed upon services.

c. As I mentioned in an earlier e-mail, we seem to be dealing with a condition subsequent, an event that might occur to discharge a previously-incurred obligation (e.g., no work done discharges the client's obligation to pay). We seem to contemplate this concept in the second sentence of our paragraph (b), which provides:

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.

Perhaps we can highlight that sentence by referring back to it in a comment.

2. Paragraph (e). I would not change the language as Randy suggests (substituting "enter into" for "make") unless we make the same change in paragraph (a).

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

3. Paragraph (f)(1) [Formerly (e)(1)]. I'm not sure why Randy changed proposed (e)(1). Was it only to shorten or simplify it? I'm fine with that but I thought we had adopted the definition in 1.5(e)(1) as a more complete explanation of a true retainer than is currently found in the California rules. Note that we removed the definitions of true retainer from Rules 1.15 and 1.16.
4. Paragraph (f)(2). I'm not sure I agree with the deletion of "if the agreed-upon legal services have not been completed" at the end of (f)(2).
5. Comment [10]. Whether comment [10] is deleted depends upon how the Commission resolves item #1, above.
6. Summary. As Harry and Randy have observed, this journey began with the Commission's decision to prohibit "non-refundable" fees. As you might recall, the initial public comment version did not have all the bells and whistles re true retainers and flat fees. That came after public comment was received from the criminal defense bar and Raul discovered the proposed Washington Rule 1.5(f). We incorporated those changes but have not assuaged the concerns of the criminal defense bar. I don't agree with Mark that "our proposed rule serves a different purpose than Washington by allowing lawyers to contract with clients to deem a flat fee paid in advance to be the lawyer's property whether or not the lawyer actually earns the fee." I think that what we wrote addressed the seizure issue and was not simply intended to provide criminal defense lawyers with a way to make an advance fee their property. However, I think Randy has made great strides in resolving the earned upon receipt vs. refund conundrum. We will have to decide, however, whether we need to address the seizure issue.

NOTE: The following e-mail message precedes Kevin's last message in the string from May 26, 2010 at 1:18 pm

From: Difuntorum, Randall
Sent: Wednesday, May 26, 2010 11:35 AM
Subject: Rule 1.5

I have revised my suggested redraft to clarify that true retainers and flat fees are not "exceptions" to the prohibition against nonrefundable fees. I also fixed some nits and added a new comment which explains the prohibition against a "nonrefundable" fee by citing *Matthew v. State Bar*. Changes are highlighted. - Randy D.

Attached:

Rule 1 5 - Dft12 1 (05-26-10) RD cf Dft11 (12-14-09).doc

Rule 1.5 – Public Comment – File List

X-2010-402 Beverly Hills Bar Assoc [1.5e]	1
X-2010-403 Martin Martinez [1.5e]	6
X-2010-404 Frank Ragen [1.5e]	10
X-2010-407a Mark Borden [1.5e]	26
X-2010-407b Mark Borden [1.5e]	27
X-2010-408 Michael Perlis [1.5e]	31
X-2010-409 Kenneth G. Gordon [1.5e]	33
X-2010-412 Randolph Daar [1.5e]	36
X-2010-413 Joe Ingber [1.5e]	37
X-2010-415 Richard Moss [1.5e]	38
X-2010-419 Criminal Defense Lawyers Club SD [1.5e]	42
X-2010-420 Barry Tarlow [1.5e]	44
X-2010-424 Multiple Signatures [1.5]	98
X-2010-425-7g SDCBA [1.5]	101
X-2010-426 LACBA [1.5e]	104
X-2010-428 Charles Sevilla [1.5e]	110
X-2010-429 Michael Pancer [1.5e]	113
X-2010-432 Nat'l Assoc. Crim. Def. Lawyers [1.5e]	114
X-2010-434 CACJ [1.5e]	117

March 24, 2010

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The Commission on the Revision
of the Rules of Professional Conduct
c/o Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, California 94105

**Re: Opposition to Proposed New Rule of Professional
Conduct, Rule 1.5(e) (4-200) (Fees for Legal Services),
Abolishing Non-Refundable Retainers**

Dear Commissioners:

The Beverly Hills Bar Association, representing nearly 4,000 California lawyers, appreciates your long and arduous process of reconciling our California Rules of Professional Conduct with the American Bar Association's Model Rules of Professional Conduct. We are grateful for the tremendous commitment of your time, the concern you have demonstrated during this decade-long endeavor, and your willingness to entertain opposing views.

We write in opposition to subdivision (e) of Proposed New Rule of Professional Conduct 1.5, "Fees for Legal Services." Subdivision (e) would subject lawyers to professional discipline for using the term "non-refundable" in their retainer agreements. We understand that Proposed Rule 1.5(e) would carve out exceptions for "true retainers" and "flat fees." However, we do not believe that lawyers who mistakenly employ the wrong term for an otherwise-proper fee agreement should be disciplined.

The reconciliation of our Rules with the ABA Model Rules is an important task. In considering the original charge to the Commission, it did not appear to authorize the enactment of regulations which are more stringent than the ABA Model Rules. ABA Model Rule 1.5 does not impose discipline for use of the term "non-refundable."

There are several good reasons not to push beyond the ABA Model Rules in this regard.

First, Proposed Rule 1.5(e) would discourage the use of written fee agreements. The Legislature, by enacting Business and Professions Codes sections 6147 and 6148, expressed public policy in favor of lawyers using written fee agreements. Numerous cases also support the use of written fee agreements, as they offer greater public protection.

However, the failure to use a written fee agreement is not a disciplinary event. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266.) Lawyers in California and throughout the United States have been permitted to recover fees for services provided without a written agreement, or even an express fee agreement, based on the conventional contractual theory of quantum meruit.¹ This well-accepted theory is adopted by the American Law Institute in its *Restatement Third of the Law Governing Lawyers*, section 39. And in *Flannery v. Prentice* (2001) 26 Cal.4th 572, 589, the California Supreme Court validated an award of attorney fees despite the absence of a fee agreement between the lawyer and the client.

Ironically, adoption of the Proposed Rule 1.5(e) would mean that a lawyer following public policy and using a written fee agreement, but selecting the term “non-refundable,” would be subject to discipline, whereas a lawyer working without a written fee agreement would not be disciplined. That result would provide a disincentive for using written fee agreements and would be contrary to the expressed policy of the State of California.

Second, the distinction between “non-refundable” and “true retainer” is subtle. Ethics experts can and often do disagree. Enactment of Proposed Rule 1.5(e) would thus send another wrong message to the legal profession. Many criminal defense lawyers (and a host of other lawyers) do not know the nuanced issues that can be triggered by use of these terms, and in reality, many lawyers use the terms interchangeably. “[M]ost

¹ Quantum meruit (quasi-contract) is an “equitable remedy implied by the law under which a plaintiff who has rendered services benefitting the defendant may recover the reasonable value of those services when necessary to prevent unjust enrichment of the defendant.” (*In re De Laurentiis Entertainment Group Inc.* 963 F.2d 1269, 1272 (9th Cir. 1992).)

The Commission on the Revision
of the Rules of Professional Conduct
March 24, 2010
Page 3

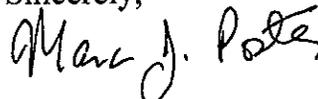
practitioners who wrongly identify a fee as nonrefundable simply do not understand the law of fees.” (Giesel, *Nonrefundable Fees: The Substance, Not the Label Matters* (May 2007) Louisville Bar Association Bar Briefs, p. 10.) Lawyers are not and should not be subject to professional discipline for inadvertence or negligence.

Third, use of a non-refundable fee is not sanctionable conduct in other jurisdictions. As the Louisville Bar Association article notes, “[m]any jurisdictions, including Kentucky, allow an attorney to refer to a fee as nonrefundable.” (Giesel, *supra*, p. 11.) A recent order from the Michigan Supreme Court validated a lawyer’s non-refundable fee agreement in a disciplinary case, and dismissed the charges against the lawyer. (*Grievance Administrator, Attorney Grievance Commission, State of Michigan v. Patricia Cooper* (Mich. Dec. 12, 2008) [attached].) The Court cited the relevant rule, and stated that the “agreement is unambiguous because it clearly states that the \$4,000 minimum fee is nonrefundable.” (*Id.* at p. 2.) In addition, esteemed ethics professors Geoffrey Hazard (a California lawyer), and William Hodes, in their seminal treatise, *The Law of Lawyering*, section 8.5 (3d ed. 2001), conclude that “[s]everal situations may be imagined in which a substantial nonrefundable fee—better understood as a minimum fee—might be justified.”

In sum, while we do not support or endorse gratuitous use of the term “non-refundable,” we do oppose a rule that will discourage written fee agreements and subject to discipline numerous lawyers who misunderstand the sophisticated distinctions, particularly when this terminology is widely permitted throughout the United States.

Thank you for your consideration of this objection.

Sincerely,



Marc J. Poster

President, Beverly Hills Bar Association

MJP/ren

cc: Marc R. Staenberg,
Executive Director, BHBA and BHBF

Order

Michigan Supreme Court
Lansing, Michigan

December 12, 2008

Clifford W. Taylor,
Chief Justice

135053

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

GRIEVANCE ADMINISTRATOR,
ATTORNEY GRIEVANCE COMMISSION,
STATE OF MICHIGAN,
Petitioner-Appellee,

v

SC: 135053
ADB: 06-000036-GA

PATRICIA COOPER,
Respondent-Appellant.

On November 13, 2008, the Court heard oral argument on the application for leave to appeal the September 17, 2007 opinion and order of the Attorney Discipline Board. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we REVERSE the opinion and order of the Attorney Discipline Board and REINSTATE the August 1, 2006 order of dismissal of the Attorney Discipline Board Hearing Panel No. 106. The Attorney Discipline Board erred in holding that the July 29, 2002 fee agreement was ambiguous as to whether the \$4,000 minimum fee was nonrefundable. As written, the agreement clearly and unambiguously provided that the respondent was retained to represent the client and that the minimum fee was incurred upon execution of the agreement, regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. So understood, neither the agreement nor the respondent's retention of the minimum fee after the client terminated the representation violated existing MRPC 1.5(a), MRPC 1.15(b) or MRPC 1.16(d).

KELLY, J. (*concurring*).

I concur in the Court's order reversing the opinion and order of the Attorney Discipline Board and reinstating the order of dismissal of the Attorney Discipline Board Hearing Panel No. 106. I write separately in the interest of curtailing future misunderstandings regarding attorney-client fee agreements similar to the one that occurred in this case.

The following is the relevant part of the fee agreement:

1. Client agrees to pay Attorney a MINIMUM FEE OF \$4,000.00 which shall be payable as follows:

Retainer \$4,000.00

Balance \$-0-

* * *

This MINIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in Paragraph 3 below.

2. Client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances.

3. Hourly rate: Attorney \$195.00

Assistant \$ _____

4. In the event the combined Attorney and Legal Assistant time shall exceed the MINIMUM FEE, Client agrees to pay for such time at the rates set forth in Paragraph 3 above.

I agree that this agreement is unambiguous because it clearly states that the \$4,000 minimum fee is nonrefundable.

However, counsel might be aided in knowing that the Attorney Grievance Commission believes that fewer grievances would be filed if a different fee agreement were substituted for the agreement used in this case. The commission recommends that the agreement explicitly designate the fee the attorney charges for being hired and state that the fee is nonrefundable under any circumstances. As the commission recommends, counsel may wish to designate the number of hours the attorney will work without additional charge, and specify an hourly rate to be charged thereafter.



s1209

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 12, 2008

Corbin R. Davis

Clerk



Martinez Law Office

Civil & Criminal Cases

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Certified Criminal Law Specialist
Board of Legal Specialization
California State Bar
Admitted: New York/California

March 31, 2010

Audrey Hollins
Office of Professional Competence, Planning, and Development
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Howard B. Miller
President, The State Bar of California
Giradi & Keese
1126 Wilshire Blvd.
Los Angeles, CA 90017

Eminent Counsel:

My colleague, Barry Tarlow has brought to my attention the changes that are to be imposed regarding an issue that has plagued numerous jurisdictions through out the country, the non-refundable retainers. The rule in question is Rule 1.5 (e). The purpose of this letter is to hopefully add some insight into the equipoise analysis as to the interests of the client, and that of counsel, in matters of money, an area that is always rife for problems. It is aspired that in the balance of these interests, all parties will be given their just due.

The proposed rules are cause for concern in as much as it will have detrimental effects on criminal defense attorneys, who work in the dark alleys of human nature, and who are generally the least paid of the profession. In this balance of equities, there is the words of Sir Francis Bacon who observed, "The greatest trust between people is the trust of giving counsel." (Bacon, *Of Counsel*, Essays of Francis Bacon, at 181 (1846).

The guidance of Sir Francis Bacon has to be weighed in regard to the clientele, the criminal defense lawyer deals with on a daily basis. Years ago, I was in a neighborhood bar, a friend of mine from elementary school was celebrating. When I inquired as to the nature of his delight, he answered he had just received some money. He advised me that the word on the street was that a client could pay a lawyer their fees, and once the case was over, complain to the State Bar, and their money would be returned. Thus, the reason for his festivities, a cash windfall. Whether, he was entitled or not, is not the issue, the disturbing news to me was how the situation arose, and how the clientele on the street saw an opportunity to fleece counsel.

In ***Baranowski v. State Bar*** (1979) 24 Cal.3d 153, the question of whether or not an advance fee payment is correctly characterized as money "received or held for the benefit of clients" was left undecided since petitioner's violation of the various sections of the Business and Professions Code fully warranted recommendation of a six-month actual suspension. Thereafter, in the case of ***T & R Foods, Inc. v. Rose*** (1996) 47 Cal.App.4th Supp. 1, the court relying on *Baranowski* reasoned that the court had distinguished an advance fee payment from a classic retainer fee arrangement.

A retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client. However, advance fee payments are payments "for the performance of a particular legal service. The court citing the case of ***In re Montgomery Drilling Co.*** (Bankr. E.D.Cal. 1990) 121 Bankr. 32 stated:

"Essentially, three types of retainers exist, being the classic or true retainers, security retainers, and advance payment retainers. Classic retainers refer to the payment of a sum of money to secure availability over a period of time. Entitlement to the fee exists whether or not services are ever rendered. The security retainer is typified by the fact that the retainer will be held by the attorneys to secure payment of fees for future services that the attorneys are expected to render. In such an agreement, the money given as a retainer is not present payment for future services. Rather, it remains property of the debtor until the attorney applies it to charges for services actually rendered, and any unearned funds are returned to the debtor. The third type of retainer, the advance payment retainer, is an agreement whereby the debtor pays, in advance, for some or all of the services that the attorney is expected to perform on the debtor's behalf. This type of retainer differs from the security retainer in that ownership to the funds is intended to pass to the attorney at the time of payment. Under California law, the issue of whether ownership of these funds passes to the attorney upon receipt is largely undecided".

Thus, if the rule allowing non-refundable retainers is to take effect, then how does this effect the status of the fees received. For example, a client walks into

counsel's office and gives a five-thousand dollar felony retainer. Unless it is called a true classic non-refundable retainer, the attorney upon the client leaving the office, in the abundance of caution, may have to place the funds in the trust account, rather than the general account. When the proposed rules were first being formulated, I had the opportunity to address the committee regarding the changes, and its effect on the trust account versus general account. I was advised by the committee that the funds could go into the general account. It appears, that legally and ethically, that advise could best be supported by the nature of the non-refundable retainer.

I am fortunate in as much as I deal with trust account issues all the time in civil related cases. Retained criminal defense work is a very small portion of my practice. The bulk of my income is from court appointed criminal and civil cases. The full time retained criminal defense lawyer does not have this luxury. Given their limited exposure to trust account management, the stress of being in court every day, clients looking at years in the state penitentiary, and financial worries, is an ethical violation ready to happen. As it presently stands, it can be safe to assume that the general standard and practice is in criminal cases, the funds are deposited in the general account. Whereas, in civil practice, the funds are deposited in the trust account.

The best solution would be to continue to allow criminal retainers to be placed in the general account as a classic true non-refundable retainer. If the rules committee is still determined to eliminate the use of non-refundable retainers, then a workable compromise would be an amendment to the proposed rule that it is not a violation of the rules of professional responsibility, to place the retained funds in the general account in criminal defense matters. This would alleviate concerns of State Bar, of the chilling effects that a non-refundable retainer would have in the eyes of the client, thinking that they cannot change counsel. Yet, this amendment would allow criminal defense attorneys to continue to maintain an active law office. If the funds are placed in trust, it would hamper the every day operations of the criminal law office.

In summary, when I passed the bar in 1981, as the tears were rolling down my eyes as I was taking the oath, I still remember the words of the appellate court justice who swore us in as members of the Bar. In essence, he stated: "If you want to keep your licenses, do not steal your client's money, and do not plead a client guilty, if they are not guilty." These words of appellate wisdom sums up the essence of this letter. If a lawyer lacks the moral fabric to live up to their sworn oath, they will lose their license, no matter what the retainer rules state.

Those criminal defense lawyers who believe in the tenets of the profession, and who always act in an assiduous manner in the zealous representation in accordance with the sixth amendment right to counsel, will continue to do so, no matter how the committee finalizes the rules. They will continue to work tirelessly, be it in the jail cells, courtrooms, and all other bastions of human suffering, that befalls the criminal defense lawyer. Keeping the lights on in the office, should not be one of those bastions. The stress of being in the infantry of the legal profession, burns out to

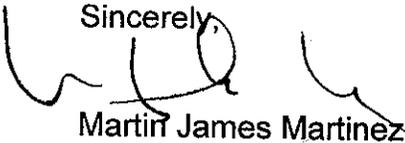
Page 4.

many good and well intentioned lawyers.

Although the proposed amendment would only allow criminal defense lawyers to place retained funds in the general account, this is not inherently unfair to other members of the profession in other fields of law. As stated, civil lawyers tend to deposit the fees in the trust account. Moreover, they are dealing in the realm of property, whereas, the criminal defense lawyer is merging himself in the quest for liberty, the sweetest and purest form of human existence. As members of the Bar, it is our duty to preserve this inalienable right, that is really the essence of the law.

If the committee on professional competence, changes the rule, and does not allow for the proposed amendment, they may have won the battle, but have lost the war, as criminal defense lawyers leave the field, and clients are left with over worked public defenders. Great lawyers of our profession throughout history have come from the ranks of the Criminal Bar. It is not to say fine lawyers are not found in other areas of the practice, but due to the type of work, criminal defense lawyers are the ones most known to the public as they deal with gory details of life. If the profession begins to lose these mavericks of the profession, then we all suffer. I respectfully ask that this rule be more fully evaluated, before it becomes law.

Sincerely,



Martin James Martinez
Member of the California and New York Bars

cc: Barry Tarlow, Esq.

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April 1, 2010

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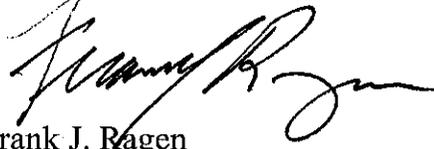
**Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e)
(4-200) (Fees for Legal Services), Abolishing Non-refundable Retainers**

I oppose the proposed new rule of Professional Conduct, Rule 1.5(e) (4-200), Abolishing Non-refundable retainers. A modification of the proposed rules of Professional Conduct which prohibits non-refundable retainers for legal service will do a disservice to the public, and create unnecessary litigation. Many times in my thirty-eight years of practice I have offered clients the option of a non-refundable retainer/flat fee for legal services or hourly billing. Many times the clients have selected the non-refundable retainer. The reason often voiced for choosing this option is that the amount of attorney fees is capped by the amount of the non-refundable retainer. When an hourly billing is selected there is no limit on what the attorney's fees might be. Attached hereto is an analysis of the proposed rule. I agree with the analysis and I incorporate it by reference.

In my years of practice I have never had a problem with a client when a client chose a non-refundable retainer as an option. You may contact me at the above listed

address and phone number.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Frank J. Ragen', written in a cursive style.

Frank J. Ragen

FJR:lnh
Enclosure

EXHIBIT 1

**SUMMARY ANALYSIS OF PROPOSED NEW RULE OF
PROFESSIONAL CONDUCT, RULE 1.5(e) (4-200) (FEES FOR LEGAL
SERVICES), ABOLISHING NON-REFUNDABLE RETAINERS**

A. The Proposal is the latest in a continuing effort by the Commission to prohibit non-refundable retainers¹ in California.

Paragraph (e) is the latest effort by the Commission to change fee agreements used by lawyers and clients in California for over 100 years by amending Rule 1.5 (4-200) to abolish non-refundable retainers. This seemingly endless process is a solution in search of a problem. Similar though somewhat different proposals were made: (1) in 1991 by the Commission, (2) in 1997 by the Committee on Professional Responsibility and Conduct (“COPRAC”), and (3) in 2008 by the Commission.² The 1991 and 1997 proposals were soundly rejected based on the negative responses from a wide cross section of California lawyers. In August 2008, in the face of widespread opposition, the Commission scrapped the proposed revision to Rule 1.5(f) and instead decided to completely redraft Rule 1.5, by adding and renumbering newly proposed paragraph (e) and adding a number of Comments. In November of 2009, without any meaningful notice to members of the Bar, the Commission presented this latest Proposal to the Board of Governors for approval along with 34 other separate rule revisions. As far as I can determine, almost no one in the general bar membership who opposed the discarded proposal was aware of the request to approve these revisions and therefore no one could or did submit their opposition or appear to oppose these extreme changes that had never been publicly circulated for comment.

¹ “Non-refundable retainer” refers to non-refundable retainers, advance fees earned when received, and minimum fees.

² The 2008 Proposed Rule 1.5(f) stated:

“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.”

The latest Proposal (Ex. 2) begins with the statement that a lawyer “cannot make an agreement for, charge, or collect a non-refundable fee, except . . .” This language demonstrates the Commission’s clear intent to abolish non-refundable retainers subject to the limited exceptions in (e). The relatively narrow exceptions of paragraph (e), however, do not permit traditional non-refundable fee arrangements that benefit clients.

1. Exception (e)(1) – “True Retainer”

Paragraph (e)(1) prohibits, for example, the long-established practice of charging a minimum fee to ensure availability (true retainer) where the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. This arrangement benefits the client because the client does not need to pay additional attorney’s fees until: (1) the true retainer is used up under the hourly calculation and/or (2) until some conditional event occurs (i.e. filing of criminal charges or a civil suit), even though the lawyer will remain available and do all work, under the initial true retainer, for agreed upon services (i.e. attempting to prevent the filing of a case). Paragraph (e)(1), however, does not permit this arrangement because if any portion of the original true retainer is used to pay for the attorney’s work in the potential case, then the entire fee is automatically converted into an advance, unearned fee. *See* Comment [8]. Paragraph (e)(1), therefore, deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received.³

2. Exception (e)(2) – “Flat Fee”

Paragraph (e)(2) (*see* Exh. 2) is the product of the Commission’s attempts to “assuage” their critics by attempting to make their attempted abolition of the

³ Paragraph (e) also reflects the lack of practical experience by the members of the drafting four-person subcommittee (which includes a law professor who served as a consultant and actually drafted Paragraph (e)) in how non-refundable retainer and fixed fees are set and earned in private practice.

non-refundable retainer “more palatable” to their critics.⁴ This novel and convoluted fee arrangement appears at first to allow for non-refundable flat fee agreements “which constitute[] complete payment for those services” so long as there is a written fee agreement that states, “in a manner that can easily be understood by the client,” a number of things including: “(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.” The obvious problem with paragraph (e)(2) is that if any portion of a “non-refundable” fee “may be” refundable, then the entire fee cannot be the lawyer’s property.

The less obvious but equally troubling problem is that when read in context of the entire Rule and Comment [5], Paragraph (e)(2) would often require that the proposed flat fee cover fees for services spanning the entire length of the case, including trial.⁵ Particularly in complex cases, since this flat

⁴ See, e.g., Dashboard for Paragraph (e) at p. 65 (when presenting Paragraph (e) to the California Bar Board of Governors, the Commission explained that the “changes” to the prior Proposed Rule 1.5(f) “may assuage the concerns raised” by public commenters in 2008).

⁵ Comment [5] states, in part, that:

“An agreement may not be made whose terms might induce the lawyer improperly 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.”

Paragraph (e), however, fails to provide any guidance on what it means to “adequately explain” that “more extensive services probably will be required.” Unfortunately, it will certainly be clarified in the future bar complaints and fee disputes. In practice, it is often difficult to precisely estimate the work that needs to be done in any reasonably complex case since for example no one really knows if the case will be tried or not. In civil cases and in the criminal law context, in most felony cases, particularly in anything that is relatively complicated, a lawyer cannot obtain discovery before being retained, to assess the merits of the case (and also to determine whether or not a lawyer wants to take on the case). For this reason,

fee is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur. If the attorney was either fired without cause or withdrew from the case before trial or the case resolved before trial, the fees that would have covered the trial would have to be refunded (either on a pre-tax or post-tax basis)⁶ because they are not earned.⁷

practitioners in complex civil or criminal cases often use hybrid fees which might use a true retainer, a nonrefundable retainer earned when received with hourly credits that would cover the provision of legal services through the different steps (i.e. pre-filing, discovery, pre-trial, trial, administrative hearings, post-trial, sentencing) of a complicated case. In these situations, non-refundable retainers are often used as a partial payment in combination with fixed fee payments or often hourly credits against the retainer.

Paragraph (e), however, would force attorneys not only to speculate about what services "probably will be required," but somehow also to "adequately explain" this "situation" to the client, without any guidance before being retained and without any meaningful analysis of the case. It is unclear how a lawyer can "adequately explain" the "situation" to the client when the attorney herself often cannot determine, with any reasonable degree of certainty, whether "more extensive services probably will be required" prior to meaningfully evaluating the case.

⁶ Lawyers pay income taxes on non-refundable fees. Under Paragraph (e), the lawyer may have to pay income tax on the "non-refundable" flat fee paid when received from the client even though it may be refundable.

⁷ One important purpose of a "flat fee" or "fixed fee" that is earned when received is to assure the client in advance that the fee will be no more than a particular amount. Many clients who have become relatively sophisticated consumers of legal services do not want fees calculated or based upon the time that is expended. This type of fee is not determined based on fixed values for individual steps in the litigation. Cases develop differently and the "fixed fee" is often an educated but fair estimate, since there is no way to determine when or how, for example, a civil litigation or administrative matter or a criminal case will be resolved.

On closer examination, Paragraph (e)(2) does not actually permit truly non-refundable “flat fees” as the Commission asserts that it does. The Commission’s effort to dress up the ban on non-refundable retainers in an attempt to make it more palatable to the critics fails and actually creates more problems for the lawyer and the client. My detailed and lengthy analysis of the significant, additional problems created by these proposed changes will be made available to you, if you would like to review it.

B. Paragraph (e) is a Solution in Search of a Problem.

There simply has not been an identifiable pattern of abuse by California lawyers resulting from the current rules which mandates the abolition of the non-refundable retainer or which would be remedied by this sweeping change. With the latest Proposal, the Commission offers a one-sentence rationale, unsupported by any California case authority:

“Paragraph (e) has no counterpart in the [ABA] Model Rule.⁸ **The Commission recommends its adoption because charging a nonrefundable fee is inimical to California’s strong policy of client protection. . .**” (Commission’s Explanation of Changes to the ABA Model Rule, Ex. 2 to Executive Summary at p. 77)

The Commission, however, fails to demonstrate that clients need protection from the pattern of misconduct by the membership of the State Bar involving the non-refundable retainer. No recent California reported cases have demonstrated any pattern of abuse involving non-refundable retainers. The Commission has not only failed to cite a single, reported recent case to support the need for Paragraph (e) (despite our repeated requests since 1991), it ignores the reality that thousands of Californian lawyers have been using some form of the non-refundable retainer (that fall outside of the limited exceptions to

⁸ The ABA Model Rules contain no prohibition on “nonrefundable fees” and “earned upon receipt fees.” *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §44, cmt.[f] (2000) (“if a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer” and need not be deposited in a client trust account).

Paragraph (e)'s ban on non-refundable retainers in (e)(1) and (2)) since the 19th century without creating any identifiable pattern of abuse.⁹

The Commission ignores and does not even disclose that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."¹⁰ See October 1992 State Bar Memorandum and attachments in connection with a "Request that the Supreme Court of California Approve Amendments . . . to Rules of Professional Conduct."¹¹

Indeed, in many jurisdictions, the use of non-refundable retainers is recognized as appropriate, if not essential in both civil and criminal cases.¹²

⁹ There are a myriad of examples of legal transactions other than criminal matters that have traditionally involved non-refundable retainers, fees earned when received, and minimum fees and are not calculated based on the time devoted to the assignment. These legal transactions are in a variety of practice areas, including: (1) real estate, (2) criminal law, (3) securities, (4) family law, (5) tax, (6) entertainment, (7) bankruptcy, (8) immigration, (9) appellate law, and (10) SEC matters.

¹⁰ Ironically, it was COPRAC that first suggested (*see* May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. *Id.*

¹¹ "Although the proposed amendments would avoid use of the terms 'fixed fee,' 'flat fee' or 'non-refundable fee,' such types of retainer fee agreements would be permissible under the proposed amendments. However, such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provides that such fees, paid in advance of the provision of legal services, are earned when paid." Page 9.

¹² John M. Burkoff, *Criminal Defense Ethics: Law & Liability*, § 10.1, at 501-505 (2d ed. 2003); John Wesley Hall, Jr, *Professional Responsibility of the Criminal*

Although Paragraph (e) abolishes the well-recognized and long-utilized non-refundable retainer (with the exception of the extremely limited categories discussed above), the Commission: (1) has not, and indeed cannot, demonstrate any need to completely alter the way law has been practiced in California or (2) how well this novel procedure will work in the actual practice of law.

The critical question here is not whether a rogue lawyer can gouge, exploit, and steal from his/her client using a non-refundable retainer or whether non-refundable retainers are prudent or wise in any given situation (this should be left to the lawyers and fully-informed clients to decide between themselves and memorialized in a written fee agreement that meets the requirements of Cal. Bus. & Prof. Code §6148(a) and Rule 1.5(a)).¹³ Rather, the critical inquiry is whether the non-fraudulent or ethical use of non-refundable retainers is nonetheless so corrosive as to require a per se prohibition. The answer to this question is a resounding no.

Paragraph (e) is a source of overreaching and proves too much. A few dishonest lawyers may cheat their clients by removing money from their trust

Lawyer (2d. ed. 1996) at p. 163. *See also, e.g., Bunker v. Meshbesh*, 147 F.3d 691 (8th Cir. 1998) (Minnesota); *Grievance Administrator v. Cooper*, SC135053 (December 12, 2008) (Michigan Supreme Court rules a non-refundable minimum fee with credit against an hourly charge "incurred upon execution of the agreement, regardless of whether the representation was terminated by the client" is perfectly appropriate); Tennessee Op. 92-F-128(b) (1993) (reaffirming earlier opinion approving nonrefundable retainers); Georgia Op. 03-1 (2003) (affirming use of non-refundable retainers); South Carolina Rule 1.16(d) ("The lawyer may retain a reasonable nonrefundable retainer."); Texas Op. 431 (1986) (affirming use of non-refundable retainers); Maryland Op. 87-9 (1987) (a non-refundable retainer is ethically proper so long as the amount involved is reasonable); Louisiana Rule 1.5(f)(2) ("When the client pays the lawyer all or part of a fixed or of a minimum fee for a particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid..."); Kentucky Op. 380 (1995) (affirming use of non-refundable retainers).

¹³ Do California lawyers really need to consult a Rule of Professional Responsibility to determine that a law license is not a permit to steal, pillage, and plunder?

accounts. Yet, no one has proposed that the solution is to abolish trust accounts.

C. The Washington Rule

The Commission's claim that the Proposal relied on, and is supported, by the Washington Rule (Rule 1.5(f) of Washington's Rules of Professional Conduct), *see* Dashboard and Introduction to proposed Rule 1.5(e)), is simply incorrect. First, non-refundable fees, advance fees, and fees earned when received are not prohibited under the Washington Rule. This fact is supported by: (a) the plain language of the Washington Rule, (b) Washington Supreme Court's rejection of the proposal to ban the use of the terms "nonrefundable," "earned upon receipt," and "minimum," and, (c) the fact that the Washington Rule does not even mention the word non-refundable and the fact that Washington previously had no rule requiring written fee agreements. Second, the Washington Rule has little, if any application, to the stated purpose of the Commission's Proposal. Rather than preventing lawyers from "charging or collecting a nonrefundable fee" as the Proposal seeks to do, the Washington Rule instead was intended to (a) change the rule that prevented lawyers from placing a fee for future services in their trust accounts and (b) impose requirements requiring lawyers to inform the client about the nature of the fee arrangements since Washington (unlike California) does not have a statute requiring lawyers to explain the fee arrangement in a written fee agreement.

The Proposal is a solution in search of a problem. The unconscionable fee limitation already protects clients from: (1) the crooked lawyer and (2) unanticipated circumstances. In the absence of a pattern of demonstrable abuses that can be remedied by either a limitation or a ban on the use of the non-refundable retainer, the primary concern of the State Bar ought to be the protection of the interests of clients and lawyers.

D. Significant Problems Created by Paragraph (e)

Paragraph (e), if codified, will impact on lawyers who practice in every area including entertainment law, matrimonial/divorce, immigration law, civil litigation, securities, bankruptcy, tax, real estate, appellate, and criminal law. In fact, prohibiting non-refundable retainers will in essence appear to make these

fee payments the property of the client until the work is performed, regardless of the intent of the lawyer or client set out in a written fee agreement. This will expose lawyers performing any type of legal work to great financial risk, by facilitating the restraint or seizure of their fees if the client has a potential problem involving securities law,¹⁴ bankruptcy, criminal law¹⁵ and jeopardy tax assessments¹⁶ and even creditors' claims.

The forfeiture/restraining order problems raised by the previous Proposed Rule 1.5(f) have not been resolved by the Commission as it claims. Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (*see* proposed Rule 1.5(e)(2)(v)), the convoluted theoretically "non-refundable" flat fee structure created by the Commission in the proposed Rule 1.5(e)(2) requiring lawyers and clients to inaccurately describe that the fee is "the lawyer's property on receipt" actually will deprive the client from ever receiving a refund if these funds are the subject of any seizure, forfeiture, or restraining order arising out of any: (a) criminal case, state or federal, (b) SEC

¹⁴ *S.E.C. v. Interlink Data Network of Los Angeles*, 77 F.3d 1201, 1205 (9th Cir. 1996) (portion of advance fee payment not for services already rendered remains property of client for purposes of determining whether the funds are subject to seizure).

¹⁵ *See United States v. Saccoccia VI*, 165 F.Supp.2d 103, 111-13 (D.R.I. Aug. 3, 2001) (discussing government forfeiture of attorneys' fees); *People v. Superior Court, (Clements)*, 200 Cal. App. 3d 491 (1988) (refusing to recognize an exemption for attorneys' fees under California's forfeiture statute).

¹⁶ *See Buker v. Superior Court*, 25 Cal. App. 3d 1085 (1972) (developed principles involving an "irrevocable assignment," the equivalent of a non-refundable retainer, in a jeopardy assessment case, enabling the client to receive representation and the lawyer to maintain the fee); *People v. Vermouth, supra*, 42 Cal. App. 3d at 359. and *People v. Vermouth*, 42 Cal. App. 3d 353, 359 (1974) (reversing conviction holding that the trial court deprived the defendants of their right to be represented by the counsel of their choice by failing to determine the validity of Mr. Tarlow's irrevocable assignment (treated as a non-refundable retainer) of the seized funds that had priority over the IRS lien). This approach has been used by hundreds of California lawyers to protect their client's constitutional right to representation while collecting their fee. *See also* Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 UCLA L. Rev. 1191 (1976).

civil restraining order, or (c) a jeopardy assessment by the IRS or the Franchise Tax Board.

In fact, to make the situation even more egregious, if money to be paid to the lawyer is contingent on an event that never occurs (i.e. trial), in the face of either (a), (b), or (c) above, the lawyer cannot return these funds to the client. The attorney may not return any funds subject to restraint to the client even when she is fired by the client and even if they are necessary to retain a new lawyer. Lawyers have been accused of and charged with obstruction of justice and/or criminal contempt as well as being subject to discipline by the court which issued the restraining order if the money is returned to the client. The fee agreement required under Paragraph (e)(2) does not even attempt to focus on or resolve this significant problem.

A client's funds that are deposited in a trust or general account under this Proposal will often be subject to federal or state restraint and/or forfeiture or attachment by potential creditors. Paragraph (e) will substantially increase the risk of attorney fee forfeiture or civil seizure because it will be impossible for an attorney who holds a fixed fee payment in trust or who has deposited it in a general account even when it is owned by the client to assert that he or she is a bona fide purchaser for value without knowledge. Therefore, compliance with the proposed rule and amendments will make it impossible for a client to be represented by any counsel in many civil and criminal matters.

Moreover, paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the fee by asserting that the fee "is the lawyer's property on receipt." The problem is not what the fee is called but who owns the funds.

There are a number of other, significant policy reasons why these changes should never be adopted, including unnecessary interference in attorney-client relationships, the generation of increased client bar complaints, arbitration proceedings and civil suits, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees and the need to preserve the availability of legal services to the people of California including consumers of low, fixed fee services, as well as to protect the constitutional rights of those accused of crimes to retain the lawyer of their choice.

In fact, on August 26, 2008, the Office of the Chief Trial Counsel of the State Bar (“OCTC”), recognized that the impact of a ban on non-refundable retainers is that “it will make members subject to discipline for charging or collecting a non-refundable retainer,” when currently, any disputes related to the charging or retention of a non-refundable fee are “typically handled as either a fee arbitration matter or, in egregious cases . . . as a failure to return unearned fees in violation of current rule 3-700(D)(2).” OCTC’s 8/26/08 comment on prior, revised Rule 1.5(f).

Current California law does not prohibit non-refundable fees and existing prohibitions against unreasonable and unconscionable fees currently protect clients from: (1) the crooked lawyer and (2) unanticipated circumstances. Rather than bringing current California standards into the Rule, Paragraph (e) creates ambiguities and uncertainties in the Rules in part by grossly departing from the current and long-standing California custom, standards, practice, and principles governing fee agreements (even including the specific form fee agreements that have been endorsed and distributed by the State Bar for years and are still available on its website¹⁷). The current standards, custom, and

¹⁷ The existing “fixed fee clause” distributed in the form fee agreements by the State Bar (and likely included in hundreds of fee agreements across the spectrum of specialties in State Bar sample fee agreements) explicitly provides that:

“unless the attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under the agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed.”
“The State Bar of California Sample Written Fee Agreement Forms” at pp. 30-31 (available at <http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf>).

In her latest column of the California Bar Journal, legal ethics expert Diana Karpman describes these “sanctified” State Bar fee forms as the “gold standard” and urges California lawyers to use them. She states:

“Lawyers are urged to use the State Bar fee forms [. . .]. These represent the ‘gold standard.’ The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify regarding issues

practice (endorsed by the State Bar which provides that the fixed fee will be earned in full and no portion of it will be refunded once any material services have been provided) are entirely irreconcilable with Paragraph (e). Paragraphs (e)(2)(iv) and (v) would permit a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, demand a refund and then file an arbitration claim, a lawsuit, or a Bar complaint against the lawyer. It appears the Commission has never addressed this significant inconsistency.

E. Failure to Effectively Advise the Bar of the Amendment

When the Commission attempted to prohibit non-refundable fees in 2008, it was done in a manner that was not designed to notify a meaningful cross section of the California Bar of the amendment.¹⁸ With the latest proposal, the Commission totally redrafted and expanded Rule 1.5(e) and presented it along with 34 other rules to the Board of Governors for conditional approval in November of 2009, without informing the membership of the State Bar and the known stakeholders who opposed the 2008 proposal. It is unlikely that any meaningful number of members of the California bar, other than a lawyer who is on the Commission or a member of the Board of Governors, actually knew about the latest Proposal (draft Rule 1.5(e)) and the Commission's attempt to present it to the Board of Governors for approval. There was no time or opportunity to learn about, scrutinize, or comment on draft Rule 1.5(e). Obviously, since no notice that the meeting agenda involving a proposed draft of Rule 1.5(e) that in fact dealt with a ban on non-refundable retainers was

involving an agreement, it's a stronger case if it's the sanctified State Bar fee agreement. . ." Diane Karpman, "Time for tuning up those fee agreements," California Bar Journal (February 2010).

¹⁸ With the 2008 proposed revision to abolish non-refundable fees, aside from the posting of the 209-page Discussion Draft of 13 proposed amendments to the rules of professional conduct (including the prior proposed Rule 1.5(f) banning non-refundable retainers) on the state bar website, it was not publicized (as far as we know) in any effective manner. See, for example, a short article in the May 2008 California Bar Journal that made no mention of non-refundable retainers. Most California lawyers were completely unaware that these significant changes to Rule 4-200 had been proposed.

distributed to the members of the Bar, no one could appear before the Regulations and Admissions Oversight Committee (“RAC”) or the Board of Governors on November 12 through 14, 2009 to raise the host of problems with this novel, wide-ranging version of Rule 1.5(e). The public comment letters sent in the spring of 2008 before it was abandoned in August 2008 could not have addressed the significant changes to Rule 1.5 submitted to the Board of Governors in November of 2009.

Considering the significance of this Proposal to lawyers and their clients throughout California, the controversy surrounding the Commission’s prior efforts to abolish the non-refundable retainer, and the fact that public commenters in 2008 complained vigorously about the lack of publicity surrounding the 2008 proposed Rule 1.5(f), I am especially concerned that the Commission sought and received the Board of Governor’s endorsement for Paragraph (e) without (1) publicizing, disseminating, or explaining, in a manner that actually informs a cross-section of the bar of its existence and (2) did not permit the membership to respond or object before the Board of Governors’ tentative approval of revised proposed Rule 1.5(e).

Rule of the State Bar 1.10(A) (“Public Comment”) requires Proposals for the Rules of the State Bar of California to be circulated for public comment before adoption, amendment, or repeal by the Board of Governors. Section 1.10(B)(2) states that Public Comment is not required:

“(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal.”

Sending this Proposal out for public comment, along with approximately 65 other rules, after it was approved by the Commission and tentatively approved by the Board of Governors subject to after-the-fact public comments does not satisfy the Rule of the State Bar 1.10(A) or solve the process and notice problems.

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March 25, 2010

State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: PROPOSED NEW BAR RULE 1.5(e)

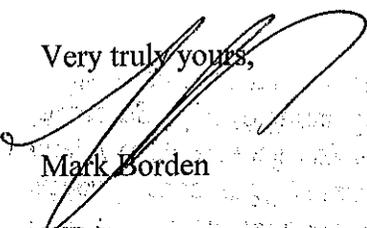
To Whom It May Concern:

This letter is being sent regarding the proposed new rule change regarding non-refundable retainers. This has been a staple of criminal law practitioners as long as I have been practicing, which is at least 30 years. My non-refundable fee allows my contacts to contact me 24 hours a day, 7 days, a week anywhere in the world. I have done this on my travels out of the country; including trips to India, Hong Kong, and Singapore and my clients have always been able to contact me anytime they need to. By proposing this rule, I am going to delete that service to my clients. The fact of the matter is that when the police are banging on their door at 2:00 am, they won't be able to get a hold of their lawyer. By eliminating the non-refundable fee, you are affecting the client's Sixth Amendment Right to counsel, as far as contacting his lawyer at anytime.

This proposed new rule is being done by people who are on large salaries, people from large law firms, and by people who work for the State Bar who have never had to practice in the private sector to and earn fees from clients. This is another case of too many bureaucrats with too much time on their hands.

I ask that this proposed rule change be postponed, since I will oppose it if I am elected from District 2 to the State Bar Board of Governors.

Very truly yours,


Mark Borden

MB/cc
Cc: file

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April 5, 2010

State Bar of California
180 Howard Street
San Francisco, CA 94105

Aubrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Howard B. Miller
President, The State Bar of California
At Girardi and Keese
1126 Wilshire Blvd.
Los Angeles, CA 90017

RE: PROPOSED NEW BAR RULE 1.5(e)

To Whom It May Concern:

In reiterate my previous objection to Rule 1.5(e).

Non-refundable retainers have been a staple of criminal law practitioners as long as I have been practicing, which is at least 30 years. My non-refundable fee allows my contacts to contact me 24 hours a day, 7 days, a week anywhere in the world. I have done this on my travels out of the country; including trips to India, Hong Kong, and Singapore and my clients have always been able to contact me anytime they need to. By proposing this rule, I am going to delete that service to my clients. The fact of the matter is that when the police are banging on their door at 2:00 am, they won't be able to get a hold of their lawyer. By eliminating the non-refundable fee, you are affecting the client's Sixth Amendment Right to counsel, as far as contacting his lawyer at anytime.

This proposed new rule is being done by people who are on large salaries, people from large law firms, and by people who work for the State Bar who have never had to practice in the private

sector to and earn fees from clients. This is another case of too many bureaucrats with too much time on their hands.

I ask that this proposed rule change be postponed, since I will oppose it if I am elected from District 2 to the State Bar Board of Governors.

Additionally, I object to the proposed rule change on the argument of Tarlow & Berk, PC as set forth below:

If adopted, Paragraph (e) to abolish non-refundable retainers (Ex. 2) will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because, for example:

- (1) The Board of Governors adopted this 2009 Proposal without any input from the membership. Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval. Rule of the State Bar 1.10(A) ("Public Comment") requires Proposals for the Rules of the State Bar to be circulated for public comment before adoption, amendment, or repeal by the Board of Governors. Section 1.10(B)(2) states that Public Comment is not required: "(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal." This 2009 proposal cannot be reasonably interpreted as interpreted as a "non-substantive" "modification" of the abandoned 2008 proposal, Rule 1.5(f). The current after the fact public comment does not solve this problem. See discussion Ex. 1, p. 12.
- (2) Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of Californian lawyers have used some form of the non-refundable retainer (that falls outside of the limited exceptions to Paragraph (e)'s ban on non-refundable retainers in (e)(1) and (2)).
- (3) There is no identifiable pattern of abuse or wrongdoing by California lawyers resulting from the current rules that mandates the abolition of the non-refundable retainer or that would be remedied by this sweeping change. The Proposal is a solution in search of a problem.
- (4) The proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee

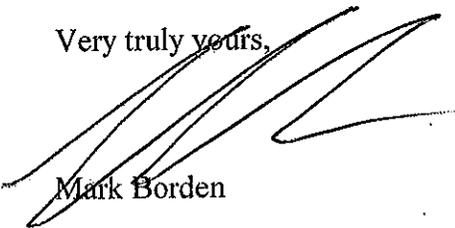
arrangement. The Board approved the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid." See October 1992 State Bar Memorandum and attachments in connection with a "Request that the Supreme Court of California Approve Amendments... to Rules of Professional Conduct." It also ignores the fact that it was the Committee on Professional Responsibility and Conduct ("COPRAC") that first suggested (see May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. *Id*

- (5) Paragraph (e)(1) involving a "true retainer" and Comment [8] prohibit the long-established practice of charging a nonrefundable retainer as a minimum fee to ensure availability when the client will also be credited for future work done either on an hourly basis or for the amount of the retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a "true retainer" earned when received if he does any legal work.
- (6) Paragraph (e)(2) and Comment [5] would often require the proposed "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.
- (7) Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the "flat fee" by representing that the fee "is the lawyer's property on receipt." The critical issue in fee forfeiture or restraining order situations is not what the fee is called but who owns the funds.
- (8) Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (see proposed Rule 1.5(e)(2)(v)), Paragraph 1.5(e)(2) actually will deprive the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.
- (9) Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risks by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., the F.T.C. or is the potential target of a civil or

criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims. Since nonrefundable retainers have protected legal fees for several decades, there is no reason to experiment with this novel concept that will no doubt generate costly litigation and, in all likelihood will fail to prevent fee forfeiture.

- (10) Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many civil clients of their ability to retain counsel.
- (11) Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.
- (12) This Proposal is confusing and internally inconsistent and will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes for honorable lawyers acting in good faith.
- (13) Paragraph 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms (that have been distributed by the Bar for approximately the past 20 years) that represent the "gold standard" for California lawyers.
- (14) The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly never be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determinative in an outgoing case, the Rule encourages client to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would not be "the lawyer's property" or property to which the lawyer is entitled.

Very truly yours,



Mark Borden

MB/cc
Cc: file

STROOCK

April 2, 2010

Michael F. Perlis
Direct Dial 310-556-5821
Direct Fax 310-407-6321

Rex Heinke (District 7, #2)
Vice-President
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Re: Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) (Fees for Legal Services), Abolishing Non-refundable Retainers

Dear Rex:

I wanted to take this opportunity to register my concern regarding the adoption of Proposed New Rule of Professional Conduct, Rule 1.5(e) (4-200) (Fees for Legal Services, Abolishing Non-refundable Retainers).

In my view, the Rule benefits neither clients nor attorneys; but only those who would seek to deprive individuals potentially in the need of legal representation from the ability to obtain it. As a former Assistant Director of Enforcement at the Securities & Exchange Commission, and prosecutor, I fully understand the propensity of the government to seek asset freezes (often times ex parte) and oppose efforts to secure funds for legal representation by those accused either civilly or criminally for violations of law.

The Rule proposing the abolition of nonrefundable retainers would only serve further to deprive the people of the ability to secure legal representation and/or compel attorneys who are already involved on behalf of those individuals to become involuntary pro bono advocates. Neither alternative is an appropriate avenue.

In practice, the nonrefundable retainer as it currently operates, does not do a disservice to the client. Attorney overreaching is readily remedied and most attorneys would clearly be prepared to return unused portions of retainers where it would be inappropriate to retain them.

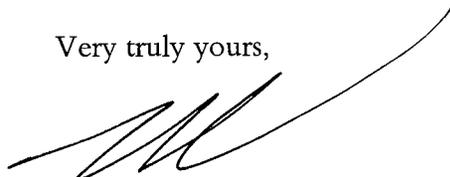
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Rex Heinke
April 2, 2010
Page 2

Proposed Rule 1.5(e)(2) does not solve the problem. It requires attorneys and clients to make binding estimates of what may be complex legal proceedings, leaves open the possibility that government agencies could require termination of counsel and return of unused retainers, and could potentially lead to attorney/client conflict relative to an evaluation of what portion of a retainer need be returned relative to non-completed legal services.

In sum, I would urge that we follow the old maxim, "if it isn't broken, don't fix it."

Very truly yours,

A handwritten signature in black ink, appearing to be "M. Perlis", written over a long, sweeping horizontal line that extends to the right.

Michael F. Perlis

LA 51253795v1

LASKI & GORDON, LLP

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ANTHONY E. GLASS

April 8, 2010

Mr. Howard B. Miller
Girardi & Keese
1126 Wilshire Blvd.
Los Angeles, Ca. 90017

Re: Proposed Rule 1.5(e)

Dear Mr. Miller:

This letter is written to you in your capacity as President of the State Bar and in connection with the proposed change to Rule 1.5(e) of the Rules of Professional Conduct.

My firm specializes in tax planning and tax controversy matters, both civil and criminal. The major part of our work pertains to the tax controversy area. The firm was started in 1983 and I have been admitted to the New York Bar in 1971 and the California Bar in 1977. From June, 1972 through 1979 I was a senior trial attorney with the Internal Revenue Service. Since January, 1980 I have been in private practice and have extensive experience in dealing with various government taxing agencies.

My principal concern with the proposed change to Rule 1.5(e) has to do with the language of (e)(2) pertaining to flat fees. Assuming the attorney and client agree in writing, a flat fee is the lawyer's property on receipt. As such, the attorney should properly deposit this fee into his operating account and take it into income. In a tax sense, the attorney has dominion and control over the fee and should treat it as income. In the event that it is not the lawyer's property or is subject to a substantial risk of forfeiture, then the tax treatment would be otherwise. The language of proposed Rule 1.5(e)(2)(v) provides that the written fee agreement shall include a provision that the client may be entitled to a refund of a portion of the fee if the agreed upon legal services have not been performed. This language appears to introduce a substantial condition into the equation of the lawyer's dominion and control of the fee.

I believe that there are sufficient remedies against abuses, such as the non-performance or incompetent performance of legal services, without the broad brush approach embodied in the proposed Rule that not only alters property rights, but puts the interests of both the lawyer and client at risk in certain fact situations. The following factual example will suffice:

Client was a substantial Schedule business, the receipts of which were mostly in cash. The business is completely legal. Client and counsel enter into a flat fee arrangement to provide for legal representation before the Internal Revenue Service during the course of a civil tax examination. In the event that the client and the IRS could not come to an agreement as to civil tax liability, it was understood that a trial would be necessary in the U.S. Tax Court. Fees arrangements for such a trial were left open, inasmuch as the dimensions of the case could not be fully evaluated until the completion of the tax examination.

In the course of the tax examination, the assigned Revenue Agent became concerned over the large amounts of cash flowing through the business and the possibility that there was unreported income. Upon the agent's recommendation, a jeopardy assessment was made by the Internal Revenue Service. Once this procedure is instituted, levies are immediately served and assets seized. Essentially, the IRS seizes property of the taxpayer and then talks. The judicial remedy to contest the propriety of the jeopardy assessment and amount of jeopardy assessment is in the Federal District Court. The amount of a tax deficiency can be contested in a subsequent action in the U.S. Tax Court.

A trial on the jeopardy assessment resulted in the complete reversal of the assessment, in the approximate amount of \$10 million. This, in turn, set the stage for the similar disposition of the underlying tax case. A trial in Tax Court was thereby rendered moot.

My interpretation of proposed Rule (e)(2) leaves open the possibility that, since the defense of a jeopardy assessment was not contemplated in the fee arrangement, the client might have been entitled to a refund of fees. There is no question that the client was quite satisfied with the result and that additional legal fees associated with a full trial in Tax Court were avoided. Logically, if the client would be entitled to a refund, then the client had a property right that was subject to seizure under the jeopardy assessment. The consequences that flow from this scenario could be:

1. The IRS, upon making the jeopardy assessment, could demand that the lawyer turn over all monies which would be subject to a refund claim by the client. Inasmuch as the initial retention of counsel did not contemplate a jeopardy assessment administrative and judicial defense, all fees attributable to this work could be subject to seizure (as well as all other assets of the client).

2. If the IRS seizes the fees from the lawyer, then the client is left without resources to contest the jeopardy assessment and any other process. This leaves the client with potential choices of defaulting on a jeopardy assessment process, since the client doesn't have the necessary resources to retain counsel, or bringing an action against the attorney for damages attributable to the turn-over of funds. As the attorney would be complying with a lawful seizure process, it is doubtful the client could prevail on this basis. However, the net result is that the client could be without representation in an action that was proved to be fatally flawed and that resulted in no additional tax liability. Even if an action for damages against counsel was ultimately successful, the client's business and net worth have been destroyed.

3. Counsel, upon a seizure of fees, is left with representing the client without immediate compensation, in the expectation that the client will prevail and recover their assets once the jeopardy assessment is abated. In the event that the jeopardy assessment is upheld, there is a subsequent tax representation in Tax Court for which the client lacks fees to be represented. In the event that the attorney, upon seizure under a jeopardy assessment, withdraws from further representation, the client could have a claim for abandonment by the professional.

4. The IRS, by having an ability to seize the amount of fees subject to a refund claim, in a purely civil matter, has been given the ability to interfere in the attorney-client relationship and decimate the client's ability to defend itself in a jeopardy case. Essentially, the logic of proposed rule 1.5(e)(2) provides the mechanism for the IRS to seize and retain funds that were necessary to mount a successful defense. The net result is that the client is out of business and bankrupt and the IRS gets to keep funds to which it is not entitled.

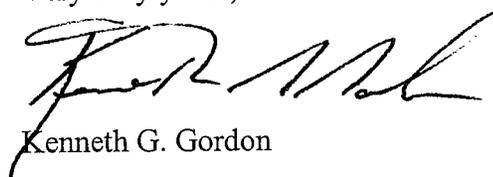
Mr. Howard Miller
April 8, 2010
Page 3

5. The language of proposed rule 1.5(e)(2)(v) is an invitation for the IRS to question and litigate the provisions of a fee engagement and get between the lawyer and his client. In the above scenario, both the lawyer and client would take the position that the services required in contesting the jeopardy assessment were contemplated to be within the parameters of engagement. The IRS, however, could take the position that an interpretation of the engagement letter, in the context of this proposed rule, provides a refund remedy to the client, which is subject to seizure. Unfortunately, by the time the extent of this property interest is litigated, the jeopardy assessment case has moved forward and the client is out of business for lack of funds. Instead of protecting the interests of the client, the proposed rule has the opposite effect.

The core issue under the proposed rule is one of property or interest in property. It appears that the proposed rule is confusing and inherently contradictory. If the flat fee is the lawyer's property upon receipt, then there should not be a basis for seizure. However, if the client has a right to a refund of fees attributable to services not completed, then the client has a property interest that can be seized by a taxing agency.

My comments have addressed the proposed rule change within a very narrow range of my tax practice and focused on a particular civil tax issue. There are many other factual situations, including those within the criminal law context, that raise issues of legal exposure for both the attorney and client which have not been addressed in this letter. Hopefully, the Special Committee considering this rule change will reconsider its position regarding this proposed rule. Existing legal remedies and professional restraints on attorneys are, in my opinion, sufficient to protect clients. The obfuscation of property rights pertaining to flat fees appears counter-productive to the interests of clients.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Kenneth G. Gordon', written in a cursive style.

Kenneth G. Gordon

cc: Mr. Rex Heinke
Mr. Michael D. Marcus
Mr. Patrick M. Kelly
Mr. James H. Aguirre

PIER 5 LAW OFFICES

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April 15, 2010

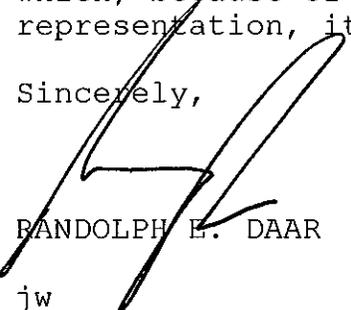
Audrey Hollins
Office of Professional Competence
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Opposition to Proposed New Rule of Professional Conduct,
Rule 1.5(e)(4-200) (Fees for Legal Services), Abolishing
Non-refundable Retainers

Dear Ms. Hollins:

I've been practicing criminal defense, and have been a member of the California State Bar, for over 30 years. I have utilized non-refundable retainers at various times in my practice. The rules that exist now adequately protect clients from excessive fees or failure of lawyers to refund fees upon withdrawal from representation. The new proposed rule deprives a client of the ability to formally retain an attorney in the circumstance in which, because of the nature or the scope of the proposed representation, it is necessary to secure the attorneys services.

Sincerely,


RANDOLPH E. DAAR

jw

JOE INGBER, ESQ.
Attorney at Law
P.O. Box 641879
Los Angeles, CA 90064-1879

April 16, 2010

Rex Heinke
2029 Century Park East, Suite 2400
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Re: Rule of Professional Conduct 1.5(e)

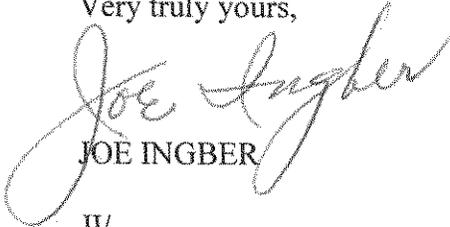
Dear Mr. Heinke:

I am an active member of the State Bar (# 31734), and have been so for about 50 years.

To modify/abolish rule 1.5(e) re: non-refundable retainer agreements, would create chaos
an unnecessary manner.

Please vote against this abolition.

Very truly yours,


JOE INGBER

JJ/

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OF COUNSEL

April 22, 2010

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180 Howard Street
San Francisco, California 94105

**Re: Opposition to Proposed New Rule of Professional Conduct 1.5(e) (4-200)
Fees for Legal Services Abolishing Non-refundable Retainers**

Dear Ms. Heller

Let me join the throngs of other criminal law attorneys in opposing the proposed ban on non-refundable retainers. I have been practicing criminal defense for 25 years of my 42 years as an attorney licensed to practice law in California. Previously I was a prosecutor in the District Attorneys office of Los Angeles for 17 years.

It is my firm belief that if adopted, Paragraph (e) to abolish non-refundable retainers will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because, for example:

- (1) The Board of Governors adopted this 2009 Proposal without any input from the membership. Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval. Rule of the State Bar 1.10(A) ("Public Comment") requires Proposals for the Rules of the State Bar to be circulated for public comment before adoption, amendment, or repeal by the Board of Governors. Section 1.10(B)(2) states that Public Comment is not required: "(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal." This 2009 proposal cannot be reasonably interpreted as a "non-substantive" "modification" of the abandoned 2008

reasonably interpreted as a “non-substantive” “modification” of the abandoned 2008 proposal, Rule 1.5(f). The current after the fact public comment does not solve this problem.

- (2) Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of Californian lawyers have used some form of the non-refundable retainer (that falls outside of the limited exceptions to Paragraph (e)’s ban on non-refundable retainers in (e)(1) and (2)).
- (3) There is no identifiable pattern of abuse or wrongdoing by California lawyers resulting from the current rules that mandates the abolition of the non-refundable retainer or that would be remedied by this sweeping change. The Proposal is a solution in search of a problem.
- (4) The Proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer “earned when paid” was a perfectly appropriate fee arrangement. The Board of approved endorsed the continued use of “fixed fees,” “flat fees,” and “non-refundable retainers” to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are “earned when paid.” See October 1992 State Bar Memorandum and attachments in connection with a “Request that the Supreme Court of California Approve Amendments... to Rules of Professional Conduct.” It also ignores the fact that it was the Committee on Professional Responsibility and Conduct (“COPRAC”) that first suggested (*see* May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add “non-refundable retainers” as part of the definition of “true” retainers earned upon receipt. COPRAC is also on record as stating it is “concerned” that any proposed rule change not “unduly restrict” a lawyer’s ability to charge a truly non-refundable retainer in appropriate circumstances. *Id.*
- (5) Paragraph (e)(1) and Comment [8] prohibit the long-established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received if she does any legal work.

- (6) Paragraph (e)(2) and Comment [5] would often require that the proposed “flat fee” to cover fees for the entire length of the case, including trial. Since this “flat fee” is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.
- (7) Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the “flat fee” by representing that the fee “is the lawyer’s property on receipt.” The critical issue is not what the fee is called but who owns the funds.
- (8) Rather than protecting the client’s entitlement to a refund of the proposed “flat fee” (*see* proposed Rule 1.5(e)(2)(v)), Paragraph 1.5(e)(2) actually will deprive the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.
- (9) Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors’ claims.
- (10) Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many civil clients of their ability to retain counsel.
- (11) Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.
- (12) The Proposal will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes, for example, when an attorney and a client cannot agree on the amount of funds that must be returned in an advance fee case even when an attorney is terminated without cause.
- (13) Paragraph 1.5(e)(2)’s novel requirement that specific, detailed wording be included in flat

fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms (that have been distributed by the Bar for approximately the past 20 years) that represent the "gold standard" for California lawyers.

- (14) The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determinative in an ongoing case, the Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled.

The proposed new Rule 1.5(e), drafted by the Commission, essentially prohibits non-refundable fees for performing legal services. In doing so, it abolishes and/or redefines a widely accepted historical fee arrangement, and in reality will provide that most payments to do legal work in the future will not be earned when received regardless of the attempts in Rule 1.5(e) to inaccurately describe some fees as "the lawyer's property upon receipt."

Thank you for your attention to my concerns. Hopefully, you shall do whatever necessary to defeat the abolishment of non-refundable retainers.

Very truly yours,



Richard A. Moss, Esq.

RAM/yp

CRIMINAL DEFENSE LAWYERS CLUB OF SAN DIEGO



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Special Commission for the Rules of Professional Conduct
c/o Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, California 94105

Re: Opposition to Proposed New Rule of Professional Conduct. Rule 1.5(e) (Fees for Legal Services). Abolishing Non-refundable Retainers

The Criminal Defense Lawyers Club [CDLC] of San Diego has voted to oppose proposed Rule 1.5(e) of the Rules of Professional Conduct. CDLC provides education, training and support to lawyers representing citizens accused of crime while advocating fair and effective criminal justice in the courts, the legislature, and wherever justice demands.

Our purposes include insuring by rule of law those individual rights guaranteed by the United States and California Constitutions in criminal cases, and to resist efforts to curtail the rights guaranteed to citizens. As part of our educational mission, we provide the constant exchange of information among members on all matters pertaining to the defense of criminal cases, educational programs, membership meetings, special committees, publications, articles and otherwise. This includes educating members on proposed changes in legislation and relevant rules pertaining to the defense of criminal cases and practice of law.

We understand that the Board of Governors will be evaluating the proposal to add Rule 1.5(e) along with a number of other changes to the Rules of Professional Conduct to determine which rules are to be sent to the Supreme Court for proposed adoption.

We are opposed to proposed Rule 1.5(e) for a number of reasons. Many of our members are sole practitioners who regularly charge flat fees for routine criminal

Emeritus Members

- TOM ADLER
RAMON CASTRO
JUDY CLARKE
JOHN CLEARY
LOUIS S. KATZ
TOM RYAN
ELIZABETH SEMEL

In Memoriam

- PAUL BELL
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BARTON C. SHEELA JR.
THOMAS J. ULOVEC

matters. This rule unnecessarily puts in place a condition that essentially makes the fee “flat” only upon the client’s wish as the case proceeds. If the work for the attorney is substantial, the client will be content with the flat fee arrangement. But if the attorney seems to be on the way to a result that will end the case on a favorable note for the client, the client can pull out of the “flat fee” contract, fire the attorney, and demand a substantial refund.

Specifically, paragraph (e) of Rule 1.5 prohibits non-refundable retainers for legal services except under the circumstances outlined in subpart (1) and (2). Yet, the latter rule, while first stating the fee is the attorney’s on delivery, then says the client may be entitled to a refund prior to the “completion” of services. This paragraph adds uncertainty (which will certainly promote fee disputes) and promotes the problem identified in the preceding paragraph.

We believe this rule change is a remedy to a non-existent problem. Any and all fee disputes with clients are resolvable with the existing rules on a case-by-case basis, under the overriding rule prohibiting unconscionable fees.

We urge this rule not be adopted. It is unneeded and would overturn a history of flat fee contracts that have served clients and lawyers for years.

Yours truly,



REBECCA P. JONES
President
Criminal Defense Lawyers Club

cc: Wells Lyman, Esq. P O Box 2085 La Mesa, CA 91943

TARLOW & BERK PC

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April 29, 2010

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Vice President - State Bar of California
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2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Re: Opposition to Proposed Rule 1.5(e)(1)-(2) Abolishing Nonrefundable Retainers

Dear Rex:

Enclosed for your review is my Opposition to Proposed Rule 1.5(e)(1)-(2). Considering the volume of material you have received and will receive about the approximately 55 new rules, I thought it would be helpful if I sent you this detailed factual and legal analysis of what the Commission has labeled "a very controversial" (the highest level used by the commission) if not the most controversial Rule change. However, in reality there is no controversy among the Bar membership. As demonstrated beginning in 1991 when the prior related proposals were rejected, the at large membership of the Bar overwhelmingly opposes abolishing nonrefundable retainers. These proposals were the subject of intense criticism by the membership in 1991, 1997 and 2008. In an attempt to give you sufficient time to analyze this comprehensive opposition, I have submitted it well in advance of the end of the June 15, 2010 public comment period.

There are a number of policy reasons why this change should never be adopted, including unnecessary interference in attorney-client relationships, the generation of increased client bar complaints and civil litigation, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees, the need to preserve the availability of civil and criminal legal services to the people of California including consumers of low, fixed fee services, and to protect the constitutional rights of those accused of crimes to retain the lawyer of their choice and the right of civil litigants to be represented by any lawyer.

Rule 1.5(e), essentially prohibiting non-refundable retainers for almost all legal services, will drastically impact the economics of practicing law in California as well as the ability of people in need of representation to obtain legal services. Considering the significance of the 2009 revisions to Rule 1.5(e)(1)-(2) (abolishing nonrefundable retainers) I am especially concerned that in apparent violation of State Bar Rule 1.10 (A) this novel version of Rule 1.5 (e)(1)-(2) prepared by the Commission for the Revision of the Rules of Professional Conduct ("Commission") was neither publicized nor disseminated, in any manner prior to its November 2009 approval by the Board of Governors¹. Therefore the membership of the Bar was

¹ §1.10 (A) requires proposals for the Rules of the State Bar of California to be circulated for public comment "before adoption" by the Board of Governors. Rule 1.5(e)(1)-(2) certainly does not meet the exceptions in Rule 1.10 B (1) for "clerical errors, [to] clarify grammar or improve organization..." or in Rule 1.10 (B) (2) that applies to "non-substantive modifications." In addition, the minutes of the November 14,

unaware² of this new rule or that it would be considered at the November 14, 2009 Board of Governors meeting and were unable to meaningfully respond or object and be heard at the RAC and Board of Governors' November meetings. See enclosed opposition pp. 7-12.

What is also troubling is that the Commission has not published any comprehensive or detailed factual and legal analysis for enacting these extensive changes or demonstrated that a need exists to do so. Rule 1.5(e)(1)-(2) also clearly violates the "Commission Charter." The Commission has asserted that a principle reason for this rule "is client protection." However, since 1991, I have asked the proponents of attempts to abolish non-refundable retainers for evidence supporting the claim that in California there is a pattern of unethical lawyers cheating clients by using nonrefundable retainers. None has been forthcoming.

It is also significant that this prohibition appears nowhere in the ABA Model Rules. Since the 19th Century nonrefundable retainers have been used in California and are currently permitted in many states. In fact, in 1992 the Board of Governors of the California Bar endorsed the continued use of "fixed fees," "flat fees," and "nonrefundable retainers" so long as the written fee agreement explicitly spelled out the arrangement and that the fee was "earned when paid."³ Their decision was widely publicized. As far as I can determine, the Commission has never provided a written analysis of this persuasive authority, advised the current Board of Governors of its existence and certainly has not demonstrated why it should be ignored by those who now sit on the Board of Governors.

In essence, the proposal abolishes and/or redefines a widely accepted historical fee arrangement and prevents fully informed clients from entering into a fee agreement, the nonrefundable retainer, that far more often than not reduces and limits the cost of legal representation. These changes will impact lawyers who practice in many areas, including immigration, entertainment law, matrimonial/divorce, civil litigation, appellate, securities, bankruptcy, tax, real estate and criminal law and their clients.

One of the most troubling aspects of the proposed Rule is that prohibiting nonrefundable retainers, see 1.5(e)(2), will make these fee payments the property of the client until the work is performed. This is so regardless of the inaccurate representation set out in Rule 1.5(e)(2) requiring a written agreement by the

2009 meeting # 132, p. 6, reflect that the "Board's adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment . . . (along with 65 other Rules)." This after-the-fact theoretical public comment does not satisfy the Rule 1.10(A) requirements of public comment "before adoption" or solve the notice and process problem.

2 It is indeed odd that the November 14, 2009 minutes of the Board of Governors # 132, p. 6 that "adopts" Rule 1.5(e) along with 34 other rules states "following publication for comment and consideration of comment received" "the Board of Governors adopts" 35 Rules that included Rule 1.5(e)(1)-(2). There was no "publication for comment" of Rule 1.5(e)(1)-(2).

3 See, "Request That the Supreme Court of California Approve Amendments . . . to the Rules of Professional Conduct," October 1992, page 9.

"Although the proposed amendments would avoid use of the terms 'fixed fee,' 'flat fee' or 'non-refundable fee,' such types of retainer fee agreements would be permissible under the proposed amendments. However, such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provides that such fees, paid in advance of the provision of legal services, are earned when paid."

lawyer and client asserting that the "flat fee is the lawyer's property on receipt." The critical issue in fee forfeiture and restraining order situations is not what the fee is called but who owns the funds. See opposition pp. 31-35.

Almost certainly, in spite of the legally and factually unsupported claim by the Commission that these changes have eliminated fee restraint and/or fee forfeiture problems, in reality the changes have aggravated this serious problem, see Opposition pp. 29-35. Abolishing the nonrefundable retainer, that for years has protected clients and lawyers from fee restraints, fee forfeiture and jeopardy assessments, will expose lawyers performing many types of legal work to great financial risk. It will facilitate the restraint or seizure of fees if the client has a potential problem involving, for example, securities law, bankruptcy, criminal law, tax law and even some creditors' claims. The enclosed opposition analyzes these significant problems and poses the question of: why enact this novel and untested fee arrangement that will result in years of collateral litigation, when for more than 40 years the nonrefundable retainer has proved to be the best available fee agreement to protect the client and lawyer from fee restraint and/or fee forfeiture?

The proposed Rule changes and Comments are also confusing and internally inconsistent. Rule 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee agreements presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It will also certainly cause clients to fire their lawyer without cause and demand a refund of fees that until now have been considered and were in fact earned when received. The result will be the filing of arbitration demands, bar complaints, and civil suits. Of course, if a lawyer has seriously underestimated the work involved in a complicated "flat fee" case, which often occurs, ordinarily he will never be discharged without cause.

As I understand the ongoing developments, a number of bar associations will join in opposing these radical changes. I sincerely hope you have the opportunity to review this submission that incorporates in one document the arguments advanced by the opposition, factually and legally analyzes why a nonrefundable retainer is a necessary and appropriate fee arrangement, responds to the arguments advanced by the proponents on the Commission and demonstrates the substantial problems that will result from the enactment of Rule 1.5(e)(1)-(2).

Thank you for your consideration.

Sincerely,

TARLOW & BERK PC

A handwritten signature in cursive script that reads "Barry Tarlow".

Barry Tarlow

BT/sew

Enclosure

cc: Audrey Hollins

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April 29, 2010

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Los Angeles, CA 90067

Re: Opposition to Proposed New Rule of Professional Conduct 1.5(e) (4-200)
(Fees for Legal Services) Abolishing Nonrefundable Retainers

Dear Rex:

I am a lawyer who has represented individuals and businesses accused of crimes in state and federal courts throughout the country for over forty years. Attached as Exhibit A is my biography so that you can consider my background and experience in evaluating my qualifications to present the analysis set out in this Submission. I am seriously concerned as are many other California lawyers about the problems raised by the Commission for the Revision of the Rules of Professional Conduct's ("Commission") proposed new Rule 1.5(e) and conforming amendments to Rule 4 200 of the Rules of Professional Conduct of the State Bar of California ("Proposal"). Paragraph (e) essentially prohibiting nonrefundable retainers for legal services will drastically and detrimentally impact the economics of practicing law in California, as well as the ability of people in need of representation to obtain legal services. I am requesting a meaningful opportunity to be heard, on behalf of the members of the bar who overwhelmingly oppose these radical and unnecessary revisions of custom, practice, and the law, (1) if this matter is heard by RAC and (2) at the time it is heard by the Board of Governors.

INDEX

	<u>Page</u>
INTRODUCTION.....	2
I. PROCEDURAL PROBLEMS CONCERNING THE MANNER IN WHICH THE COMMISSION OBTAINED THE BOARD OF GOVERNOR’S ENDORSEMENT OF THE 2009 PROPOSAL	7
A. Lack of Notice/Process Surrounding Commission’s Abandoned 2008 Proposal To Prohibit Nonrefundable Fees	7
B. The Manner In Which The Commission Obtained Board of Governors Approval of The 2009 Proposal To Ban Nonrefundable Retainers.....	9
C. The Commission Violated Rules Of The State Bar 1.10 By Failing To Circulate The Proposal For Public Comment Before Adoption	11
II. ANALYSIS OF THE SUBSTANTIVE PROBLEMS WITH PROPOSED RULE 1.5(e).....	13
A. Description of the Proposal:.....	13
B. The Proposal is the latest effort by the Commission to prohibit nonrefundable retainers in California	14
1. Past efforts to abolish the nonrefundable retainer	14
2. Drafters’ Clear Intent Is To Abolish The Nonrefundable Retainer.....	16
C. The Narrow Exceptions of Section (e) Do Not Permit Traditional, Nonrefundable Fee Arrangements That Benefit Clients.....	17
1. Exception (e)(1) – “True Retainer”	17
2. Exception (e)(2) – “Flat Fee”	19
D. The Proposal is A Solution in Search of A Problem	21
E. Significant Problems Created by the Proposal for Many Members of the Bar and Their Clients	26
1. Section (e)(2) – “Nonrefundable” Flat Fee Constituting “Complete Payment” For “Specified Legal Services.”	27
2. Restraint, Fee Forfeiture, Seizure, Attachment	29
3. Conflicts	36

	<u>Page</u>
4. The Proposal Is A Source Of Ambiguity And Confusion:.....	37
a. Comment [5].....	38
b. Paragraph (e)(2).....	39
5. The Proposal and The Economic Viability of Firms.....	40
6. Discipline cases and complaints to the Bar:.....	41
F. The Proposal Is Unsupported By the ABA Model Rule, Any Consensus in the States, or the Washington Rule.....	42
G. The Proposal Grossly Departs From Longstanding California Custom, Standards, Practice, and Principles.	43
H. The Proposal Fails to Address The Concerns of the California Commission on the Fair Administration of Justice and The Position of Two Justices of The California Supreme Court in <i>People v. Doolin</i> , 45 Cal. 4th 390, 460 (2009).	45
CONCLUSION	46

INTRODUCTION

In 1992, the Board of Governors approved the continuing use of the nonrefundable retainer “earned when paid,” as a perfectly appropriate fee arrangement. It endorsed the continued use of “fixed fees,” “flat fees,” and “nonrefundable retainers” to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement provided that such fees paid in advance of legal services are “earned when paid.”¹ This information was widely publicized. In 1991, the Committee on Professional Responsibility and Conduct (COPRAC) first suggested that any change to the rules should explicitly add "nonrefundable retainers" as part of the definition of "true" retainers earned upon receipt. *See* May 20, 1991 COPRAC memorandum. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly nonrefundable retainer in appropriate circumstances. *Id.*

The Bar has soundly and repeatedly rejected attempts to ban the nonrefundable retainer: (1) in 1991 by the Commission, (2) in 1997 by COPRAC, and (3) in 2008 by the Commission. Now again, without notice, process, or opportunity to be heard, the Commission submitted a proposal to the Board of Governors to abolish nonrefundable retainers primarily on the grounds of consumer protection. Since 1991, we have been requesting that the Commission demonstrate any pattern of misconduct that would justify such a ban. It has been unable to do so simply because none exist.

This Proposal to ban nonrefundable retainers is a solution in search of a problem. Although the Commission’s four-person subcommittee (which includes a law professor consultant, Kevin Mohr, who actually drafted the proposed rule) is no doubt knowledgeable in the ethics field, they appear to lack practical experience with how such a fee actually works in private practice. One significant example of this problem is the unsupported, undocumented and erroneous assertions that the abandonment of the 2008 proposed Rule 1.5(f) and the creation of 1.5(e)(2) has eliminated the previous problems involving fee forfeiture, restraint of legal fees or asset restraint that would deprive clients of their lawyer of choice in civil and criminal matters. *See pp. 29-35, infra.*

It has always been recognized by members of the Bar practicing in many fields, including immigration, family law, criminal law, tax law, civil trial practice, and SEC law, as well as appellate, entertainment and real estate law, that there is nothing about a nonrefundable retainer that permits a lawyer to charge an unconscionable or a clearly excessive fee. That is, the nonrefundable retainer, as with any other traditional fee

¹ *See* October 1992 State Bar Memorandum and attachments (prepared by the Office of Professional Competence, Planning and Development in connection with a “Request that the Supreme Court of California Approve Amendments . . . to Rules of Professional Conduct”). To this point we have been unable to find a record demonstrating this document was in fact filed with the Supreme Court.

arrangement, has always been subject to well-established professional rules that apply to the unscrupulous lawyer who extracts an unconscionable fee as a “nonrefundable retainer” from a naïve client, does little or no work, and keeps the client’s money. These rules include: (1) the case-by-case Rule against charging excessive fees (Rule 1.5(a)) and (2) the longstanding Rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). Common sense, fairness, and the existing protections against unconscionable fees dictate that under a nonrefundable retainer fee arrangement, if a lawyer does very little or no work, the client is entitled to a full refund.

Similarly, members of the Bar have almost universally recognized that when a client signs an agreement and pays a nonrefundable retainer, as with many contracts, there are unanticipated events that can result in a total or partial refund. For instance, a client would be entitled to a full refund if his/her lawyer is sick and unable to work on the case. Likewise, an honest lawyer would refund a \$10,000 nonrefundable retainer if, shortly after receiving it, the client changes her mind and fires him/her without cause, and the lawyer has not done any meaningful work. In these and many other unanticipated circumstances, a nonrefundable retainer would be “unconscionable” under Rule 1.5(a) and an honest lawyer would refund all of the unearned portion of the fee.

If adopted, Paragraph (e), designed to essentially abolish nonrefundable retainers, will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, expose lawyers acting in good faith to disciplinary charges, arbitration, and civil lawsuits, seriously undermine the attorney-client relationship, prevent many clients from obtaining representation, and deprive clients of their lawyer of choice by facilitating the restraint or forfeiture of legal fees. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because, for example:

- (1) The Board of Governors adopted this Proposal without any input from the membership. Considering the significance of Paragraph (e)(1)-(2) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors’ adoption of the Rule. Although the minutes of the November 14, 2009 meeting ¶ 132, p. 6, reflect that the “Board’s adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment . . . (along with 65 other Rules),” such after-the-fact theoretical public comment does not satisfy the Rule 1.10(A) requirements of public comment “before adoption” or solve the notice and process problem.
- (2) Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a nonrefundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of Californian lawyers have used

some form of the nonrefundable retainer (that falls outside of the limited exceptions to Paragraph (e)'s ban on nonrefundable retainers in (e)(1)-(2)).

- (3) There is no identifiable abuse or pattern of wrongdoing by California lawyers resulting from the current rules that mandate the abolition of the nonrefundable retainer or that would be remedied by this sweeping change.
- (4) The Proposal ignores the fact that in 1992 the Board of Governors approved the continued use of the nonrefundable retainer "earned when paid" as an appropriate fee arrangement. The Board of Governors approved the continued use of "fixed fees," "flat fees," and "nonrefundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."²
- (5) Paragraph (e)(1) (a true retainer) and Comments [8] and [10] prohibit using a nonrefundable retainer as a minimum fee to ensure availability when the client will also be credited for future work done either on an hourly basis or for the amount of the retainer. Rule 1.5(e)(1) deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from charging a nonrefundable retainer earned when received if he does any legal work while waiting for a case to be filed or rejected.
- (6) Paragraph (e)(2) and Comment [5] would often require the theoretically "nonrefundable" "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" should cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.

² See "Request That the Supreme Court of California Approve Amendments . . . to the Rules of Professional Conduct," October 1992, page 9.

"Although the proposed amendments would avoid use of the terms 'fixed fee,' 'flat fee' or 'nonrefundable fee,' such types of retainer fee agreements would be permissible under the proposed amendments. However, such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provides that such fees, paid in advance of the provision of legal services, are earned when paid."

- (7) Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the fee by representing that the fee “is the lawyer’s property on receipt.” However, the critical issue is not what the fee is called but who owns or has any interest in the funds.
- (8) Rather than protecting the client’s entitlement to a refund of the “nonrefundable” flat fee (*see* proposed Rule 1.5(e)(2)(v)), Paragraph 1.5(e)(2) actually will deprive the client from receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessment, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.
- (9) Paragraph (e)(2), contrary to the Commission’s claims, exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims.
- (10) Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee restraint/forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional right to retain the lawyer of their choice and many civil clients of their ability to obtain any legal representation.
- (11) Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.
- (12) The Proposal is confusing and internally inconsistent. It will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes for honorable lawyers acting in good faith.
- (13) Paragraph 1.5(e)(2)’s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the “sanctified” State Bar fee forms (specifically the “fixed fee” clause) that have been distributed by the Bar for approximately the past 20 years and represent the “gold standard” for California lawyers.³

³ In her article in the *California Bar Journal*, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee forms:

- (14) The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to an advance “flat fee” that is earned when received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determinative in an ongoing case, the Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the “flat fee” that under this Proposal would no longer be “the lawyer’s property” or property to which the lawyer is entitled.

The Commission also appears to have ignored a significant problem. If these changes are adopted and approved by the California Supreme Court, what will happen to the hundreds if not thousands of partially completed nonrefundable fee agreements? Is the simple answer that they should be honored since the Proposal would not apply retroactively? Putting aside for the moment any Constitutional prohibitions, what can possibly be done about these partially performed contracts, some of which may require legal services for two or three years into the future, for example, an agreement for representation in federal Habeas Corpus proceedings? Will the lawyer be compelled to alter partially performed contracts? What will happen if the client does not agree to the alteration or the lawyer would not have initially entered into the agreement in its altered form? How will the structure of the new contracts be determined? The permutations and combinations of potential problems are mind numbing. This is simply yet another example where the actual practice of law has been ignored in pursuit of unnecessary theoretical reforms.

The proposed new Rule 1.5(e), drafted by the Commission, essentially prohibits nonrefundable fees for performing legal services. In doing so, it abolishes and/or

“Lawyers are urged to use the State Bar fee forms [. . .]. These represent the ‘gold standard.’ The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify regarding issues involving an agreement, it’s a stronger case if it’s the sanctified State Bar fee agreement. . .” Diane Karpman, “Time for tuning up those fee agreements,” *California Bar Journal* (February 2010)

Paragraph (e) is irreconcilably inconsistent with the existing and widely-used “fixed fee clause” at pp. 30-31 of “The State Bar of California Sample Written Fee Agreement Forms” available at:

<http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf>.

redefines a widely accepted historical fee arrangement, and in reality will provide that most payments to do legal work in the future will not be earned when received regardless of the attempts in Rule 1.5(e) to inaccurately describe some fees as “the lawyer’s property upon receipt.” At the same time, in violation of the theoretical rationale for abolishing nonrefundable retainers, it leaves in place in Rule 1.5(e)(1) a nonrefundable fee that is a “true retainer.”

I. PROCEDURAL PROBLEMS CONCERNING THE MANNER IN WHICH THE COMMISSION OBTAINED THE BOARD OF GOVERNOR’S ENDORSEMENT OF THE 2009 PROPOSAL

Many lawyers in California share my concern about the process or lack thereof that resulted in the Board of Governors’ passage of Rule 1.5(e)(1) and (2). The concern focuses on the lack of any prior opportunity to comment on the version of Rule 1.5(e) that was approved by the Board of Governors on November 14, 2009. Prior to the rule being sent out for final comment with the 65 other rules and the endorsement of the Board of Governors, the membership of the Bar and interested local Bar associations should have been given the opportunity to: (1) submit public comments before the rule was approved and (2) appear before the board to present their opposition to this controversial, novel, and literally unprecedented change to the Rules.

A. Lack of Notice/Process Surrounding Commission’s Abandoned 2008 Proposal To Prohibit Nonrefundable Fees

The Commission attempted to prohibit nonrefundable fees in 2008 without effectively informing the Bar membership of its attempt to do so. Although they posted a 209-page Discussion Draft of 13 proposed amendments to the rules of professional conduct (including the prior proposed Rule 1.5(f) banning nonrefundable retainers) on the State Bar website, the Commission’s 2008 proposal to ban nonrefundable retainers was not meaningfully publicized. As discussed below, for example, posting a short article in the May 2008 California Bar Journal related to the Commission’s proposed revisions to 13 Rules of Professional Conduct that did not mention this radical change.

I only discovered this specific provision after reading the May 2008 edition of the *California Bar Journal* about the Commission’s proposed revisions to 13 Rules of Professional Conduct, and learned that the deadline for public comment was June 6, 2008. I was interested in a totally different Rule and it was only by chance in early May 2008, after printing and reviewing 209 pages of information from the website regarding all 13 Rules, that I first noticed the provision prohibiting nonrefundable retainers. I do not recall at the time seeing anything on the Bar’s home page about existing Rule 4-200 to be revised as Rule 1.5(f) that would abolish nonrefundable retainers.

This short *California Bar Journal* article did not describe, discuss, or mention the proposed revision to abolish nonrefundable retainer fees. This provision may have possibly been mentioned somewhere. However, I certainly never read about it and no lawyer had previously discussed it with me. I have not yet spoken to any lawyer, other than perhaps someone who was a member of the state or local bar association ethics committee, who in early May 2008 was aware that this specific Proposal existed, even though I have attempted to find members of the Bar who were aware of this drastic change. Most California lawyers were completely unaware that these significant changes to Rule 4-200, referred to as new Rule 1.5(f), had been proposed.

When I learned of the 2008 proposal in May of 2008, I was able to advise a relatively small number of members of the California Bar and several bar associations about these proposed radical changes.⁴ At that time, the public comment window expired on June 6, 2008.

The Commission received a number of comments complaining about the lack of notice and process. In response to the complaints that the former 2008 proposal had not been publicized in a manner that permitted members to respond, the Commission later stated:

“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 *Daily Journal*, the *Daily Recorder*, and the *Sacramento Bee*; e-mail notifications to approximately 14,000 interested persons; and a press release to the media.” See Public Comment Chart, Exh. 1 to the Executive Summary.

As far as I knew, not one publication mentioned by the Commission actually discussed the proposal to ban nonrefundable retainers. On March 17, 2010, I received via email from Randall Difuntorum requested copies of what appear to be all of the publications, including several different emails, that the Commission maintains provided adequate notice of the 2008 proposal to ban nonrefundable retainers. A review of these materials reveals that nowhere in the emails or anywhere else did the Commission ever explicitly publicize or state that it was going to take up the issue of nonrefundable retainers, let

⁴ With the 2008 Proposal, the Commission also did not publish any rationale for enacting this comprehensive change or demonstrate that a need exists to do so. It failed to publish a comprehensive legal and factual analysis of this revision anywhere in its 209-page March 2008 Discussion Draft of the 13 proposed amendments or anywhere on the State Bar website.

alone seek to prohibit them altogether. Indeed, no version or parts of the words “nonrefundable retainer” appear even once in any of these materials.⁵

Moreover, even if the materials had provided some sort of information about their efforts to abolish nonrefundable retainers, many, if not most, of those materials would not have afforded concerned members of the Bar adequate time to act within the 90-day comment period scheduled to end on June 6, 2008. The brief notices for a public hearing on “Proposed Amended Attorney Rules of Professional Conduct” that appeared in the *Los Angeles Daily Journal*, the *Recorder*, and the *Sacramento Bee*, for example, were first published on May 15, just a week prior to the May 22 Sacramento hearing, which itself was only two weeks prior to the end of the 90-day comment period.

It is therefore hardly surprising that not a single well-respected and established Sacramento lawyer that I personally spoke with (approximately five to ten) knew, prior to conversing with me, of a public hearing in Sacramento that was noticed in the publications discussed above and that would deal with a proposal to ban nonrefundable retainers. The methods used to notice the 2008 proposal to ban nonrefundable retainers were also clearly ineffective in giving actual notice of this sparsely-attended public hearing.

B. The Manner In Which The Commission Obtained Board of Governors Approval of The 2009 Proposal To Ban Nonrefundable Retainers

In August of 2008, the Commission’s prior proposed approach that was Rule 1.5(f) was abandoned. This proposed rule consisted of one sentence.

In late 2009, the Commission totally redrafted Rule 1.5 and expanded it in a new paragraph (e) and five accompanying Comments [7]-[11] (which were not a part of the 2008 proposal). The Commission presented this new proposed rule, along with 34 other rules to the Board of Governors for approval in November of 2009, without informing the

⁵ For example, the notices of public comment published in the *California Bar Journal* merely noted that the Commission was considering proposed amendments to rules that governed a wide variety of issues including “fees for legal services,” while the notices of public hearing published in the *Los Angeles Daily Journal*, the *Recorder*, and the *Sacramento Bee* provided no information whatsoever about any of the proposed rule changes. Assuming someone sorted through the public notices in these publications and discovered the Commission’s notice, all they would have learned was that there was a Sacramento meeting about “proposed amended attorney rules of professional conduct.” The emails sent out to theoretically interested parties similarly failed to mention anything about nonrefundable retainers, either providing no details about any of the proposed rule changes or listing a number of potential changes unrelated to nonrefundable retainers.

membership of the State Bar or even the known stakeholders who vigorously opposed the 1991, 1997 and 2008 proposals. It is unlikely that any meaningful number of members of the California Bar, other than for example a lawyer who is on the Commission or a member of the Board of Governors, or perhaps some member of a local Bar ethics section, actually knew about the latest Proposal (draft Rule 1.5(e)) and the Commission's attempt to present it to the Board of Governors for approval. There was no time or opportunity to learn about, scrutinize, or comment on draft Rule 1.5(e).

Obviously, since there was no notice that the meeting agenda involved a proposed draft of Rule 1.5(e) that in fact dealt with a ban on nonrefundable retainers was distributed to the members of the Bar, no one opposing the proposal could appear before the Regulations and Admissions Oversight Committee ("RAC") or the Board of Governors on November 12 through 14, 2009 to raise the host of problems with this new version of Rule 1.5(e).

However, the proponents of these radical changes did in fact have the opportunity to advance their agenda and did appear before RAC and approximately 17 members of the Board of Governors at the November 12, 2009 RAC meeting. Harry Sondheim, Chairperson of the Commission and the co-chair of the four person Subcommittee responsible for drafting Rule 1.5(e), and Professor Kevin Mohr, who drafted this new proposal, were present. Coincidentally Mr. Sondheim was Chair of the Commission in 1991 when, using a different approach and rationale, it was a major proponent of abolishing nonrefundable retainers.

So far as I know the fact the board would deal with the issue of nonrefundable retainers was not published and/or disseminated on any board agenda. The Board of Governors' meeting agenda for November 2009 only mentioned: "Rules of Professional Conduct, Proposed New and Amended, Batches 1, 2, and 3, Return from Public Comment." See BOG agenda for the November 2009 meeting available at: <http://bog.calbar.org/pages/Agenda.aspx?id=10237&t=0&s=false>. The public comment letters sent in the spring of 2008 could not have addressed Rule 1.5(e) submitted to the Board of Governors in November of 2009.

Despite the overwhelming opposition to this Rule, I do not believe any member of the Bar wrote to the Commission or the Board of Governors about (e)(1) and (2) and of course no member of the Bar appeared before the RAC or the Board of Governors to oppose this rule. All quite logical since how could any member of the Bar who opposed the rule appear at a meeting about which they were unaware? In fact, I have not heard that the merits of the proposed ban on nonrefundable retainers was even discussed at the Board of Governors meeting. The minutes of the Board of Governors' November meeting do not reflect any such discussion. Although Rule 1.5(e) was designated as one of the most controversial changes, the unofficial recording of the November 12 RAC

meeting reflects that there was no discussion of Rule 1.5(e) and the approximately 17 members of the Board of Governors who attended that meeting heard only a brief discussion of Rule 1.5 about whether the words unconscionable or unreasonable should appear in 1.5(a). It appears from the recording that the word nonrefundable was never mentioned. The minutes of the November RAC meeting do not reflect anything different. However, at the November meeting, Rule 1.5(e) was approved by the Board of Governors along with approximately 33 other Rules.

In December 2009, the California Bar Journal published a small article announcing that 35 revisions of the professional conduct rules won approval by the Board of Governors. This after-the-fact announcement (after the Board of Governors had already endorsed the Proposal) was the only publicity I am aware of given to the new proposed draft Rule 1.5(e) which had already been endorsed by the Board of Governors and the article made no mention of the newly drafted and renumbered paragraph (e) prohibiting nonrefundable retainers. Rather, it only stated:

“at its November meeting, the Board of Governors approved [35] rule revisions that . . . retain current standard prohibiting, for disciplinary purposes, an ‘unconscionable fee.’ The commission had been considering adopting ABA’s standard that prohibits an ‘unreasonable fee.’ (Rule 1.5).”

Like the 10-page October 23, 2009 ”Executive Summary” submitted to the Board prior to the November meeting, this article did not mention one word about the proposed Rule to change the way fees are structured in California by, among other revisions, the abolishment of nonrefundable retainers.

On November 16, 2009, the State Bar issued a press release that the “Board of Governors has approved 35 revisions of the California Rules of Professional Conduct.” Approximately one week later, I learned of the decision about Rule 1.5 made by the Board of Governors. Since that time, I have discussed this matter with a cross-section of the Bar membership from throughout California and have not found lawyers who were aware that a decision about whether to approve Rule 1.5(e)(1) would be made by the Board of Governors at its November 2009 meeting.

C. The Commission Violated Rules Of The State Bar 1.10 By Failing To Circulate The Proposal For Public Comment Before Adoption

Rule of the State Bar 1.10(A) (“Public Comment”) requires Proposals for the Rules of the State Bar of California to be “circulated for public comment before adoption, amendment, or repeal by the Board of Governors.” Section 1.10(B)(1) states that Public Comment is not required:

“(1) to correct clerical errors, clarify grammar [or] improve organization” or

“(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal.”

The 2009 Proposal cannot be reasonably interpreted as a “non-substantive” “modification” of the abandoned 2008 proposed Rule 1.5(f). The 2008 proposal consisted of one sentence of 47 words from which the Commission later removed 32 words. The 2009 Proposal adds approximately 557 new words to Rule 1.5 and the “Comments” and creates an entirely new structure concerning “flat fee” arrangements. Any comments received by the Commission in the spring of 2008 about the proposed Rule 1.5(f) that was abandoned by the Commission in August of 2008 could not have been directed at the 2009 Proposal adopted by the Board of Governors in November of 2009. Rule 1.5(e)(1)-(2) did not even exist on June 6, 2008 when the comment period ended for the abandoned proposal.

The Board of Governors adopted this 2009 Proposal without any input from the membership.⁶ Considering the significance of Paragraph (e)(1)-(2) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors’ adoption. *See* Rule of the State Bar 1.10(A) (“Public Comment”) requiring Proposals for the Rules of the State Bar to be “circulated for public comment before adoption, amendment, or repeal by the Board of Governors.”

Finally, the minutes of the November 14, 2009 meeting #132, p. 6, note that the “Board’s adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment . . . (along with 65 other Rules).” Such after-the-fact theoretical public comment does not satisfy the Rule 1.10(A) requirements of public comment “before adoption” or solve the notice and process problems.

⁶ It is indeed odd that the November 14, 2009 minutes of the Board of Governors # 132, p. 6 that “adopts” Rule 1.5(e) along with 34 other rules states: “following publication for comment and consideration of comment received that the Board of Governors . . . adopts” the 35 Rules that include Rule 1.5e(1)-(2). There is no doubt there was no “publication for comment” of Rule 1.5e(1)-(2). In spite of the number of members of the Board of Governors and their staff who were present at (1) the RAC and (2) the Board of Governors’ meeting, it appears due to the enormous volume of material that no one recognized that Rule 1.5(e)(1)-(2) had never been circulated for public comment.

II. ANALYSIS OF THE SUBSTANTIVE PROBLEMS WITH PROPOSED RULE 1.5(e)

A. Description of the Proposal:

In November of 2009, the California State Bar's Board of Governors adopted the new proposed Rule 1.5(e) (referred to as "The Proposal"). The Proposal states:

- (e) A lawyer shall not make an agreement for, charge, or collect a nonrefundable 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.

The Proposal also includes several comments (numbered [7] through [11]), in addition to the already existing Comment [5], that state:

[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.

[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 (e)(2) are not met, a flat fee received in advance must be treated as an advance for fees. See Rule 1.15.

B. The Proposal is the latest effort by the Commission to prohibit nonrefundable retainers⁷ in California.

1. Past efforts to abolish the nonrefundable retainer

The Proposal is the latest effort by the Commission to amend Rule 1.5 (4-200) to abolish nonrefundable retainers. Similar though somewhat different proposals were made by the Commission in 1991⁸ and 2008⁹ and by the Committee on Professional

⁷ "Nonrefundable retainer" refers to nonrefundable retainers, true retainers, advance fees earned when received, and minimum fees.

⁸ See proposed and rejected amendments to State Bar Rule 4-100 (Preserving Identity of Funds and Property of a Client) and Rule 3-700 of the Rules of Professional Conduct (Termination of Employment) (1991). The vast majority of the public comment was in opposition to the proposed 1991 amendments, which were ultimately withdrawn.

⁹ A 209-page Discussion Draft for 13 proposed Rules of Professional Conduct, including proposed Rule 1.5(f), is posted on the State Bar website. Proposed Rule 1.5(f) stated:

Responsibility and Conduct (“COPRAC”) in 1997.¹⁰ They were soundly rejected based on the overwhelming number of negative responses from a wide cross-section of California lawyers.

In fact, in 1992, the Board of Governors concluded that a nonrefundable retainer “earned when paid” was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of “fixed fees,” “flat fees,” and “nonrefundable retainers” to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are “earned when paid.” See October 1992 State Bar Memorandum (prepared by the Office of Professional Competence, Planning and Development). Indeed, it was COPRAC that first suggested (see May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add “nonrefundable retainers” as part of the definition of “true” retainers earned upon receipt. COPRAC is also on record as stating it is “concerned” that any proposed rule change not “unduly restrict” a lawyer’s ability to charge a truly nonrefundable retainer in appropriate circumstances. *Id.*

In August 2008, the Commission scrapped the pending proposed revision to Rule 1.5(f) and instead decided to redraft Rule 1.5 to incorporate the following concepts: (1) that nonrefundable fees for the performance of future services would be prohibited; (2)

“A lawyer shall not make an agreement for, charge, or collect a nonrefundable 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.”

Aside from the posting of this 209-page Discussion of 13 proposed Rules on the state bar website, the proposed revision to abolish nonrefundable fees, as far as we know, was not publicized other than a short article in the May 2008 California Bar Journal that made no mention of nonrefundable retainers. Most California lawyers were completely unaware that these significant changes to Rule 4-200 had been proposed. For a more detailed discussion of the failure to give meaningful notice of this 2008 proposal to the vast majority of the Bar membership, see pp. 7-9, *supra*.

¹⁰ See proposed and rejected State Bar Rule 4-110 (Advance Payment of Fees for Legal Services) and amendments to Rules 3-700 (Termination of Employment) and 4-100 Preserving Identity of Fund and Property of A Client) (1997). The public comment information on the proposed 1997 amendments is unavailable for purchase or review on the State Bar website.

that a “true retainer” fee would be permitted; and, (3) that a fixed or flat fee would be permitted subject to compliance with stated requirements such as the requirements used in Washington’s proposed Rule 1.5(f)(2). Commission Meeting Notes of August 29-30, 2008 meeting.¹¹ The Proposal is the result of this drafting decision.

2. Drafters’ Clear Intent Is To Abolish The Nonrefundable Retainer

The Proposal begins with the statement that a lawyer “cannot make an agreement for, charge, or collect a nonrefundable fee, except . . .” This language demonstrates the Commission’s¹² clear intent to abolish, nonrefundable retainers, advance fees earned when received, and minimum fees subject to the limited exceptions in (e) (discussed below). The Commission’s intent is also apparent from the comments made by the Commission members and drafters during the drafting of the Proposal and demonstrates a myopic focus on linguistics and a profound misunderstanding of firmly established custom and legal principles. They state, for example:

- “. . . The concept of nonrefundable fee does not fly, except to the extent it is a true retainer which means it genuinely is earned upon receipt in return for the lawyer making himself or herself available to provide legal services for a period of time. . .” (August 15, 2008 email drafted by Commission consultant Mohr);
- “. . . I suggest tweaking 1.5(f) to clarify our intent, namely, prohibiting the designation of a fee to a client as nonrefundable when in fact it may be refundable.” (August 16, 2008 email drafted by Commission Chair Sondheim);

¹¹ The August 2008 drafting decision also included “restrictions (in the rule or in the comments) on what lawyers can or cannot say to their clients to avoid misleading clients about the refundable nature of a fee (e.g., proposed Washington Rule 1.5(g)).” Commission Meeting Notes of August 29-30, 2008 meeting. These restrictions were abandoned by the Commission after they failed to pass in Washington.

¹² “The Commission” refers to the Special Commission for the Revision of Rules of Professional Conduct, chaired by Harry Sondheim. Mr. Sondheim was also the Chair of the 1991 Commission that proposed amendments to State Bar Rule 4-100 (Preserving Identity of Funds and Property of a Client) and Rule 3-700 of the Rules of Professional Conduct (Termination of Employment). This proposal would have eliminated fees for future services, including nonrefundable retainers, fees earned when received, and minimum fees. The vast majority of the public comment was in opposition to the proposed 1991 amendments, which were ultimately withdrawn.

- “I suggest we . . . have a comment which indicates that a fee described as a ‘flat fee’ (as well as any other type of fee that the Commission wishes to set forth) is not deemed by the use of that phrase to be describing a fee that is not refundable. . .” (August 16, 2008 email drafted by Commission Chair Sondheim);
- “. . . it seems to me that, even in the situation of a naming retainer, we should not describe the retainer as nonrefundable. . . I think there is no such thing as a nonrefundable retainer. . .” (August 22, 2008 email drafted by Sapiro); and,
- “. . . [Commissioner Sapiro’s] statement that “there is no such thing as a nonrefundable retainer” is, of course, absolutely correct. I agree wholeheartedly.” (August 22, 2008 email drafted by Julien).

As explained below, these comments (and the Proposal itself) demonstrate that the members of the drafting subcommittee and certainly the professor who was the primary drafter have little understanding of how nonrefundable retainers actually function in private practice. It is doubtful they have any meaningful experience or substantial involvement in negotiating and drafting nonrefundable fee agreements for paying clients and collecting or refunding these fees, for example, in criminal, immigration and SEC cases. If they in fact had practical experience in drafting nonrefundable fee agreements while actually practicing criminal law, they would understand what young criminal lawyers have been taught for generations or have learned through personal and sometimes painful experience. That is that such fee arrangements for nonrefundable retainers are essential to the economic viability of an active criminal practice. It is quite frankly indisputable that many individuals charged with crimes either because of their character or economic misfortune simply do not pay their legal fees.

C. The Narrow Exceptions of Section (e) Do Not Permit Traditional, Nonrefundable Fee Arrangements That Benefit Clients.

1. Exception (e)(1) – “True Retainer”

The authors of “The Truth about True Retainers” in the April 2010 issue of *California Lawyer* described this type of nonrefundable retainer as “very very rare” and a “vestige of days gone by.” Paragraph (e)(1) may well prohibit, for example, the long-established practice of charging a minimum earned when received fee to ensure availability of a specific lawyer who often has exceptional qualifications if the client will also be credited for future work done either on an hourly basis or for the amount of the

true retainer. This arrangement benefits the client because the client may not need to pay additional fees until: (1) the true retainer is used up under an hourly or date related calculation, if it is and/or (2) until some conditional event occurs (i.e. filing of criminal charges or a civil suit), even though the lawyer will remain available and do all necessary work, under the initial minimum earned when received fee, for agreed upon services (including attempting to prevent the filing of a case). Paragraph (e)(1), however, appears to not permit this arrangement because if any portion of the original true retainer is used to pay for the attorney's work in the potential case, then the entire fee is automatically converted into an advance, unearned fee. *See* Comment [8].¹³ Paragraph (e)(1), therefore, deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received.

If this arrangement is characterized as a "true retainer" and this requirement that the lawyer be additionally compensated for any actual work conforms with existing law, there is currently a far better solution. The Commission fails to discuss or analyze the relatively common use of hybrid fees. There is no reason a nonrefundable retainer or minimum fee cannot serve as payment for precharging representation to cover: (1) availability, and/or specialized knowledge and experience as well as, for example, (2) serve as a minimum advance fee earned when received for active representation until the time a decision is made as to whether criminal charges or a civil suit will be filed with (3) the full payment also credited as discussed above for necessary legal work performed prior to the filing of a civil suit or criminal charges. However, the fee for these services will be no less than the minimum fee. If the work exceeds the minimum fee, as computed hourly or an agreed upon future date passes, then the client can be billed as

¹³ Paragraph [8] describes a "true retainer." "It presumes the lawyer is to be additionally compensated for any actual work performed." The section goes on to say, "Therefore, a payment . . . "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)."

Under this proposal, if the lawyer chooses to be generous and reasonable in the negotiation of the availability retainer and decides to treat the payment as a minimum fee and give the client credit for any substantial work that will be performed until, for example, a decision is made about whether a case is filed, the entire balance of the availability retainer can no longer be considered as earned when received. Therefore, the hourly billing or additional fixed fee clock would begin running if the lawyer performs any substantive work. Under Comment [8] of the Proposal, this nonrefundable fee is no longer nonrefundable, but instead becomes a refundable, advance fee. As discussed above, this prohibition of charging nonrefundable retainers as a minimum fee with a credit against future services, if any, hardly serves the interest of the client or public.

agreed hourly or by an additional fixed fee for future work prior to the decision on whether the charges or a civil claim will be filed. If charges are filed so that in fact there is an actual case, the lawyer and the client can attempt to agree on a reasonable fee arrangement for further specified legal work or the entire case. This arrangement is obviously in the best interest of the client who has paid a nonrefundable retainer or true retainer or minimum fixed fee earned when received and who receives both availability and legal services for that payment.

In fact, just such a minimum fee agreement¹⁴ was approved by the North Carolina State Bar in an October 24, 2008 ethics opinion. The Model Fee Provisions also state that “. . . The following paragraphs contain suggested or recommended language. Lawyers are not required to use these model fee provisions. This Model Fee Agreement does not mention the dreaded N word (nonrefundable) and disposes of the unpersuasive linguistic analysis applied by some members of the Commission.

2. Exception (e)(2) – “Flat Fee”

Paragraph (e)(2) (*see* Exh. 2) is the product of the Commission’s attempts to “assuage” their critics by attempting to make their attempted abolition of the

¹⁴ **“Minimum Fee**

As a condition of the employment of Lawyer, Client agrees to pay \$_____ to Lawyer. The money is a minimum fee for the reservation of Lawyer’s services; to insure that Lawyer will not represent anyone else relative to Client’s legal matter without Client’s consent; and for legal work to be performed for Client.

Client understands and specifically agrees that:

- the minimum fee will be earned by Lawyer immediately upon payment and will be deposited in Lawyer’s business account rather than a client trust account;
- Lawyer will provide legal services to Client on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement until the value of those services is equivalent to the minimum fee; thereafter, Client will be billed for the legal work performed by Lawyer and his/her staff on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement; and
- when Lawyer’s representation ends, Client will not be entitled to a refund of any portion of the minimum fee, even if the representation ends before Lawyer has provided legal services equivalent in value to the minimum fee, unless it can be demonstrated that the minimum fee is clearly excessive fee under the circumstances.”

nonrefundable retainer “more palatable” to their critics.¹⁵ This novel and convoluted fee arrangement appears at first to allow for “nonrefundable” flat fee agreements “which constitute[] complete payment for those services” so long as there is a written fee agreement that states, “in a manner that can easily be understood by the client,” a number of things including: “(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.” The obvious problem with paragraph (e)(2) is that if any portion of a “nonrefundable” fee “may be” refundable, then the entire fee cannot be the lawyer’s property.

The less obvious but equally troubling problem is that when read in context of the entire Rule and Comment [5], Paragraph (e)(2) would often require that the presumably “nonrefundable” flat fee cover fees for services spanning the entire length of the case, including trial.¹⁶ Particularly in complex cases, since this flat fee is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur. If the attorney was either fired without cause or withdrew from the case before trial or the case resolved before trial, the fees that would have covered the trial would have to be refunded (either on a pre-tax or post-tax basis)¹⁷ because they are not earned.¹⁸

¹⁵ Following public comment in 2008, there was a series of email exchanges and memoranda between the drafting subcommittee members concerning the overwhelming criticism of the former proposed Rule 1.5(f) (prior attempt to abolish nonrefundable retainers). Among them is an August 13, 2008 Memorandum from Paul Vapnek to the members of the Commission where he asks whether there is anything the Commission could do to “make the bitter pill more palatable to our critics?”

¹⁶ See detailed discussion at pp. 27-29, *infra*.

¹⁷ Lawyers pay income taxes on nonrefundable fees. Under Paragraph (e), the lawyer may have to pay income tax on the “nonrefundable” flat fee paid when received from the client even though it may be refundable.

¹⁸ One important purpose of a “flat fee” or “fixed fee” that is earned when received is to assure the client in advance that the fee will be no more than a particular amount. Many clients who have become relatively sophisticated consumers of legal services do not want fees calculated or based upon the time that is expended. This type of fee is not determined based on fixed values for individual steps in the litigation. Cases develop differently and the “fixed fee” is often an educated but fair estimate, since there is no way to determine how or when, for example, a civil litigation or administrative matter or a criminal case will be resolved.

On closer examination, Paragraph (e)(2) does not actually permit truly “nonrefundable” “flat fees” as the Commission asserts that it does. The Commission’s effort to dress up the ban on nonrefundable retainers in an attempt to make it more palatable to the critics fails and actually creates more problems for the lawyer and the client. *See* discussion in section [E] below concerning the many substantive problems with section (e)(2) of this Proposal.

D. The Proposal is A Solution in Search of A Problem.

The Proposal suggested by the Commission is truly a solution in search of a problem. There simply has not been a pattern of abuse by California lawyers resulting from the current rules which mandates the abolition of the nonrefundable retainer or which would be remedied by this sweeping change. With the latest Proposal, the Commission offers a one-sentence rationale,¹⁹ theoretically supported by two relatively ancient cases:

“Paragraph (e) has no counterpart in the [ABA] Model Rule.²⁰ The Commission recommends its adoption because charging a nonrefundable fee is inimical to California’s strong policy of client

¹⁹ In support of the proposed Rule, the Commission relies solely on two off point, seventy-plus year old cases (dated 1931 and 1934), neither of which dealt with nonrefundable retainers; rather, they both dealt with the unconscionability standard. *See* Agenda Item re: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2, and 3 – Return from Public Comment, Attachment 1, p. 64 (October 23, 2009); *Herrscher v. State Bar*, 4 Cal. 2d 399, 402 (1934) and *Goldstone v. State Bar*, 214 Cal. 490, 498 (1931). The rule announced in these cases was:

“Although we are of the opinion that usually the fees charged for professional services may with propriety be left to the discretion and judgment of the attorney performing the services, we are of the opinion that if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court.”

²⁰ The ABA Model Rules contain no prohibition on “nonrefundable fees” and “earned upon receipt fees.” *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §44, cmt.[f] (2000) (“if a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer” and need not be deposited in a client trust account).

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).” (Commission’s Explanation of Changes to the ABA Model Rule, Exh. 1 to Executive Summary²¹ at p. 77)

The Commission, however, fails to demonstrate that clients need protection from a pattern of willful misconduct by the membership of the State Bar involving the nonrefundable retainer. No recent California reported cases have demonstrated any pattern of knowing abuse involving nonrefundable retainers. The Commission has failed to cite a single, recent reported California case to support the need for Paragraph (e) (despite our repeated requests since 1991).²² It ignores the reality that thousands of Californian lawyers have been using some form of the nonrefundable retainer (that fall outside of the limited exceptions to Paragraph (e)’s ban on nonrefundable retainers in (e)(1) and (2)) since the 19th century without creating any identifiable pattern of willful abuse.²³

The Commission ignores and fails to disclose that in 1992 the Board of Governors concluded that a nonrefundable retainer “earned when paid” was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of “fixed fees,” “flat fees,” and “nonrefundable retainers” to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the

²¹ On October 23, 2009, Randall Difuntorum distributed his Executive Summary re: “Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2 and 3 – Return from Public Comment” to the Members of the Board of Governors and the Members of the Board Committee on Regulation and Admissions. Attached to the Executive Summary were over 2,000 pages of exhibits (Exh. 1 [includes Introduction and Dashboard for proposed Rule 1.5] – 922 pages, Exh. 2 – 1022 pages, and Exh. 3 – 252 pages, Exh. 4 – 125 pages).

²² It similarly failed to explain previous proposed Rule 1.5(f) anywhere in its 209-page March 2008 Discussion Draft of the 13 proposed amended Rules of Professional Conduct or anywhere on the State Bar website.

²³ There are a myriad of examples of legal transactions other than criminal matters that have traditionally involved nonrefundable retainers, fees earned when received, and minimum fees that are not calculated based on the time devoted to the assignment. These legal transactions are in a variety of practice areas, including: (1) real estate, (2) criminal law, (3) securities, (4) family law, (5) tax, (6) entertainment, (7) bankruptcy, (8) immigration, (9) appellate law, and (10) SEC matters.

arrangement with the inclusion of an express statement that such fees paid in advance of legal services are “earned when paid.”²⁴ See, *supra*, p. 15.

Aside from the unsupportable position that in California this novel rule is justified by the need for client protection, most of the Commission’s arguments are essentially sophistry. To justify creating Proposed Rule 1.5(e) a number of members of the Commission advanced the startling proposition that “there is no such thing as a nonrefundable retainer,” *supra*, pp. 16-17 in spite of, for example, its specific approval by the Board of Governors in 1992. Indeed, in many jurisdictions the use of nonrefundable retainers has been recognized for decades as appropriate, if not essential, in both criminal and civil cases.²⁵ Although Paragraph (e) abolishes the well-recognized and long-utilized nonrefundable retainer (with the exception of the extremely limited categories discussed above), the Commission has not, and indeed cannot, demonstrate: (1) any need to completely alter the way law has been practiced in California or (2) how well this novel procedure will work in the actual practice of law.

²⁴ Ironically, it was COPRAC that first suggested (*see* May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add “nonrefundable retainers” as part of the definition of “true retainers” earned upon receipt. COPRAC is also on record as stating it is “concerned” that any proposed rule change not “unduly restrict” a lawyer’s ability to charge a truly nonrefundable retainer in appropriate circumstances. *Id.*

²⁵ John M. Burkoff, *Criminal Defense Ethics 2d: Law & Liability*, § 10.1, at 455 (2009). *See also, e.g.*, John Wesley Hall, Jr., *Professional Responsibility in Criminal Defense Practice* (2d ed. 2005) at § 7:9, p. 184 (noting that “[m]ost ethics committees to have passed on the question permit this distinction in fee agreements that non-refundable retainers are permissible if properly handled”) (emphasis deleted); *Bunker v. Meshbesh*, 147 F.3d 691 (8th Cir. 1998) (Minnesota); *Grievance Administrator v. Cooper*, SC135053 (December 12, 2008) (Michigan Supreme Court rules a nonrefundable minimum fee with credit against an hourly charge “incurred upon execution of the agreement, regardless of whether the representation was terminated by the client” is perfectly appropriate); *In re Connelly*, 203 Ariz. 413 (2002) (Arizona); *In re Kendall*, 804 N.E.2d 1152 (Ind. 2004 (Indiana)); Tennessee Op. 92-F-128(b) (1993) (reaffirming earlier opinion approving nonrefundable retainers); Georgia Op. 03-1 (2003) (affirming use of nonrefundable retainers); South Carolina Rule 1.16(d) (“The lawyer may retain a reasonable nonrefundable retainer.”); Texas Op. 431 (1986) (affirming use of nonrefundable retainers); Maryland Op. 87-9 (a nonrefundable retainer is ethically proper so long as the amount involved is reasonable); Louisiana Rule 1.5(f)(2) (“When the client pays the lawyer all or part of a fixed or of a minimum fee for a particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid...”); Kentucky Op. 380 (1995) (affirming use of nonrefundable retainers).

The critical question here is not whether a rogue lawyer can gouge, exploit, and steal from his/her client using a nonrefundable retainer or whether nonrefundable retainers are prudent or wise in any given situation (this should be left to the lawyers and fully-informed clients to decide between themselves and memorialized in a written fee agreement that meets the requirements of Cal. Bus. & Prof. Code §6148(a) and Rule 1.5(a)).²⁶ Rather, the critical inquiry is whether the non-fraudulent or ethical use of nonrefundable retainers is nonetheless so corrosive as to require a per se prohibition. The answer to this question is a resounding no.

First, the membership of the Bar, though at times mistaken about the proper terminology used to describe a fee, has always recognized there is nothing about a nonrefundable retainer that permits a lawyer to charge an unconscionable or a clearly excessive fee.²⁷ That is, the nonrefundable retainer, as with any other traditional fee arrangement, has always been subject to well-established professional rules that provide a sufficient basis on which to discipline the unscrupulous lawyer who extracts a “nonrefundable retainer” from a naïve client, does little or no work, and then, after being fired, keeps the client’s money. These rules include: (1) the case-by-case rule against charging excessive fees (Rule 4-200 of the Rules of Professional Conduct) and (2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule of Professional Conduct 1.16). Common sense fairness as well as the existing protections against unreasonable and unconscionable fees demand that under a nonrefundable retainer arrangement, if a lawyer does no work and is fired with or without cause, the client is entitled to a full refund.

Second, the Bar membership who have relied on these types of fee arrangements have also recognized that there are unanticipated events, as there are in any contractual

²⁶ Do California lawyers really need to consult a Rule of Professional Responsibility to determine that a law license is not a permit to steal, pillage, and plunder?

²⁷ A nonrefundable retainer is, and will be, evaluated for reasonableness. *See, e.g.*, Rule 4-200(A) of the Rules of Professional Conduct (prohibiting lawyers from gouging their clients by charging unconscionable fees); South Carolina Rule 1.16(d) (“The lawyer may retain a reasonable nonrefundable retainer.”); Florida Rule 4-1.5 (explicitly acknowledging the propriety of nonrefundable retainers subject to review to ensure the fee was not “clearly excessive”); *In the Matter of Scapa*, 2 Cal. State Bar Ct. Rptr. 635, *24 (Rev. Dept., 1993) (finding lawyers attempted to charge “unconscionable fees” under Rule 4-200).

agreement, that result in the refunding of a nonrefundable retainer. The issue is not about semantics or the sophistry embraced by some Commission members who assert “there is no such thing as a nonrefundable retainer.” For example, a client would be entitled to a full refund of the nonrefundable retainer if his/her lawyer gets sick and does no work. Similarly, an honorable and honest lawyer would refund the balance of a \$10,000 nonrefundable retainer if, two weeks after receiving it, the client fires him/her without cause and the lawyer has performed little, if any, services. In these “unanticipated circumstances,” a nonrefundable retainer would be “unconscionable” and almost all lawyers would refund the unearned portion of the fee. There is nothing about the way a nonrefundable retainer works in practice that permits a lawyer to charge and keep an unconscionable fee.²⁸ The sophisticated lawyers on the State Bar Board of Governors understood and considered these simple concepts in 1992, *see* October 1992 State Bar Memorandum and attachments Prepared by the Office of Professional Competence, Planning and Development discussed *supra*, when they concluded a nonrefundable fee earned when received was a perfectly appropriate fee agreement. *See* discussion at p. 15, *supra*.

Third, the Proposal is a source of overreaching and proves too much.²⁹ Though there are, no doubt, some lawyers who cheat and gouge their clients while theoretically

²⁸ While the Proposal permits the concept of a nonrefundable true retainer (to mean a retainer for availability and does not permit the lawyer to do any work to be applied against the true retainer), *see* proposed Rule 1.5(e)(1) and Comment [8], the true retainer is subject to the same unanticipated circumstances. For example: (1) the lawyer may inadvertently become involved in representation that later creates a conflict and the lawyer only later recognizes a conflict with his or her representation of the client. Therefore, the lawyer could not represent the client in the future so he would have to refund a true retainer; or (2) the lawyer could get sick and not be able to represent the client if a civil or criminal case is filed. Therefore, once again, a refund would have to be made of the “true retainer.”

The Commission’s treatment of the true retainer from other forms of the nonrefundable retainer is neither consistent nor justifiable.

²⁹ According to the minority of the Commission who opposed the Proposal:

“ . . . 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-

charging hourly rates (by padding their bills or charging unconscionable fees or having inexperienced lawyers spending endless hours on a simple legal matter, *see, e.g.*, Cal. Ethics Op. 1996-147 [billing clients for work performed on two or more matters at a time]), there is no effort by the Commission to impose a ban on hourly billing. Basic negotiation of fee contracts is still left to lawyers and their clients with some limited exceptions. Similarly, the fact that dishonest lawyers have had problems with trust accounts did not result in an effort to abolish trust accounts.

The unconscionable fee limitation in Rule 1.5(a) already protects clients from: (1) the crooked lawyer and (2) unanticipated circumstances. Moreover, in the absence of demonstrable abuses that can be remedied by a ban, the primary concern of the State Bar ought to be the protection of the interests of clients and lawyers and not, for example, the generation of substantial increases in income for State Bar projects that depend on income from interest earned on lawyers' trust accounts.³⁰

E. Significant Problems Created by the Proposal for Many Members of the Bar and Their Clients

When presenting the Proposal to the Board of Governors for approval, the Commission stated:

“During the public comment period, members of the California criminal defense bar and some of their representative organizations³¹ disagreed with

700(D)(2) and Washington Rule 1.5(f)(2). . .” Introduction (attached as Exh. 1 to the Executive Summary) at p. 69.

³⁰ The motivation for the original proposed changes that were rejected in 1991 was that certain groups within the State Bar wanted to require lawyers to move funds from their general accounts to their trust accounts to generate additional income for projects that receive the interest earned on lawyers' trust accounts. *See, e.g.*, April 28, 1997 Letter from Barry Tarlow to Katherine McMahon at p. 3, fn. 6. Although this rationale appeared nowhere in the similar and later rejected 1997 proposals, it seemed apparent at the time that those proposals were intended to serve the same purpose as the 1991 proposals. While funding of these programs is a vital and worthwhile function of the Bar, it cannot be an appropriate basis for a drastic reworking of the practice of law. There appears to be no way to determine from the bare record whether the current changes were motivated by some different reason or a simple misunderstanding of how nonrefundable retainers have worked in the actual practice of law in California since the 19th century.

³¹ The Commission's effort to characterize the opponents of the Proposal as members of the criminal defense bar ignores the fact that the public commenters, opponents, and

the Commission’s proposed paragraph (f), which provided that a lawyer shall not charge, contract for or collect a nonrefundable fee, except for a true retainer. . . After public comment, the Commission revised paragraph (f) [now lettered “(e)”] to also permit nonrefundable *flat* fees, so long as the requirements set forth in paragraph (e)(2) are satisfied. . . The Commission believes the changes made should assuage the concerns raised by the criminal defense bar.” Dashboard at p. 3.

A cynic might ask: if they were truly concerned, why did they divine this conclusion about the state of mind of the opponents rather than picking up the phone or sending an email and asking those dedicated lawyers who submitted public comments about the 2008 abandoned proposed Rule 1.5(f)?

As discussed below, the Proposal fails to assuage the concerns of either the criminal defense bar or other members of the Bar. Instead, it creates a number of significant problems for many members of the Bar (practicing in a variety of areas including entertainment law, matrimonial/divorce, immigration law, civil litigation, securities, tax, real estate, and appellate, to name a few) and their clients. There are also significant policy reasons why these changes should never be adopted, including unnecessary interference in attorney-client relationships, the generation of increased client bar complaints, arbitration proceedings and civil suits, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees and the need to preserve the availability of legal services to the people of California including consumers of low, fixed fee services, as well as to protect the constitutional rights of those accused of crimes to retain the lawyer of their choice. Several of these policy reasons are discussed below.

1. Section (e)(2) – “Nonrefundable” Flat Fee Constituting “Complete Payment” For “Specified Legal Services”

As discussed on pp. 19-21, *supra*, the Proposal appears to permit a “nonrefundable” flat fee if it constitutes “complete payment” for “specified legal services.” Proposed Rule 1.5(e)(2). On closer examination and when read in context of the entire Rule (to ban nonrefundable retainers) and Comment [5], however, it is readily apparent that those “specified legal services” actually cover fees for all services that could be rendered during the entire duration of the case, including trial. This requirement

stakeholders included the Los Angeles County Bar Association (the largest county bar association with 50,176 members).

poses many problems for the criminal defense lawyer (and applies equally to civil litigators handling complex civil matters).

First, under the Proposal, criminal lawyers (as well as any civil lawyer dealing with complex civil litigation or administrative matters) must at times speculate about what the fees will be before being retained, without any meaningful analysis of the case.³² In practice, however, it is nearly impossible to accurately estimate the work that needs to be done in any reasonably complex case because, for example, no one really knows if the case will be tried or not.³³ Although in reality the lawyer often could not accurately predict and advise the client about whether there will or will not be a trial, how long it will last, and how much work will be involved, the Proposal would require the lawyer and the client blindly agree to a flat fee that includes the costs for a trial that may never happen. This is necessary so that the client will not have to “bargain for assistance in the midst of a proceeding.” See Comment [5] and discussion at pp. 38-39, *infra* regarding exemption from this requirement if the “situation” is “adequately explained” to the client. If the client waives this requirement so that, for example, the trial fee or motion fee is not paid in advance, it creates a significant additional problem. A future restraint or forfeiture order as discussed below, *infra*, will prevent the client from paying the remainder of the fee that was not deposited in advance, when no restraining order existed.

Second, a problem that surprisingly is not always limited to criminal defense practitioners is that while a civil lawyer may often be able to withdraw if the client refuses to make additional agreed payments required under a fee agreement or pay hourly fees, in criminal cases the lawyer after doing a meaningful amount of work may not be able to withdraw (certainly in federal court and at times in state court). This is especially

³² In the criminal law context, in most felony cases, particularly in anything that is relatively complicated, a lawyer cannot demand discovery from the prosecution before being retained in order to assess the merits of the case and determine whether or not a lawyer wants to take on the case. In a state felony case, for instance, a lawyer may receive some discovery in advance of a preliminary hearing. For this reason, a widespread practice is for the lawyer to be retained simply for the preliminary hearing in state court and the parties later decide whether the lawyer will continue after the lawyer learns about the case.

³³ For this reason, practitioners in complex cases often use hybrid fees which might use a true retainer, a nonrefundable retainer earned when received with hourly credits that would cover the provision of legal services through the different steps (i.e. pre-filing, discovery, pre-trial, trial, post-trial) of a complicated case. In these situations, nonrefundable retainers are often used as a partial payment in combination with fixed fee payments or hourly credits on the retainer.

true if the fee agreement states that the flat fee covers the trial of the case. This is anything but an abstract, hypothetical fact pattern. In fact, in the Menendez brothers' case, after the first hung jury, the trial judge refused to let Leslie Abramson withdraw. Ms. Abramson had to retry the case without receiving any additional funds from her client for the retrial because her fee agreement stated that, for a flat fee, she would prepare and try the case. The fact she had already spent more than 2 years preparing the case and 6 months during the first trial did not change Judge Stanley Weisberg's ruling. If this type of drafting problem with serious financial consequences can happen to an experienced criminal defense lawyer, imagine what misfortunes will occur to the general practitioner who attempts to stumble through the morass of novel problems created by Rule 1.5(e).

Third, if the case does not result in trial (or the lawyer was allowed to withdraw from representation prior to trial or the lawyer is fired prior to trial), lawyers must determine what portion of the fee is refundable and whether this portion is paid with pre or post tax dollars.³⁴ These determinations are subject to dispute, fee arbitrations, and disciplinary proceedings.

Fourth, as explained in detail below, the Proposal exposes the purportedly "nonrefundable" flat fees to forfeiture.

2. Restraint, Fee Forfeiture, Seizure, Attachment

Restraint or attempts to forfeit attorneys' fees is an increasingly common occurrence in state and federal court. Numerous articles have appeared in the legal press on the impact of fee forfeiture on the ability of clients to exercise their constitutional right to retain lawyers of their choice to represent them in serious criminal cases. For almost three decades, Bar Associations throughout the country have vigorously opposed the concept of forfeiture or restraint of legal fees because it destroys an individual's Sixth Amendment right to counsel of choice. In light of the extraordinary effort by these concerned representatives of the organized Bar to safeguard the right to counsel in potential fee forfeiture situations, it is particularly disturbing that the California Bar would pass rules that will greatly facilitate restraints on legal fees and deprive the citizen accused of private counsel of choice.

Paragraph (e), if codified, will impact lawyers who practice in every area, including entertainment law, matrimonial/divorce, immigration law, civil litigation, securities, tax, real estate, appellate, and criminal law. In fact, prohibiting nonrefundable

³⁴ Lawyers pay income taxes on nonrefundable fees. Under the Proposal, the lawyer would have to pay income tax on the flat fee paid when received from the client.

retainers will in essence make these fee payments the property of the client until the work is performed, regardless of the characterization of the intent of the lawyer or client set out in a written fee agreement. This will expose lawyers performing any type of legal work to great financial risk by facilitating the restraint or seizure of their fees if the client has a potential problem involving securities law, criminal law and jeopardy tax assessments, and even certain types of creditor claims.

The Commission has repeatedly asserted, both directly and indirectly, that Rule 1.5(e) will solve the restraining order/forfeiture problems that in 2008 generated extensive negative public comments directed at Rule 1.5(f). *See, e.g.*, Agenda Item re: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2, and 3 – Return from Public Comment, Combined Attachment 1, p. 69 (October 23, 2009)(claiming that the changes to Rule 1.5(e) “should assuage the concerns raised by the criminal defense bar”). In fact, in explaining the proposed addition of Rule 1.5(e)(2) to the Board of Governors, the Commission asserted that subparagraph (2) was specifically drafted so as to avoid the restraining order/fee forfeiture problems.³⁵

³⁵ According to the Commission:

“Subparagraph (1) [sic] 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 romanettes in the subparagraph will operate to prevent abuses of the flat fee exception and avoid the problems envisioned by the defense bar.” *See* Agenda Item re: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2, and 3 – Return from Public Comment, Combined Attachment 1, p. 77-78 (October 23, 2009).

The Commission made similar assertions in its summary of the 2008 public comments regarding Rule 1.5(f). In this summary, the Commission responded to nearly every comment critical of the Rule 1.5(f) prohibition on nonrefundable retainers, including all of the comments focused on the restraining order/fee forfeiture issues, with an assertion that subparagraph (2) alleviates any and all expressed concerns. In the Commission’s words: “To address the commenter’s concerns . . . the Commission revised the approach to advance fee payments in paragraph (e) of the Rule” by adding subparagraph (2). *Id.* at 94-130.

Restraining orders, fee forfeitures, and jeopardy assessments depriving clients of the constitutional right to counsel of choice involve extremely complex areas of the law. There are few lawyers in the state of California who have extensive experience in these highly specialized areas. This is yet another important example of the lack of practical experience by the drafters. Certainly the Commission Subcommittee and Professor Mohr who actually drafted the Rule, and most likely (as far as I can determine) the Commission who no doubt are experienced in ethics issues, have no significant hands on experience and the background to hold themselves out as being experienced and knowledgeable about the relevant substantive issues of (1) federal restraint or forfeiture of funds necessary to pay attorney's fees in civil or criminal matters, (2) bogus jeopardy assessments,³⁶ often used by the IRS and Franchise Tax Board, that prevent the owner of the funds from retaining counsel, (3) seizure or restraint of attorney fees after counsel is retained by agencies ranging from the SEC, FBI and DEA to the Federal Trade Commission.

While erroneously asserting that Rule 1.5(e) has eliminated the significant problems relating to fee forfeiture or potential restraint or seizure of legal fees that existed under the now abandoned 2008 proposed Rule 1.5(f), so far as I can recall and have to this point discovered, the Commission has never prepared and/or circulated a legal and/or factual analysis purporting to support its claims that Rule 1.5(e) has solved the fee restraint/forfeiture problems. I believe the public comments the Board of Governors will receive conclusively demonstrate (1) the Commission's lack of understanding and their erroneous unsupported conclusion about this significant problem and (2) the fact that the restraining order/forfeiture problems raised by the previous Proposed Rule 1.5(f) have not now been resolved by the Commission as it claims.

Proposed Rule 1.5(e)(2)(v) does not protect the client's entitlement to a refund of the "nonrefundable" flat fee. Instead, the convoluted theoretically "nonrefundable" flat fee structure created by the Commission in proposed Rule 1.5(e)(2) requiring lawyers and clients to inaccurately describe that the fee is "the lawyer's property on receipt" actually will prevent the client from receiving a refund if these funds are the subject of any

³⁶ These jeopardy assessments should actually reflect the income before expenses, net income, and the amount of tax due. There has been a pattern of misconduct extending back at least to the 1960's directed at people suspected of criminal conduct in the alleged computation of the taxes theoretically owed. For example, on January 2 of a tax year, officers would seize \$200,000 in cash during an arrest. In order to seize the funds a Franchise Tax Board agent would make the following computation. At a 10% tax rate the owner of the fund must have earned 2 million dollars in profit to owe \$200,000 in state taxes. Therefore, they would base the jeopardy assessment for the two days of the tax year on a theoretical profit of 2 million dollars and then seize the \$200,000 recovered by the police as the state or federal tax due. See detailed discussion at fn. 40, *infra*.

seizure, restraining order or potential forfeiture arising out of any: (a) criminal case, state or federal, (b) SEC civil restraining order, or (c) a jeopardy assessment³⁷ by the IRS or the Franchise Tax Board. In fact, to make the situation even more egregious, if money to be paid to the lawyer is contingent on an event that never occurs (i.e. trial), in the face of either (a), (b), or (c) above, the lawyer cannot return these funds to the client. The attorney may not return any funds subject to restraint to the client even when she is fired by the client and even if they are necessary to retain a new lawyer.³⁸ Lawyers have been accused of and charged with obstruction of justice and/or contempt as well as being subject to discipline by the court which issued the restraining order if the money is returned to the client. The Commission appears to have not even focused on, let alone resolved, this aspect of the significant problem.

Federal and state statutes³⁹ and decisions control what the lawyer must do, not a provision in Section (e)(2) (requiring lawyers and clients to inaccurately describe that the

³⁷ Jeopardy assessments present a clear example of the problem the Proposal would create. In hundreds of California cases, clients have transferred funds that have been seized by an investigative agency to a lawyer to pay for representation in the criminal case. The irrevocable assignments that have been used to pay legal fees transfer all of the client's rights, title and interest in the funds. Depending on timeliness issues, this often gives the lawyer priority over the IRS or the Franchise Tax Board jeopardy assessments. If the client maintains any contingent or actual interest, the funds would be subject to seizure with a jeopardy assessment. These jeopardy assessments have often been used and abused in state and federal criminal related matters.

³⁸ Why would a client go through a fee arbitration to receive a refund of a fee or portion of a fee after firing a lawyer without cause when that fee cannot be returned to the client? In addition, there is no reported case that we are aware of where a lawyer who received a nonrefundable retainer and was discharged without cause could transfer the money to a new lawyer selected by the client.

³⁹ Under federal law, attorneys' fees may be subject to restraint or forfeiture under a number of statutes, including 21 U.S.C. § 853, 18 U.S.C. §§ 981 and 982 or 18 U.S.C. § 1963 (RICO). If the government or the state of California seeks forfeiture of funds a defendant has used to pay his lawyer under 21 U.S.C. § 853, the lawyer's sole defense is that he or she is "a bona fide purchaser for value of the right, title or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(n)(6)(B); *United States v. Saccoccia VI*, 165 F.Supp.2d 103, 111-13 (D.R.I. Aug. 3, 2001) (lawyers often qualify as bona fide purchasers for value and without knowledge with regard to the fees received before conviction). The federal RICO statute provides the same language with regard to forfeiture under RICO. 18 U.S.C. § 1963(c). An attorney or other third party can defend

fee is "the lawyer's property on receipt") that is artificially attempting to change the character of funds that are actually not "earned when received." The critical issue in fee forfeiture or restraining order situations is not what the fee is called in a fee agreement, but who in reality owns the funds. The only way the client is guaranteed to obtain legal services and the lawyer is guaranteed to receive a fee when a client is potentially involved in a bankruptcy, SEC, criminal or jeopardy tax situation, or has potential creditors, is if there is a nonrefundable assignment or absolute transfer of the funds. This is the key principle of defense historically utilized to protect legal fees from seizure, restraint, and forfeiture.⁴⁰ When the client maintains the right to the funds before they are used, the state, the SEC, and IRS, or the bankruptcy lawyers or state and federal prosecuting agencies could and will make a persuasive argument that the fee is the client's property and therefore it can be seized and forfeited.

The Proposal enhances the risk of seizure, restraint, attachment, and/or forfeiture of legal fees. If a fee paid to a lawyer is earned when received, it is the property of the lawyer. The client's right to have representation in litigation is protected. The ban on nonrefundable retainers mandates that advance fees belong to the client. These funds

a forfeiture proceeding under 18 U.S.C. §§ 981 and 982 to the extent that the lawyer can show an interest as an owner. 18 U.S.C. § 981(2).

California law provides for various forms of asset restraint and/or forfeiture in insurance and health fraud cases. *See, e.g.*, California Penal Code § 186.11(e)(2) (1996). It also provides for forfeiture for drug and so-called racketeering offenses. *See, e.g.*, California Health and Safety Code § 11470(f). As in the federal system, the legislature has provided that lawyers may challenge a fee forfeiture under this section by proving that the fee is "solely owned by a bona fide purchaser for value." Cal. Penal Code § 186.7(a).

⁴⁰ *See Buker v. Superior Court*, 25 Cal. App. 3d 1085 (1972) (developed principles involving an "irrevocable assignment," the equivalent of a nonrefundable retainer, in a jeopardy assessment case, enabling the client to receive representation and the lawyer to maintain the fee); *People v. Vermouth, supra*, 42 Cal. App. 3d at 359 and *People v. Vermouth*, 42 Cal. App. 3d 353, 359 (1974) (reversing conviction holding that the trial court deprived the defendants of their right to be represented by the counsel of their choice by failing to determine the validity of Mr. Tarlow's irrevocable assignment (treated as a nonrefundable retainer) of the seized funds that had priority over the IRS lien). This approach has been used by hundreds of California lawyers to protect their clients' constitutional right to representation by a lawyer of their choice while collecting their fee. *See also* Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 UCLA L. Rev. 1191 (1976).

may well be subject to seizure under the criminal or civil process.⁴¹ Therefore, in many situations the attorney will lose a fee, the client will lose the ability to pay for an attorney of his choice, and in federal criminal prosecutions where nonpayment of fee after an appearance in court is often not grounds for withdrawal, the lawyer may be forced to complete all the remaining legal services without pay.

If the client does not deposit the trial fee or a motion fee in advance as usually required by Comment [5], see discussion, *supra*, it creates an additional significant problem. A subsequent restraining order or forfeiture will prevent the client from paying the necessary fee to the lawyer who unfortunately has become attorney of record.

A client's funds that are deposited in a trust or general account under this Proposal will always be subject to federal or state restraint and/or forfeiture or attachment by potential creditors. The Proposal will substantially increase the risk of attorney fee forfeiture or civil seizure because it will be impossible for an attorney who holds a fixed fee payment in trust, or who has deposited it in a general account even when it is owned by the client, to assert that he or she is a bona fide purchaser for value without knowledge. Therefore, compliance with the proposed rule and amendments will make it impossible for a client to be represented by counsel of choice in many criminal or civil cases.⁴²

⁴¹ Putting the funds in a general account with the permission of the client does not eliminate the problem. Under the Proposal, and the applicable forfeiture and property law concepts, the unexpended portion belongs to the client, not the lawyer. Therefore, it would be subject to seizure or restraint under applicable criminal law principles and also probably by the S.E.C under *S.E.C. v. Interlink Data Network of Los Angeles*, 77 F.3d 1201, 1205 (9th Cir. 1996) (portion of advance fee payment not for services already rendered remains property of client for purposes of determination of whether the funds are subject to freeze on client's assets). See also *HBE Leasing Corp. v. Frank*, 61 F.3d 1054 (2d Cir. 1995) (attorneys compelled by creditors to disgorge \$750,000 paid as legal fees as "fraudulent conveyances"); *United States v. Vincent*, unpublished. No. 93-10769 (9th Cir. 1995) (advance fee for post-conviction appeal ordered disgorged to pay criminal restitution as asset of client and not property of attorney).

⁴² See *Caplin & Drysdale Chartered v. United States*, 109 S.Ct. 2646 (1989); *United States v. Monsanto*, 109 S.Ct 2657 (1989) (upholding the constitutionality of government forfeiture of attorneys' fees); *People v. Superior Court, (Clements)*, 200 Cal. App. 3d 491 (1988) (refusing to recognize an exemption for attorneys' fees under California's forfeiture statute).

Under the revised Proposal, the fee continues to belong to the client until earned, unless it fits in the very narrow definition of "true retainer" (which in real life experience and in the case law, is rarely, if ever, a substantial amount compared to what would be necessary for a civil or criminal trial). See Proposed new Rule 1.5(e)(1) and (2) and discussion on pp. 16-17, *supra* regarding the Proposal's ban on nonrefundable retainers. Although a narrow exception in Rule (e)(2) of the Proposal appears to permit a "nonrefundable" flat fee defined as the "complete payment" for "specified legal services" (meaning the entire representation in a case, including trial, see discussion at pp. 38-39, *infra*, about Comment [5]), such a fee is subject to seizure, forfeiture, restraint or attachment resulting from a civil, criminal, or an SEC process. This will occur because a significant portion of the Proposal's "nonrefundable" flat fee (that covers all services that are contingent upon the occurrence of future events, i.e. trial) is actually refundable because it is not in fact earned by the lawyer upon receipt and therefore is not the lawyer's property.⁴³ The controlling rationale is that the actual arrangement created is the controlling factor not language inserted in a fee agreement that does not actually describe the transaction and is inserted to prevent seizure or restraint of legal fees.

Even if the Board of Governors disagrees with my interpretation and the analysis in public comments from talented lawyers who have extensive experience in this sophisticated area of the law about the impact of this Proposal, it will still subject lawyers to an enormous risk, extensive extrinsic litigation, and the unpalatable option of hiring a separate attorney to represent the client and his lawyer of choice in a separate restraining order, fee forfeiture or jeopardy assessment case. There is quite simply no persuasive reason to depart from the proven protection provided to legal fees by nonrefundable retainers as a result of 40 years of litigation and gamble that after years of continuing litigation, the unsupported assertions of the Commission that 1.5(e) has resolved the fee restraint/forfeiture problems will eventually be embraced by the federal and state courts.

The additional advantage of the nonrefundable retainer for the client is that by having the fee earned in advance, the lawyer can rest assured that, if the fee was legitimate when received, they will not risk generally forfeiting the fee if they "learn too much" about the client's source of income and, therefore, will not face any disincentive to thoroughly investigating the case. See *Caplin & Drysdale, supra*, 491 U.S. at 632 n.10.

⁴³ When considering all the applicable rules, this portion of the Proposal's "nonrefundable" flat fee will likely have to be placed into a trust account.

3. Conflicts

The Proposal fails to account for the conflict situation in many civil and criminal litigation matters where accepting a particular client in a case precludes the lawyer from representing a number of other potential parties or defendants. The nonrefundable retainer is designed and intended to solve specific problems in a multi-defendant case. It is not unusual in these cases for there to be anywhere from six to twelve people charged in a complex fraud or controlled substance case. Often, if not most of the time, there are conflicts between and among the defendants. Accepting and agreeing to represent one person eliminates the lawyer from consideration in representing any other defendant or potential co-conspirator who may later be charged, or any person related to the case. Lawyers are quite often consulted by more than one person in a complex or well publicized case. By agreeing to represent a defendant the lawyer surrenders the possibility of representing any number of other people who may request to be represented by the law firm. This includes any potential witness or any person who may be investigated or indicted in the future in a related matter.

In addition, in the field of commercial transactional law, the lawyer or law firm accepting a client not only often forecloses representation of any other parties involved in the pending transactions, but may also be precluded in the future from representing other major clients in transactions that come to fruition years later. The Proposal also fails to account for the special knowledge, experience and ability an attorney may have already acquired on an issue or area of the law, which might otherwise have to be gathered at the expense of a client with a less experienced or knowledgeable lawyer. These are clearly legitimate bases for compensation and are a substantial part of the traditional factors justifying nonrefundable retainers.

Setting out in a fee agreement that “the fee agreement does not alter the client’s right to terminate the client/lawyer relationship” (*see* Rule 1.5(e)(iv)) and also that the client “may be entitled to a refund” (*see* Rule 1.5(e)(v)), enables a client to retain a lawyer, have the lawyer work on the case for some time (say for one month), fire the lawyer without cause, demand a refund, and then prevent the lawyer from representing anyone else in the litigation or future related litigation. Although the client should be permitted to terminate the lawyer for cause, the lawyer and the client should also be free to ensure that a satisfactory fee arrangement has been negotiated to cover the contingency of a discharge without good cause. This problem is further complicated because under the Proposal’s definition of the “true retainer,” the lawyer must be separately compensated for “any services provided.” *See* Comment [8]. The small fee charged for availability will most often never compensate the lawyer or law firm for being unable to represent anyone else related to the case.

Similarly, the Proposal fails to account for the civil or criminal lawyer who accepts one case that requires a substantial amount of work by the lawyer and perhaps other attorneys in the office, causing other cases necessarily to be turned down because the time is not available. A lawyer can handle very few complicated cases at the same time. Often when a lawyer agrees to handle a complex case and begins diligently working on that case, the lawyer adjusts his or her schedule and refuses to represent and participate in other complicated or uncomplicated matters in order to devote the time necessary to work on the client's case. The Commission's narrow definition of the "true retainer" (in Comment [8]), in the real world, often is not a sum which would significantly compensate the lawyer if after two months the client terminates the lawyer/client relationship without cause. The client has been guaranteed his lawyer, but the lawyer in order to keep the availability commitment has often turned down other desirable legal work. Eliminating nonrefundable retainers and permitting only true retainers or a flat fee subject to a refund does not permit the lawyer and the client to contract fairly. It turns representation into a one way street where the benefits only flow to the client and threatens the economic viability of small firms as well as financial planning of large firms.

4. The Proposal Is A Source Of Ambiguity And Confusion

Requiring California lawyers on the pain of discipline to include specific language (some of which is) set out in the rules (and some not) is both a trap for the unwary and a source of confusion. The point of fee agreements between a lawyer and the client has always been to write them so that a reasonably intelligent client can understand them. They should be written simply, made as short as possible, and in plain language, not legalese, covering the important points.⁴⁴ The more complex and lengthy a fee agreement is, the less likely it is going to be (a) read or (b) understood.⁴⁵

⁴⁴ Commissioner Voogd cautioned against proposing a rule that results in "a thirty page contract that is not read and in substance screws the client." In his January 6, 2009 email to drafters, he stated:

"I find it difficult to make recommendations on particular language when I find the general structure of the rule unsatisfactory. I would adopt the existing ABA rule. However, a few comments may be appropriate. . .

2. If you are going to buy into the Washington approach, you might as well go whole hog, including form language and specified type size. My concern is that you end up with a thirty page contract that is not read and in substance screws the client. I am still of the view expressed long ago that the attorney should advise the client that the terms and conditions of the

Clients and lawyers, for that matter, prefer fee agreements that are relatively simple, the shorter the better and the less confusion the better. The Proposal's provisions and comments, however, are rife with ambiguity, inconsistency, and confusion.

a. Comment [5]

As set out above at p. 13, Comment [5] prohibits attorneys from entering 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.”

It fails to provide any guidance on what it means to “adequately explain” the “situation.” Paragraph (e) would force attorneys in any complicated case not only to speculate about what services “probably will be required,” but somehow also to “adequately explain” this “situation” to the client, without any guidance before being retained and without any meaningful analysis of the case. It is unclear how a lawyer can “adequately explain” the “situation” to the client when the attorney himself often cannot determine, with any reasonable degree of certainty, whether and what “more extensive services probably will be required” and how much work will be necessary to complete these potential services prior to meaningfully evaluating the case. Perhaps this can lead to more work that the client must pay for: “a consultation fee” to cover the preparation necessary to “adequately explain” the case before receiving any discovery.

In practice, it is often difficult for any experienced litigator to precisely estimate the work that needs to be done in any reasonably complex case since, for example, often no one really knows which cases will go to trial and which will be dismissed. In civil cases and in the criminal law context, in most felony cases, particularly in anything that is relatively complicated, a lawyer cannot obtain discovery to assess the merits of the case (and also to determine whether or not a lawyer wants to take on the case) before being retained. Even if retained, it is unusual in a criminal or civil case for a lawyer to obtain any discovery before a complaint is filed. For this reason, practitioners in complex civil or criminal cases often use hybrid fees that are a combination of a true retainer, a

agreement are negotiable and he may wish to seek the assistance of other counsel in determining whether it is fair and reasonable.

⁴⁵ Most people rarely read complex and lengthy contracts such as: (1) warranties for expensive purchases, (2) title policies for the purchase of a home, (3) bank notes (other than the sum due and the interest rate), and (4) insurance policies.

minimum fee that is a nonrefundable retainer earned when received and either fixed payments or an hourly calculation that would cover the provision of legal services through the different steps (i.e., including in a criminal case, pre-filing, administrative hearings, discovery, pre-trial, trial, post-trial, and sentencing). In these situations, nonrefundable retainers are often used as a partial payment in combination with fixed fee payments or often hourly credits against the retainer.

This kind of unworkable language together with the unnecessary “Rube Goldberg” creation of section (e) will only encourage proceedings involving fee arbitrations, bar complaints and civil disputes, for a problem which is not endemic or widespread or ongoing or in need of any reform under the current practices. Heaven help the young non-specialist practitioners drafting a fee agreement in their first “big” case.

b. Paragraph (e)(2)

Paragraph (e)(2) compels lawyers, on the pain of discipline, to include the enumerated language (e)(2)(i)-(v) in their fee agreements. It also states that the client “may be entitled to a refund of a portion of the fee, if the agreed upon legal service has not been completed.” The section, however, provides no guidance in situations (two of which are outlined below) that practicing attorneys are routinely confronted with:

- (a) Where a lawyer may get a good result but not a complete result: What happens when the client fires the lawyer after the lawyer gets a good result but not a complete result that is outcome determinative? For example, in a criminal case, a lawyer succeeds in winning a motion to suppress but the retainer is for the entire trial. The motion did not end the case but shortened the case substantially. Is the client entitled to a refund of a substantial portion of the fee after firing the lawyer without cause? If so, how much?
- (b) Where the case is concluded but the agreed upon legal services have not been performed: For example, the fee agreement was to cover an entire criminal case, including a potential six week jury trial, and the lawyer wins the case in two months after a preliminary hearing has occurred, by filing a demurrer. The case is then completed but the lawyer has not performed the agreed upon legal services. Is the client entitled to a refund and if so, how is this refund computed?

Paragraph (e)(2) also requires the lawyer and client to inaccurately describe the actual nature of the fee by asserting that the fee “is the lawyer’s property on receipt.” See discussion at pp. 19-20; 29-35, *supra*. The problem is not what the fee is called but who

owns the funds. The fee is not in reality the lawyer's property on receipt as it is erroneously asserted to be in paragraph (e)(2).⁴⁶

Moreover, by restricting the definition of the traditional retainer and actually changing the existing requirements as to what can or must be deposited in a client trust account and what cannot (*see* discussion at pp. 17-19, *supra*; *see also* Comments [8], [9], [11]), the Proposal creates a trap for even experienced members of the Bar acting in good faith but unfamiliar with these niceties of the compelled language expressly or inferentially required by section (e)(2) and the Comments.

5. The Proposal and The Economic Viability of Firms: "Get it in Front or You Will Get it in the End"

Lawyers using nonrefundable agreements often underestimate how many hours are expended on a case. Experience has demonstrated that generally hourly billing is far more lucrative. Therefore, the criminal defense bar and other lawyers will find themselves in a troubling position. If the lawyer agrees to an advance nonrefundable fixed fee that is earned when received and substantially underestimates the work, he will certainly not be terminated by the client. However, if the lawyer through skill and ability has prevailed in an important part of the case that is not outcome-determinative, the client can then terminate the representation without cause and obtain a refund of a substantial portion of the fixed fee that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled.

The Proposal fails to: (1) recognize that an exceptional attorney may be able to obtain a superior result 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, (2) help firms guard against being hired only briefly by a client before the client changes to another lawyer and conflicting the rest of the firm out of representing other potential clients involved in the case, and (3) young criminal defense lawyers learn early on that a nonrefundable retainer is quite simply essential to the economic viability of an active criminal practice. Failure to arrange for an advance fee that is truly earned when received is an invitation to financial ruin. This principle has been characterized as "Get it in front or you will get it in the end." *See* Tarlow, *Five Important Words on Fee Forfeiture: Getting It Up Front & Getting It in the End*, The

⁴⁶ If the client demands the refund under the proposed provisions at a time after the lawyer has paid taxes on the money, what does the lawyer put in the trust account? The fee paid by the client or the fee less the taxes? What if the lawyer is from a small firm and does not have excess funds to deposit?

Champion (May 2004); Tarlow, *Fee Forfeiture: Getting It Up Front May Not Mean You Get It in the End*, The Champion (May 2002).

6. Discipline cases and complaints to the Bar:

On August 26, 2008, the Office of the Chief Trial Counsel of the State Bar (“OCTC”) recognized that the impact of a ban on nonrefundable retainers is that “it will make members subject to discipline for charging or collecting a nonrefundable retainer,” when currently, any disputes related to the charging or retention of a nonrefundable fee are “typically handled as either a fee arbitration matter or, in egregious cases . . . as a failure to return unearned fees in violation of current rule 3-700(D)(2).” OCTC’s 8/26/08 comment on prior, revised Rule 1.5(f).

California law does not now prohibit nonrefundable fees and existing protections against unreasonable and unconscionable fees currently protect clients from: (1) the crooked lawyer and (2) unanticipated circumstances. Rather than bringing current California standards into the Rule, Paragraph (e) creates ambiguities and uncertainties in the Rules, in part, by grossly departing from the current and long-standing California custom, standards, practice, and principles governing fee agreements (even including the specific form fee agreements that have been endorsed and distributed by the State Bar for years and are still available on its website, *see* pp. 44-45, *infra*). The current standards, custom, and practice (endorsed by the State Bar which provides that the fixed fee will be earned in full and no portion of it will be refunded once any material services have been provided, *see* the existing “fixed fee clause” at pp. 30-31 of “The State Bar of California Sample Written Fee Agreement Forms”) are entirely irreconcilable with Paragraph (e), which in paragraphs (e)(2)(iv) and (v) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and then file an arbitration claim, a lawsuit, or a Bar complaint against the lawyer. It appears the Commission has never addressed this significant inconsistency.

It is bad policy to force lawyers to adhere to vague and complicated language in disciplinary rules when they do not address complex factual and legal situations that practicing lawyers will often face. Not only are these principles complex, but there will be a large number of people of good will who are attempting to be fair with their clients who either will not understand the complicated legal or factual principles, will not strictly adhere to or follow the language set out in (e)(2), or may well be unaware that (e)(2) even applies to the wide variety of fee arrangements that exist. These lawyers will be exposed to Bar discipline arbitration and potential civil liability. The resources of the Bar discipline office should be far more appropriately spent on lawyers who are demonstrably acting unethically or in a dishonorable manner.

F. The Proposal Is Unsupported By the ABA Model Rule, Any Consensus in the States, or the Washington Rule.

The Proposal lacks support from either the ABA Model Rules or any consensus in the states. Nonrefundable retainers are permitted under the ABA Model Rules and many states (if not most) permit the use of nonrefundable retainers.⁴⁷ By “substantially reject[ing] the ABA Model Rule,” *see* Dashboard attached as Exh. 1 to the Executive Summary, the Proposal fails to “eliminate and avoid unnecessary differences between California and other states.” *See* Commission Charter. Rather than looking to the ABA Model Rule, the Commission claims that the Proposal relies on and is supported by the Washington Rule.⁴⁸ *See* Table of Commission’s Explanation of Changes to the ABA Model Rule (attached as Exh. 1 to the Executive Summary) at p. 7. This reliance is misplaced.

The Commission’s claim that the Proposal relies on and is supported by the Washington Rule (Rule 1.5(f) of Washington’s Rules of Professional Conduct), *see* Dashboard and Introduction to proposed Rule 1.5(e)), is simply incorrect. First, nonrefundable fees, advance fees, and fees earned when received are not prohibited under the Washington Rule. This fact is supported by: (a) the plain language of the Washington Rule, (b) the Washington Supreme Court’s rejection of the proposal to ban the use of the terms “nonrefundable,” “earned upon receipt,” and “minimum,” (c) the fact that the Washington Rule does not even mention the word “nonrefundable,” and (d) the fact that Washington previously had no rule requiring written fee agreements. Second, the Washington Rule has little, if any, application to the stated purpose of the Commission’s Proposal. Rather than preventing lawyers from “charging or collecting a nonrefundable fee” as the Proposal seeks to do, the Washington Rule instead was intended to (a) change the rule that required lawyers to place a fee for future services in their trust accounts and (b) impose standards requiring lawyers to inform the client about the nature of the fee arrangements since Washington (unlike California) did not have a statute requiring lawyers to set out and explain the fee arrangement in a written fee agreement.⁴⁹ *See*

⁴⁷ *See* fn. 25, *supra*.

⁴⁸ In August of 2008 when the Commission decided to model the Proposal after the Washington Rule, the so-called Washington rule had not even been enacted. *See* Commission Meeting Notes of August 29-30, 2008 meeting. The Washington Rule took effect on November 18, 2008.

⁴⁹ At the time that the Washington Rule was approved, Washington’s Rules of Professional Conduct did not require written fee agreements except: (1) in the case of contingency fee agreements (Rule 1.5(c)(1) or (2) upon the request of the client. Rule 1.5(b). Even under the new Washington Rule, a signed written fee agreement is only

July 10, 2007 Memo from the drafters of the Washington Rule to the Washington Bar Board of Governors.

G. The Proposal Grossly Departs From Longstanding California Custom, Standards, Practice, and Principles.

The Commission makes erroneous and unsupported claims that: (a) “. . . current California law, [] does make fixed and flat fees refundable” (*see* Commission’s October 2009 Introduction to proposed Rule 1.5, p. 69) and (b) “stating the requirements for a nonrefundable flat fee in the Rule itself explicitly brings current California standards into the Rule.” *Id.* Current California law does not prohibit nonrefundable fees. Rather than bringing current California standards into the Rule, as explained in greater detail below, the Proposal creates ambiguities and uncertainties in the Rules by:

- (1) grossly departing from the current and long-standing California custom, standards, practice, and principles governing fee agreements;
- (2) grossly departing from and contradicting the form fee agreements (and the long-standing custom, standards, practice, and principles incorporated in those agreements) that are (and have been for years) endorsed and circulated by the State Bar (and which are still available on its website);
- (3) failing to address the criticism of the flat fee agreements raised by the California Commission on the Fair Administration of Justice; and,
- (4) taking a position that is inconsistent with the position of two Justices of the California Supreme Court in *People v. Doolin*, 45 Cal. 4th 390, 460 (2009).

First, the Proposal is a gross departure from “current California standards.” There are no current California standards that prevent the charging of nonrefundable retainers, flat fees earned when received, and minimum fees. The Proposal contradicts the express conclusion of the Board of Governors on this very issue. The December 1991 proposal, endorsed by the State Bar and the Board of Governors in 1992, recommended minor, reasonable changes to the rules permitting the continued use of “fixed fees”, “flat fees” and “nonrefundable retainers” to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services

required for the retainer or flat fee portion of the fee (and only if the lawyer and client agree that the fee will be the lawyer's property on receipt). *See, e.g.*, Washington Rule, Comments [11] and [16].

are “earned when paid.” This determination was widely publicized. Since that time, my law firm and others have often included this specific concept “earned when received” in nonrefundable retainer fee agreements even though this change was never codified. Without justification, the Commission has now abandoned these important principles, heading in the exact opposite direction by improperly eliminating the concept of a legal fee for services that is fully earned when paid.

Moreover, the limitations on the use of a “true retainer” prohibiting the use of the funds to do legal work (and if the lawyer does do any work, seemingly requiring a true retainer for availability to then be deposited in a trust account), *see* Comments [8] and [10], ignore the financial interests and needs of the client. The Commission fails to consider the use of a hybrid fee that reflects the reality of the actual practice of law, *see* pp. 17-19, *supra*. While the Commission’s asserted intent is consumer protection, in practice (and as discussed on pp. 17-19, *supra*), the Proposal disadvantages the consumer by prohibiting the lawyer from giving the client any credit, hourly or fixed fee, for money paid as a true retainer when the lawyer (as will happen in literally every case) is required to do the work. Therefore, the client is forced to pay additional legal fees even though she has already paid the true retainer.

Second, the written advisement set out in proposed Rule 1.5(e)(2)(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” is a radical departure not only from existing California practice, but from the fee agreements and flat fee principles and form agreements that are (and have been for years) endorsed and circulated by the State Bar (and which are still available on its website, *see* California State Bar’s sample written fee agreement “fixed fee clause” form⁵⁰). The existing “fixed fee clause” distributed in the form fee agreements by the State Bar (and then likely included in hundreds of fee agreements across the spectrum of specialties) explicitly provides that:

“unless the attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under the agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed.”

The current standards, custom, and practice (endorsed by the State Bar) for a “fixed fee clause” are entirely inconsistent with the Proposal, which in paragraphs (e)(2)(iv) and (v) permits a client to terminate representation without cause, before all of

⁵⁰ This form was approved by the Board of Governors in 1987, last amended on June 23, 2005, and available on the California Bar website at: <http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf>.

the work has been completed and after the lawyer has performed a substantial amount of work, and then file an arbitration claim, a lawsuit, or a Bar complaint against the lawyer. Indeed, the overwhelming majority of public commenters to the Commission's 2008 effort to abolish the nonrefundable retainer opposed the prior proposed Rule 1.5(f) in order to preserve the current standards.

H. The Proposal Fails to Address The Concerns of the California Commission on the Fair Administration of Justice and The Position of Two Justices of The California Supreme Court in *People v. Doolin*, 45 Cal. 4th 390, 460 (2009).

The Proposal fails to address the criticism of the flat fee agreements raised by the California Commission on the Fair Administration of Justice⁵¹ and is inconsistent with the position of two Justices of the California Supreme Court in *People v. Doolin*, 45 Cal. 4th 390, 460 (2009), who, relying on the California Commission on Fair Administration of Justice, stated the Court should exercise its supervisory powers to “prospectively declare fee agreements of this type [flat fee agreements] invalid.” Proposed Rule 1.5(e)(1)-(2) does not preclude and in fact encourages flat fee agreements that could include all potential legal services as well as case costs. Neither the position of the California Commission on Fair Administration of Justice nor the two dissenting Justices in *People v. Doolin*, 45 Cal. 4th 390, 460 at fn. 1 (2009) were discussed in the Proposal, its comments, or by the Commission.⁵² We are also unable to find any evidence that any of these materials were brought to the Board of Governors’ attention.

⁵¹ The California Commission on the Fair Administration of Justice is “a group that was chaired by former Attorney General John Van de Kamp, and whose members included the current Attorney General; the District Attorneys of Santa Clara, San Mateo, and Ventura Counties; several law enforcement officers; and members of the criminal defense bar.” *People v. Doolin*, 45 Cal. 4th 390, 460 at fn. 1 (2009). Its 2008 report criticized “Flat Fee Contracting” and recommended that:

“. . . legislation be enacted to provide that when Counties contract for indigent defense services in criminal cases, the contract shall provide separate funding for ... investigators and expert witnesses.” *Id.* at 13.

⁵² The two dissenting Justices in *People v. Doolin* would unquestionably find the Proposal to be problematic. In the face of their comments alone the Proposal should be rejected. It is a brazen decision to reject the views of the two Justices who reached the “supervisory power issue” question.

CONCLUSION

For all the reasons discussed in this opposition, the Proposal fails to advance the goals or meet the criteria set out in the Commission's Charter. It is unnecessary, not in the public interest, and should be rejected as were the related proposals in 1991, 1997 and 2008.

Very truly yours,

Barry Tarlow

Barry Tarlow

A

BARRY TARLOW*
BLAIR BERK
MARK O. HEANEY
MI KIM
DAVID HARRIS

*CERTIFIED SPECIALIST - CRIMINAL LAW
STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

BIOGRAPHY

Barry Tarlow is a nationally prominent Los Angeles criminal defense lawyer who was profiled in *The National Law Journal* as one of "Ten of the Best Winning Trial Lawyers" in America. In 1992, he was selected for the Robert Heene Memorial Award for lifetime achievement by the National Association of Criminal Defense Lawyers. In 1993, Mr. Tarlow received a "Special Award" from the Los Angeles Criminal Courts Bar Association recognizing: "His Prominence as a Brilliant Advocate and as a Zealous Defender of Constitutional Rights." In 1994, he was profiled in *The New York Times Magazine* as one of six attorneys in "L.A.'s Exclusive Club of Celebrity Lawyers," and in 1998, he was selected as a Fellow of the International Academy of Trial Lawyers.

A recent article described how "a specialty of Mr. Tarlow's is heading off indictments before big names hit headlines." He is recognized as one of the country's leading authorities in the defense of RICO prosecutions. Barry Tarlow, who practices criminal law exclusively, was certified as a specialist in criminal law by the California Board of Legal Specialization in 1975, and has been recertified in 1980, 1985, 1990, 1995, 2001 and 2005. In 1992, he received the "Criminal Defense Lawyer of the Year" Award from the Century City Bar Association. Mr. Tarlow has been selected as one of the finest criminal lawyers in the country by publications ranging from *The National Law Journal's* "Directory of the Legal Profession," Martindale-Hubbell's "Bar Register of Preeminent Lawyers," each of the 16 bi-annual editions from 1983-2010, of Naifeh and Smith's "The Best Lawyers in America" (in the specialties of appellate law, criminal defense: non-white collar and criminal defense: white-collar), to *Town and Country Magazine*. In 1991, *The National Law Journal* selected Mr. Tarlow among the "Who's Who in Defense Among the Nation's Top White-Collar Experts." In 1989, he was profiled in *The Los Angeles Times* as one of the eight best criminal defense lawyers in Los Angeles, and was named in a survey by the *California Lawyer* among "California's Most Respected Lawyers." He was described as "one of the country's leading criminal-defense lawyers" in a *Washington Legal Times* article entitled "The Lawyer Who Hates Snitches." In a 1998 "List of the Most Powerful Lawyers in Town," published by *Los Angeles Magazine*, Mr. Tarlow was named the top "gunslinger" among the 40,000 lawyers in Los Angeles County. In 2005-2010 he was selected each year as one of California's "Super Lawyers" based on ballots sent to 65,000 lawyers.

In 1964, Barry Tarlow graduated first in his class from Boston University Law School where he was senior editor of the law review. In 1965, he served as a prosecutor for the Justice Department as an Assistant United States Attorney for the Central District of California, Criminal Division. During this period, he prosecuted cases ranging from kidnaping and bank robbery to complex white-collar crimes. Since 1966, he has defended individuals and corporations in cases ranging from tax and environmental violations to RICO, money laundering and homicide, in state and federal trial and appellate courts throughout the country. His law firm maintains an extensive federal and state appellate practice. He has represented defendants in numerous significant criminal appeals which have had widespread implications for attorneys engaged in the practice of criminal law. His firm has represented clients in complicated white-collar matters involving ITT, National Health Laboratories, SmithKlein Beecham, General Dynamics, Waste Management, Hyundai, Airgas, Inc., Avant!, and GTE. Recently, a substantial portion of Mr. Tarlow's practice has consisted of the defense of lawyers, health care providers, and other professionals under investigation by federal and state prosecutors. He has often represented celebrities accused of crimes and was named as one of eight of "L.A.'s Celebrity Defenders" in an article entitled "The Stars' Bar," published in an issue of *California Law Business*.

Mr. Tarlow has been an outspoken critic of overzealous prosecutorial tactics that have led to abuses of individual rights and liberties. He first coined the now widely accepted theme that: "The War on Crime Had Become a War on the Defense Bar." Since that time, he has written, spoken, and also litigated cases defining this attack on the right to counsel. A front page profile in *The National Law Journal* observed: "If the phrase weren't Barry Tarlow's by dint of originality, he's earned title to it." Adversaries and defense lawyers describe Mr. Tarlow as a "fighter,"

BIOGRAPHY

Page 2

scholar,” the “ultimate advocate,” and “the tiger,” and his approach to trials as “innovative,” “confrontational,” and “obsessive.” A 1998 article in *Los Angeles Magazine* concluded his “reputation as a contentious advocate in the courtroom is unmatched.”

Barry Tarlow has been selected as an expert witness by clients ranging from the State Bar of California to plaintiff or defense counsel in complex litigation matters including the Howard Weitzman-John DeLorean fee disputes. He has been retained as a RICO or forfeiture litigation consultant to the trial lawyers in numerous high-profile criminal cases including the Princeton Newport prosecution. Mr. Tarlow is often consulted by the country's major newspapers including *The New York Times*, *Washington Post*, and *The Los Angeles Times* for commentary about his own cases and developing legal affairs issues. He is regularly interviewed on these subjects by all the network news programs as well as *60 Minutes*, *Nightline*, *Crossfire*, *Larry King Live*, Court TV, and CNN.

Mr. Tarlow was lead counsel in the Chance/Powell case, in which two innocent men, framed by rogue police detectives, were freed after serving 18 years in prison for the murder of a Los Angeles Sheriff, and received “The Pro Bono Award” for this case when *The National Law Journal* announced its “Great Moments in the Law Awards” for 1992. In 1989, he was awarded a commendation from the State Bar of California Board of Governors, “In recognition of outstanding contributions to the delivery of pro bono legal services.”

Barry Tarlow has lectured at law schools and seminars throughout the country (see Attachment A). The topics have included: “Defense of Federal Conspiracy Cases,” “White Collar Criminal Prosecutions,” “Defense of RICO Prosecutions,” “Representation of Witnesses and Attorneys Before Grand Juries,” “Defense of Federal Forfeiture Cases,” “Cross-Examination,” “Closing Argument,” “The Aggressive Defense of a Criminal Case,” and “Federal Rules of Evidence Developments.” Mr. Tarlow has participated in educational programs sponsored by organizations such as: Continuing Education of the Bar, Practicing Law Institute, National College of Criminal Defense Lawyers, American Bar Association, California Attorneys for Criminal Justice, American Trial Lawyers Association, and the American Law Institute.

For the past 15 years, Barry Tarlow has served as editor of the *National Directory of Criminal Lawyers*. He is a prolific author who has written over 325 books and articles dealing with criminal practice and procedure issues (see Attachment B), including “RICO Revisited,” 17 Ga. L. Rev. 291; “RICO: The New Darling of the Prosecutor's Nursery,” 49 Fordham L. Rev. 165; “Defense of a Federal Conspiracy Prosecution,” 4 National Journal of Criminal Defense 183; “Criminal Defendants and Abuse of Jeopardy Tax Procedures,” 22 UCLA L. Rev. 1191; “Admissibility of Polygraph Evidence: An Aid in Determining Credibility in a Perjury-Plagued System,” 26 Hastings L.J. 917. He is an author of *California Criminal Defense Practice*, Vols. 1-6 (Matthew Bender, 1980), as well as each of the annual supplements, and is a member of the National Editorial Board of *Forecite*, the criminal jury instruction publication. He was the Criminal Law Editor of the *RICO Litigation Reporter* and a Contributing Editor of *The Champion*, the publication of The National Association of Criminal Defense Lawyers, and since 1982 has authored “The RICO Report.”

He has been extremely active in various local and national bar organizations. In 1978, Mr. Tarlow served as President of California Attorneys for Criminal Justice — the 3,000 member state criminal defense lawyers' bar association — and from 1981 through 1991, he was Chairman of the RICO Committee. Mr. Tarlow was the Vice-Chairperson of the American Bar Association, Criminal Justice Section, and Chairperson of the Criminal Law Subcommittee of the Prosecution and Defense of RICO Cases Committee. He was a member of the Board of Directors for the National Association of Criminal Defense Lawyers from 1979 through 1990, and from 1978 through 1990, he was Co-Chairman of the RICO Prosecutions Committee. From 1992-1995, Mr. Tarlow co-chaired the NACDL Committee to Free the Innocent Imprisoned. He was a member of the Board of Directors of the ACLU Foundation of Southern California from 1997-2005. From 2005 through 2008 he was a member of the Criminal Law Advisory Commission of the State Bar that reviews all Criminal Law Specialist applications for certification and recertification.

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May 5, 2010

By U.S. Mail

Cheryl L. Hicks
Representative Member, District 3
State Bar of California Board of Governors
1440 Broadway # 814
Oakland, CA 94612

**Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5
(4-200)**

Dear Ms. Hicks:

We are partners at Arguedas, Cassman & Headley, LLP in Berkeley, California. Each of us is a past President of California Attorneys for Criminal Justice, the country's largest statewide organization of criminal defense lawyers and allied professionals, and we each have more than twenty-five years of experience practicing criminal defense in California's state and federal courts. We write to oppose the State Bar of California's Proposed Rule 1.5(e), which would amend California Rule of Professional Conduct 4-200 by prohibiting attorneys from collecting a "non-refundable fee" except in certain limited circumstances.

As an initial matter, we see no reason for any rule change in this area. We are unaware of any pattern of attorneys abusing non-refundable fees to bilk their clients. Such misconduct is barred by already-existing rules, such as current Rule 4-200, which prohibits attorneys from charging or collecting unconscionable fees.

Furthermore, the Proposed Rule is confusing and internally inconsistent, and would negatively impact the financial realities of practicing law in California and the ability of clients to obtain legal services. Exception (e)(1) to the Proposed Rule purports to permit a "true retainer" fee to "ensure the lawyer's availability to the client." But the Proposed Rule would prohibit an agreement under which the retainer would constitute a minimum fee that ensures the attorney's availability yet also serves as a credit against which the attorney charges her time until the fee is exhausted. Such arrangements are

common and benefit both the client and the attorney. The attorney can be comfortable that she will be compensated sufficiently to make her time available to the client, and the client benefits because he will not need to pay additional fees until the retainer fee is exhausted. A rule prohibiting such arrangements would hamper clients' ability to afford the services of quality counsel.

Similarly, Proposed Rule 1.5(e)(2) purports to permit "flat fee" agreements under which the fee becomes the property of the attorney upon receipt, but the Rule will in fact make such arrangements impossible. Subsection (e)(2) requires a written agreement that states, among other things, "that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal service have not been completed." This is a contradiction — the fee cannot be the lawyer's property upon receipt if it is also potentially refundable. More importantly, the potential for refund undermines the very purpose of flat fees. Such fees benefit each party to the agreement. The client benefits because he knows his costs will not exceed the amount of the fee, and the lawyer benefits because she knows that she will at least collect the amount of the fee. The parties both undertake a calculated risk: the client finds that the assurance of a maximum fee outweighs the risk that the case will require less work than the fee would seem to justify; the attorney finds that the assurance of payment outweighs the risk that the case will require more work than the fee would seem to justify. If the parties do not wish to take such risks, they can enter into a different type of fee agreement, such as one in which the lawyer charges an hourly rate. Flat fee agreements are important because they often permit a client to hire an attorney he could not otherwise afford. Yet the Proposed Rule would essentially bar flat fee agreements by placing all the risk on the attorney — under the Proposed Rule, if the case requires less work than anticipated at the time of the agreement, the attorney will be required to refund a portion of the fee, but if the case requires more work, the attorney will be stuck with the flat fee. Few attorneys will enter into such an arrangement.

Finally, it is a matter of concern that the Proposed Rule has proceeded this far toward approval without proper notification to the Bar's membership. Many attorneys and organizations opposed previous efforts to make similar amendments to the rules governing non-refundable fees, yet this Proposed Rule was conditionally approved by the Board of Governors without any meaningful opportunity for public comment. This procedure seems to violate the terms of Rule of the State Bar 1.10, and in any case is not advisable when, as here, the proposal at issue is likely to be the subject of significant controversy.

Best regards,



Cristina C. Arguedas
Partner
Arguedas, Cassman & Headley, LLP



Ted W. Cassman
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cc:

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May 6, 2010

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180 Howard Street
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Re:

RULE	TITLE
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4	Communication
Rule 1.4.1	Disclosure of Professional Liability Insurance *BATCH 6*
Rule 1.5	Fee for Legal Services
Rule 1.5.1	Financial Arrangements Among Lawyers
Rule 1.6	Confidential Information of a Client
Rule 1.7	Conflict of Interests: Current Clients
Rule 1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client
Rule 1.8.2	Use of a Current Client's Confidential Information
Rule 1.8.3	Gifts from Client
Rule 1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client
Rule 1.8.6	Payments Not From Client
Rule 1.8.7	Aggregate Settlements
Rule 1.8.8	Limiting Liability to Client
Rule 1.8.9	Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review
Rule 1.8.10	Sexual Relations with Client
Rule 1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)
Rule 1.9	Duties to Former Clients
Rule 1.11	Special Conflicts for Former and Current Government Officers and Employees *BATCH 6*
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13	Organization as Client
Rule 1.14	Client with Diminished Capacity
Rule 1.15	Handling Funds and Property of Clients and Other Persons
Rule 1.16	Declining or Terminating Representation
Rule 1.17	Purchase and Sale of a Law Practice *BATCH 6*
Rule 1.18	Duties to Prospective Clients *BATCH 6*
Rule 2.1	Advisor
Rule 2.4	Lawyer as a Third-Party Neutral
Rule 2.4.1	Lawyer as a Temporary Judge
Rule 3.1	Meritorious Claims
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer As A Witness

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Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,



Patrick L. Hosey, President
San Diego County Bar Association

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the
State Bar of California

**Subject: Proposed Rule 1.5 - Fees For Legal Services
[Existing CRPC Rule 4-200]**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Disapprove Proposed Rule 1.5 and adopt ABA Model Rule 1.5a with the addition of those factors set forth in existing CRPC Rule 4-200 to determine reasonableness that are not in existing ABA Model Rule 1.5.

Rationale For Comment 1: In the interest of uniformity, guidance to attorneys, and fairness, reasonableness should be the standard and the client's informed consent should be a consideration in determining whether a fee is ethical. Mandatory fee arbitration has a history of successfully resolving these issues.



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LOS ANGELES COUNTY
BAR ASSOCIATION

May 10, 2010

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Audrey Hollins,
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Comment Regarding Proposed Rule 1.5(e) (Fees for Legal Services) &
State Bar Rule 1.10

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has a number of comments on Proposed Rule of Professional Conduct 1.5(e)(2).

The current version of proposed California Rule of Professional Conduct 1.5(e) provides, in relevant part:

1.5 (Fees for Legal Services) . . .

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

- (1) a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A true retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt.
- (2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a

refund of a portion of the fee if the agreed-upon legal services have not been completed.

See:

<http://www.calbar.ca.gov/calbar/pdfs/ethics/RPC/ProposedRule154200DiscussionDraft.pdf>.

PREC's concerns about rule 1.5(e)(2) include the following:

1. This proposal discourages lawyers from efficiently resolving matters given the potential it creates for a client to request a refund because "the agreed-upon legal services have not been completed." For example, if a lawyer settles a matter before trial, a fee agreement that provided that the fee would cover representation through trial could be construed to require a partial refund, even though the case was favorably resolved. This would be unfair, and is contrary to the longstanding treatment of what constitutes an earned fee.
2. Sub-parts (e)(2)(i), (ii) and (iv) are equally applicable to all types of retainer agreements. Including them in a sub-part that pertains only to flat fee agreements creates the misleading negative inference that these requirements may not apply to hourly or contingent fee agreements. If it is desirable to mandate that fee agreements contain additional provisions, this should be accomplished through the existing statutory framework in the Business and Professions Code. The Legislature could choose to amend sections 6147 and 6148 to specifically address flat fees, but attorneys who use flat fee arrangements should not be singled out for discipline for failing to have details in a fee agreement that are not required for other types of fee arrangements.
3. Sub-part (e)(2) provides that the fee is the "lawyer's property on receipt," but also requires the attorney to state that the client "may be entitled to a refund" under certain circumstances. This is confusing. Also, stating that a fee is the lawyer's property on receipt suggests the creation of substantive law. Isn't the intent simply to clarify that a flat fee need not be placed in the client trust account? To describe the fee as the "lawyer's property" increases the likelihood of future litigation over who owns the fee, especially when combined with the mandate that counsel state that the client may be entitled to a refund. Ambiguities in fee agreements are construed against the lawyer, and this draft rule mandates an ambiguity.
4. This proposed language in Sub-part (e)(2) is unnecessary in light of the prohibition on charging unconscionable fees, a traditional and well

established standard which sufficiently safeguards clients from unscrupulous lawyers who overcharge clients, and which provides a uniform standard regardless of the type of retainer agreement involved.

5. The language of (e)(2) may discourage the attorney from providing details in the fee agreement regarding the extent of the work for which a flat fee is being paid because of the potential it creates for a client to request a refund because "the agreed-upon legal services have not been completed." The proposed language will foment greater discord over fee arrangements, which is not in the interests of either clients or the legal profession.
6. This proposal likely will lead to litigation in the context of an injunction, jeopardy assessment or forfeiture. It may lead to substantial problems in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace. The reason for this is that persons or entities with a claim against a client will seek to seize and forfeit a client's potential interest in obtaining a refund based the client's possible right to "be entitled to a refund of a portion of the fee." How would a creditor of the client know whether the agreed upon services were or were not provided?
7. This proposal has no counterpart in the ABA Model Rules. Thus, it does not advance the intended goal of national uniformity that is among the purposes for revising California's existing rules of professional conduct.

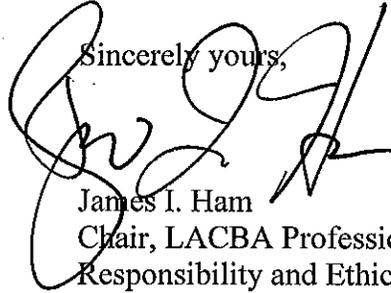
For the above reasons, PREC believes that the Rule needs to be substantially revised, without the controversial provisions in the present draft of (e)(2).

In addition to the above concerns, PREC is aware that some practitioners have expressed concern that this provision was presented to the State Bar Board of Governors without the prior public comment that is required by State Bar Rule 1.10. If there has been a failure to comply with any procedural rule, PREC believes that the Rules Revision Commission should consider recommending necessary corrective action in order to ensure that all of California's new Rules of Professional Conduct are lawfully adopted.

Office of Professional Competence, Planning & Development
State Bar of California
May 10, 2010
Page 4

Thank you for the opportunity to comment on this rule.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'James I. Ham', written over the typed name.

James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee

Cc: via email: *see* attached list.

Office of Professional Competence, Planning & Development
State Bar of California
May 10, 2010
Page 5

Office of Professional Competence, Planning & Development
State Bar of California
May 10, 2010
Page 6

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May 11, 2010

Special Commission for the Rules of Professional Conduct
% Ms. Audrey Hollins, The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, California 94105

Re: Opposition to Proposed New Rule of Professional Conduct. Rule 1.5(e)

Dear Ms. Hollins,

I write to oppose the proposed new rule of Professional Conduct. Rule 1.5(e). The Rule would prohibit charging non-refundable fees except when: 1) it is a "true retainer" for the attorney's future availability, or 2) it is a flat fee for specified legal services which constitutes complete payment. However, subpart 2 then states the client may be entitled to a refund upon terminating the relationship prior to all services being delivered.

Subpart 2 adds uncertainty to the rules. While the rule states that the fee is the property of the attorney on receipt, this is contradicted by the addition of the clause stating the client, upon termination of the relationship, can demand a refund. A fee cannot be both an attorney's property if it is also subject to a client right of refund. This makes the fee status uncertain and has direct implications in matters of creditor rights and government forfeiture claims. As others have written to you about those issues in detail, I shall only mention them here as direct byproducts of the proposed rule's contradiction.

There appears to be no need shown for a change of the rules. I regularly read the various discipline reports and fail to see that flat fee contracts have been a problem. Perhaps this is because there are already in place a number of substantive protections for clients to insure they enter fee contracts knowing their terms and insuring their fairness.

First, fee contracts of any size (\$1,000) must be in writing. (Bus. & Prof. Code § 6148.) This promotes clear understanding at the outset of the relationship between counsel and the client. It creates and describes the agreed upon basis for compensation and service. Such contracts should be honored so long as not unconscionable.

Second, attorneys are prohibited by law, rules and ethics from entering contracts with clients that breach fiduciary duties to the client or are in conflict with the client's

interests. (See Rule 3-300,¹ requiring full disclosure, fair terms, and client consent in writing after having consulted independent counsel. (Hawk v. State Bar (1988) 45 Cal.3d 589 [an attorney who takes a promissory note secured by a deed of trust in real property to secure payment of a fee must comply with rule 5-101, now Rule 3-300]); see Maxwell v. Superior Court (1982) 30 Cal.3d 606 (regarding rules when publication rights to a client's case are negotiated as a fee); In re Corona (1978) 80 Cal.App.3d 684, 720 ("[S]uch arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment....")

Third, in criminal cases, as a policy matter, contingent fee contracts are prohibited. (People v. Clancy (1985) 39 Cal.3d 740, 747: "[T]he contingent fee is generally considered to be prohibited [in] the prosecution and defense of criminal cases....")

Fourth, Rule 3-700(D)(2) states that upon discharge, the attorney must:

Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

"True retainers," of course, are now very rare as few attorneys charge clients fees simply to retain available time in the future.

Finally, the existing rule on unconscionable fees protects the clients from overreaching attorneys. California Rules of Professional Conduct, Rule 4-200, which provides an eleven factor test to determine whether a fee is conscionable, is broad enough to protect clients and has done so over the years. Case law also has been quite sensitive to the issue over overcharging. In Bushman v. State Bar (1974) 11 Cal.3d 558, a lawyer was suspended from practice for one year because he charged \$2,800.00 for services worth no more than \$300.00. The situation was worsened by the attorney's insistence that the clients, who were on welfare, execute a \$5,000 promissory note in his favor. In imposing discipline, the court recited the guiding law in the area:

It is settled that gross overcharge of a fee by an attorney may warrant

¹ Rule 3-300: "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: ¶ (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and ¶ (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and ¶ (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

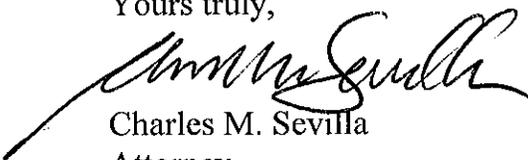
discipline. The test is whether the fee is "so exorbitant and wholly disproportionate to the services performed as to shock the conscience." (Herrscher v. State Bar (1935) 4 Cal.2d 399, 401-402 [29 P.2d 832], quoting from Goldstone v. State Bar (1931) 214 Cal. 490, 498 [6 P.2d 513, 80 A.L.R. 701].) In Herrscher this court stated that most cases warranting discipline on this ground involve an element of fraud or overreaching by the attorney, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds. (4 Cal.2d at 403). (Id. at 563 [113 Cal.Rptr. at 906].)

In Tarver v. State Bar (1984) 37 Cal.3d 122, the attorney was disbarred in part for charging his client more in fees than were recovered in the settlement of an age discrimination case. This was held to be an unconscionable fee. In Champion v. Superior Court (Boccardo) (1988) 201 Cal.App.3d 777, a junior partner left the firm. He had a contract with the partners which stated that if he left the firm and took his cases, he would only be entitled to remuneration from any awards in the case as determined by his partnership share. His share was 1.79%. He argued the contract produced an unconscionable fee, noting that if he won a case for \$160,000, he would received \$912 while his ex-partners would get \$50,088. The court agreed and struck the contract as shocking to the conscience.

Many criminal defense lawyers are sole practitioners who regularly charge flat fees for routine criminal matters. This rule unnecessarily puts in place a condition that essentially makes the fee fixed (or "flat") only at client sufferance. If the work for the attorney is substantial, the client will be content with a fixed fee. But if the attorney seems to be on the way to a speedy result that will end the case on a favorable note for the client, the client can pull out of the "flat fee" contract, fire the attorney, and demand a substantial refund. There is no such thing as a "flat" fee when one party to the contract can void it at will.

This scenario is permitted by paragraph (e)(2) of the proposed rule. The proposal prohibits non-refundable retainers for legal services except under the circumstances outlined in subpart (1) and (2). While first stating the fee is the attorney's on delivery, it then says the client may be entitled to a refund prior to the "completion" of services. This paragraph adds uncertainty if not contradiction to the rules, and promotes the problem identified above. I urge this rule change not be adopted. It is unneeded, unfair and uncertain.

Yours truly,



Charles M. Sevilla
Attorney

cc: Wells Lyman, Esq. P O Box 2085 La Mesa, CA 91943

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THE STATE BAR OF CALIFORNIA
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May 12, 2010

Audrey Hollins
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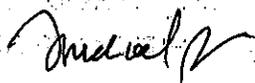
Dear Ms. Hollins:

It is the purpose of this letter to register my opposition to the proposed new Rule of Professional Conduct 1.5(e)(4-200). I wish to add my voice to those members of the bar who oppose the above-referenced proposed new Rule of Conduct.

In speaking from 40 years of experience in the practice of criminal defense, I believe that the "flat fee" can play an important role in maximizing the availability of legal services, especially to those who can least afford it. I know that you have received in-depth arguments from many lawyers and bar associations.

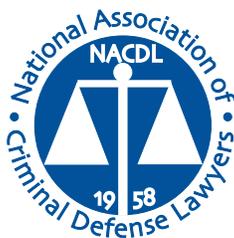
The point I want to emphasize is that many clients prefer to have a "flat fee" arrangement. Unless a client is extremely wealthy, a client is concerned about the cost of legal services and often does not want to enter into an agreement where the amount is indefinite. And while there may be attorneys who would take advantage of the "flat fee" opportunity, certainly there now exists sufficient safeguards to prevent "unconscionable" fees. But if "flat fee" contracts are not going to be enforced and therefore not entered, many potential clients will find themselves unable to avail themselves of legal services that they request and require.

Best regards,



Michael Pancer

MP:cr



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25 May 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 1.5(e) (Fees for Legal Services)

Dear Ms. Hollins:

The National Association of Criminal Defense Lawyers (NACDL) writes to oppose the adoption of Proposed Rule of Professional Conduct 1.5(e)(2).

NACDL is the nation's preeminent organization committed to advancing the criminal defense bar's mission to ensure justice and due process for persons accused of criminal wrongdoing. Founded in 1958, NACDL is comprised of over 11,000 direct members in 28 countries, and affiliated with more than 350,000 attorneys in 90 states, provincial, local, and international organizations. In California, NACDL has over 900 members. These members are public defenders, private criminal defense lawyers, military defense counsel, law professors, and judges dedicated to promoting a fair, rational, and humane criminal justice system.

NACDL is concerned that the present text of proposed rule 1.5(e)(2) undermines the Sixth Amendment right to counsel by impairing the ability of lawyers and clients to agree that a client will pay a flat fee for legal representation by counsel in a specified matter.¹ As drafted, the language of the proposed rule will substantially discourage, if not preclude, criminal defense lawyers from offering to represent clients on a flat fee basis. This is a common form of retention in criminal cases in California, and throughout

¹ As used in this letter, the term "flat fee" means a fee that is earned-in-full upon receipt, and paid pursuant to an agreement by which counsel commits to represent the client in a specified matter or through a specified stage of proceedings in a matter. Such fees are also commonly referred to as "non-refundable" fees.

the country. The issue is of substantial concern to many California criminal defense lawyers and their clients. It also has national significance insofar as other jurisdictions may look to California for purposes of fashioning ethics rules.

Flat fees agreements have the benefit of allowing persons under investigation or accused of crimes, at the inception of a matter, to secure representation that is assured to continue throughout the duration of the matter unless the client chooses otherwise, or unforeseen circumstances arise, such as the death of a client or counsel or an unforeseen conflict of interest. The proposed rule discourages flat fees by making flat fees received by counsel vulnerable to third-party claims against clients and/or their property, forfeitures, jeopardy assessments, seizures, liens and attachments. These types of claims would be asserted *against counsel* because of the inchoate interest the proposed rule appears to give a client in fees which purportedly were the “lawyer’s property on receipt.” This additional potential risk and expense will cause many, if not most, criminal defense lawyers to decline to agree to represent clients on a flat fee basis.

Discouraging counsel from using flat fee agreements is a disservice to those clients who may desire such fee arrangements. Flat fee arrangements allow persons who are under investigation or accused of offenses to plan in advance and reduce the risks they face. If such persons were unable to secure representation in a matter for a flat fee, they would receive the services of counsel retained on an hourly basis only as long as they could continue to compensate counsel on an hourly basis. While wealthy clients could assume such a risk, most could not. Flat fees, therefore, provide clients the most affordable representation while also assuring that they will not be beggared by litigation and forced to rely upon forms of public assistance.

In contrast to a client who retains counsel for a flat fee, a client who retains counsel on an hourly basis may be forced to seek the appointment of counsel at public expense, or seek the services of a less expensive lawyer, if a matter progresses to a point where the client can no longer afford to pay existing counsel on an hourly basis. Because of the uncertain nature of criminal cases, estimating at the inception of a matter how long it will take to represent a client competently and effectively is inherently challenging. Flat fee agreements place the bulk of the risk upon lawyers, and enable risk-sharing between clients and defense counsel. A virtual ban on flat fees – as would result from adoption of the proposed rule – will shift the entire burden to clients and disproportionately burden less wealthy individuals.

If a flat fee agreement were agreed upon by a client and lawyer notwithstanding adoption of proposed rule 1.5(e)(2), counsel would be vulnerable to becoming embroiled in costly litigation over third-party claims asserted against counsel, forfeitures, jeopardy assessments, seizures, liens, and attachments based on the debts or other obligations of clients. This would interfere with attorney-client relationships by creating potential conflicts between lawyers and their clients. It also would unfairly penalize lawyers in practice areas in which flat fee agreements are commonplace, including criminal defense, among others.

Proposed Rule 1.5(e)(2) is unnecessary in light of the prohibition of unconscionable fees, a uniform standard applicable to all types of fee arrangements, including contingency, hourly and flat fees. This standard is sufficient to protect clients from being charged unreasonable fees, and

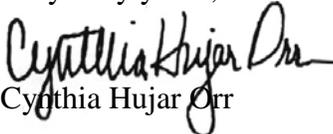
to safeguard clients from excessive charges where a client chooses to discharge counsel, or other unforeseen circumstances arise such as the death of a client or counsel prior to the conclusion of a matter.

NACDL believes that Proposed Rule 1.5(e)(2) is unsound on a number of additional grounds. First, it provides that a fee is the "lawyer's property on receipt," but a client also "may be entitled to a refund" under certain circumstances. This language is internally inconsistent and confusing. Clarity, rather than confusion, best serves clients and counsel with respect to retainer agreements. Second, it has no counterpart in the ABA Model Rules, and there is no national authority to provide guidance on how the provision may be interpreted by California disciplinary authorities or courts. Accordingly, it may create uncertainty and the potential for protracted and costly litigation, rather than certainty, which best serves the interests of both clients and counsel. Third, Sub-parts (e)(2)(i), (ii) and (iv) are equally applicable to *all* types of retainer agreements, but placing them in a sub-part that pertains only to flat fee agreements creates the inaccurate negative inference they may *not* apply to hourly or contingent fee agreements. Fourth, it could discourage detailed descriptions of the "agreed-upon legal services" in written retainer agreements because it encourages third parties to assert an interest on a previously paid fee on the grounds that "the agreed-upon legal services have not been completed." This would increase disputes between clients and counsel.

Finally, NACDL is concerned that Rule 1.5(e) is among a large number of new rules that were provisionally adopted in a manner that may have deprived the Board of Governors of the State Bar of California (the Board) of the insights of lawyers, and other members of the public, who have knowledge and experience with flat fee arrangements. NACDL understands that Rule 1.5(e) was among a number of provisions adopted by the Board without the prior public comment required by Rule 1.10 of the Rules of the State Bar of California. *See* http://calbar.ca.gov/calbar/pdfs/rules/Rules_Title1.pdf. NACDL believes that public comment in accordance with Rule 1.10 is critical to ensure fairness and the adoption of a sound and informed rule. Although the Board's adoption was subject to potential reconsideration following a period of public comment for all rules provisionally adopted, NACDL believes that this does not provide a sufficient opportunity for the public scrutiny that is essential for a rule that substantially impacts the Sixth Amendment right to counsel and disproportionately burdens clients of limited means.

NACDL appreciates the opportunity to comment on this rule.

Very truly yours,


Cynthia Hujar Orr

cc via email: Howard B. Miller, Esq.

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 contingent;</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><i>(10) the time and labor required;</i></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 relations<u>family law</u> matter, the payment or amount of which is contingent upon the securing of a divorce<u>dissolution or declaration of nullity of a marriage</u> or upon the amount of alimony<u>spousal</u> or <u>child</u> 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>

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<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>

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<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] 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>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>

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	<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>

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	<p>adverse to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.</p>	
	<p>[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.</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>[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</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>

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<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><u>[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.</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>

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	<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>

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<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			<p>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.</p>	<p>No response necessary.</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
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]**

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						<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]**

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					<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]**

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					<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]**

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					<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]**

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					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]**

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						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]**

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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]**

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					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]**

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						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]**

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						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]**

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						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]**

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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]**

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					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]**

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						<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]**

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					<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]**

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					<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>

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

October 16, 2009 Melchior E-mail to RRC:.....	100
<i>Updated Full Dissent</i> :.....	100
October 16, 2009 Difuntorum E-mail to KEM, cc McCurdy, Yen & Lee:	102
<i>8/29-30/08 Action Summary re Rule 1.5</i> :.....	102
October 17, 2009 KEM E-mail to Difuntorum, cc McCurdy, Yen & Lee:	103
October 17, 2009 Difuntorum E-mail to Blumenthal (OCTC), cc Staff:	103
October 20, 2009 KEM E-mail to Difuntorum, McCurdy, Lee & Yen, cc Sondheim:	104
October 21, 2009 Difuntorum E-mail to Andrew Tuft, cc McCurdy & KEM:	104
October 21, 2009 Difuntorum E-mail to McCurdy & KEM, cc Sondheim & Lee:	104
October 21, 2009 KEM E-mail to Difuntorum, McCurdy & Lee, cc Sondheim:.....	104
December 11, 2009 KEM E-mail to Lamport, cc Chair & Staff re 1.8.1 & 1.5:	105
December 12, 2009 Lamport E-mail to KEM, cc Chair & Staff re 1.8.1 & 1.5:	105
December 12, 2009 KEM E-mail to Lee, cc RRC & Staff re 1.8.1 & 1.5:	106
December 12, 2009 Lamport E-mail to RRC re 1.5:.....	106
December 14, 2009 Kehr E-mail to Difuntorum, cc Peck, Chair & Staff:.....	106
December 14, 2009 Difuntorum E-mail to Kehr, cc Peck, Chair & Staff:.....	106
December 15, 2009 KEM E-mail to Difuntorum, McCurdy, Lee, Yen & Andrew Tuft re 1.8.1 & 1.5:	107
December 15, 2009 KEM E-mail to Difuntorum, McCurdy, Lee, Yen & Andrew Tuft re 1.8.1 & 1.5:	108
December 15, 2009 Lee E-mail to KEM re 1.8.1 & 1.5:.....	108
December 15, 2009 Difuntorum E-mail to KEM, cc McCurdy, Lee, Yen & Andrew Tuft re 1.8.1 & 1.5: ..	108
December 16, 2009 Difuntorum E-mail to KEM, cc McCurdy, Lee, Yen & Andrew Tuft re 1.8.1 & 1.5: ..	109
December 17, 2009 McCurdy E-mail to KEM, cc Difuntorum re 1.8.1 & 1.5:.....	109
December 17, 2009 KEM E-mail to McCurdy, cc Difuntorum re 1.8.1 & 1.5:.....	109
February 3, 2010 Kehr E-mail to Difuntorum, McCurdy & KEM, cc Evan Jenness:	111
February 3, 2010 Difuntorum E-mail to Kehr, McCurdy & KEM, cc Evan Jenness:.....	111
February 4, 2010 Difuntorum E-mail to KEM, cc McCurdy & Lee:	111
February 8, 2010 Difuntorum E-mail to KEM, cc McCurdy & Lee:	111
February 8, 2010 KEM E-mail to Difuntorum, cc McCurdy & Lee:	112
February 8, 2010 Lee E-mail to KEM:.....	112
February 8, 2010 KEM E-mail to Lee, cc Difuntorum:	112
March 24, 2010 Evan Jenness E-mail to LACBA [PREC] Listserv (forwarded to RRC by Sondheim): ...	113
April 5, 2010 Difuntorum E-mail to Sondheim, cc KEM:	113
<i>April 1, 2010 Daily Journal/ California Lawyer Article re True Retainers</i> :.....	114
<i>California State Bar Arbitration Advisory 01-02 (5/16/2001)</i> :.....	118
April 20, 2010 Difuntorum E-mail to Sondheim, cc KEM:	123
May 5, 2010 McCurdy E-mail to Drafters (Vapnek & Ruvolo), cc RRC:.....	124
May 14, 2010 McCurdy E-mail to Drafters, cc RRC:	124
May 19, 2010 McCurdy E-mail to Drafters, cc RRC:	124
May 19, 2010 Difuntorum E-mail to Drafters, cc RRC:	125
<i>The Truth about True Retainers</i>	125
<i>ARBITRATION ADVISORY 01-02</i>	130
May 19, 2010 Sondheim E-mail to RRC:	135
May 21, 2010 KEM E-mail to RRC:	135
May 21, 2010 Sondheim E-mail to KEM, cc RRC:	136

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

May 21, 2010 KEM E-mail to Sondheim, cc RRC:	137
May 23, 2010 Kehr E-mail to KEM, cc RRC:	138
May 23, 2010 KEM E-mail to Kehr, cc RRC:	138
May 23, 2010 Sondheim E-mail to KEM, cc RRC:	139
May 23, 2010 Martinez E-mail to Sondheim, cc RRC:	140
May 24, 2010 Difuntorum E-mail to Sondheim, cc RRC:.....	141
May 25, 2010 Sondheim E-mail to KEM, cc RRC:	141
May 25, 2010 Martinez E-mail to Sondheim, cc RRC:	142
May 25, 2010 Melchior E-mail to RRC:.....	142
May 25, 2010 Martinez E-mail to Sondheim, cc RRC:	142
May 25, 2010 Sondheim e-mail to Martinez, cc RRC:.....	142
May 25, 2010 Difuntorum E-mail to Drafters, cc RRC:	143
May 25, 2010 Tuft E-mail to RRC:.....	143
May 25, 2010 Sondheim E-mail to Difuntorum, cc RRC:.....	143
May 26, 2010 Difuntorum E-mail to Sondheim, cc RRC:.....	144
May 26, 2010 Difuntorum E-mail to RRC:.....	144
May 26, 2010 KEM E-mail to RRC:	145
May 26, 2010 Difuntorum E-mail to KEM, cc RRC:	146
May 27, 2010 Difuntorum E-mail to KEM, cc RRC:	149
May 28, 2010 Difuntorum E-mail to Sondheim, cc RRC:.....	150
May 29, 2010 Sondheim E-mail to Difuntorum, cc RRC:.....	150
May 31, 2010 Sondheim E-mail to RRC:	150
May 31, 2010 Martinez E-mail to RRC:	151
May 31, 2010 Kehr E-mail to RRC:.....	151
May 31, 2010 Tuft E-mail to RRC:	153
June 1, 2010 Melchior E-mail to RRC List:	154
June 1, 2010 William Balin E-mail to RRC List:	156
June 1, 2010 Difuntorum E-mail to Sondheim, cc RRC:.....	157
June 1, 2010 Tuft E-mail to Difuntorum, cc RRC:.....	158
June 1, 2010 Difuntorum E-mail to Tuft, cc RRC:.....	158
June 1, 2010 Julien E-mail to RRC:.....	159
June 1, 2010 Julien E-mail to RRC:.....	159
June 2, 2010 Sapiro E-mail to RRC List:	159

May 5, 2010 McCurdy E-mail to Drafters (Vapnek & Ruvolo), cc RRC:

Rule 1.5 Codrafters (VAPNEK, Ruvolo):

The public comments received to date on this rule are attached in a combined PDF. I've also provided a Word copy of the draft public commenter chart with the comment synopses filled in. To keep pace with the comments being received, please consider beginning to add the RRC responses, and if desired, modifications to the synopses.

Of course, more comments continue to be received each day, and we will convey updated information periodically in order to keep abreast of the public comment review in anticipation of the work being carried out at your June 4 & 5, and June 25 & 26 meetings.

Attached:

RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT1 (4-22-10).doc
RRC - 4-200 [1-5] - Public Comment Complete - REV (05-05-10).pdf

May 14, 2010 McCurdy E-mail to Drafters, cc RRC:

Rule 1.5 Codrafters (VAPNEK, Ruvolo):

Three additional public comments have been received for this rule, bringing the total comments to 15. I've attached an updated comment compilation which is current. An updated public commenter chart, but the SDCBA comment has not yet been added to the public commenter chart.

Here are the instructions from the assignment agenda for all post public comment rules:

INSTRUCTIONS: For each rule listed below that has received three or more comments/testimony, the codrafters are assigned to review the comments/testimony received and to prepare a revised draft rule, if any revisions are recommended, and a Public Commenter Chart with RRC responses, for submission to staff by 12 noon on Tuesday, May 25, 2010 to distribute with the June 4 & 5 meeting agenda materials. An updated Dashboard, Introduction, and Model Rule comparison chart are also needed to complete the rule; however, the codrafters have the discretion of waiting until the end of the public comment period (on June 15th) to begin work on these documents. Additional comments will be sent to each drafting team by e-mail as they are received. Where three or more comments have been received, materials are enclosed for codrafters. Rules that have received less than three comments/testimony will not be considered until the June 25 & 26 meeting.

Attached:

RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT1.1 (05-14-10).doc
RRC - 4-200 [1-5] - Public Comment Complete - REV (05-14-10).pdf

May 19, 2010 McCurdy E-mail to Drafters, cc RRC:

Two additional comments have been received for this rule since my last message, bringing the total number of comments to 17. Here's an updated comment compilation and an updated public commenter chart.

Attached:

RRC - 4-200 [1-5] - Public Comment Chart - By Commenter - XDFT1.2 (05-19-10).doc
RRC - 4-200 [1-5] - Public Comment Complete - REV (05-19-10).pdf

May 19, 2010 Difuntorum E-mail to Drafters, cc RRC:

Rule 1.5 Codrafters (Vapnek, Ruvolo):

Below is some information that you might find helpful in analyzing the many comments received that oppose adoption of Rule 1.5(e). –Randy D.

(1) Link to a Minnesota State Bar rules revision committee memorandum explaining that committee's proposal for regulating "flat fees." Like the Commission's proposed rules, Minnesota's proposal is based on the rationale that labeling flat fees as "nonrefundable" is inaccurate and potentially misleading. The memorandum is a very helpful summary of the public protection concerns at stake in the regulation of "flat fees."

<http://www.mnbar.org/committees/rules/NonrefRPCprop.pdf>

(2) Link to a December 2009 D.C. Bar Counsel article describing the D.C. approach to applying the D.C. version of ABA Model Rule 1.15 which requires advance fees to be deposited into a client trust account and withdrawn only when they are earned. (Note that the Commission's proposed rules would continue to permit lawyers to use "true retainer" and "flat fee" arrangements as fees that are earned on receipt and not required to be deposited into the client trust account.)

http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/december_2009/barcounsel.cfm#note6

(3) Pasted below is a recent Daily Journal article entitled "The Truth About Retainers." Also pasted below is the State Bar Fee Arbitration Advisory mentioned in the article. The Arbitration Advisory also is found on the Bar's website at this link:

http://calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Mandatory_Fee_Arbitration_Advisories.gif&sCategoryPath=/Home/Attorney%20Resources/Special%20Services/Mandatory%20Fee%20Arbitration/Arbitration%20Advisories&sHeading=01-02&sFileType=HTML&sCatHtmlPath=html/MFA_Advisory_01-02.html

The Truth about True Retainers

Daily Journal California Lawyer Article April 01, 2010 by Leigh Chandler and Aaron Shechet

At the outset of an attorney-client relationship, it is crucial to define the scope of the engagement and establish payment terms. Lawyers commonly refer to a client's opening payment as a "retainer" and often state that it is "nonrefundable." However, that can be a big mistake. Indeed, many attorneys are confused about the proper treatment of retainers and, specifically, whether a particular retainer payment really is nonrefundable. An

examination of leading authority reveals that only "true retainers" are nonrefundable—and these are very, very rare.

Governing Rule

When a client discharges an attorney, the Rules of Professional Conduct require the attorney to "[p]romptly refund any part of a fee paid in advance that has not been earned." The rules also state that a refund is unnecessary if the money is "a true retainer fee ... paid solely for the purpose of ensuring the availability of the member for the matter." (Rule 3-700(D)(2).) That is, money advanced by a client but not earned by the lawyer must be refunded, unless it constitutes a true retainer.

Why is it crucial to understand the difference? Improper retention of client funds can result in discipline, even disbarment. Moreover, an attorney may face civil liability for breach of fiduciary duty, which may be determined as a matter of law based on a breach of the rules of professional conduct which "help define the duty component of the fiduciary duty which an attorney owes to his [or her] client." (*Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086 (1995).) Avoiding these consequences depends on accurately structuring the attorney-client relationship.

Retainer Problems

The State Bar addressed the issue of retainers in Arbitration Advisory Opinion 01-02 (calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=11337&id=6493). The opinion states that "unless the attorney and client have contracted for a 'true retainer' (also known as a 'classic retainer'), the attorney must refund any portion of the advance fee that the attorney has not yet earned."

The key characteristic of a true retainer is that it is paid solely to secure the availability of the attorney over a given period of time and is not paid for the performance of any other services. When a valid true retainer exists, if the attorney's services are eventually needed, those services are billed and paid for separately, and no part of the retainer is applied to pay for them. Thus, any fee arrangement in which the attorney bills against the retainer is not a true retainer.

As explained in Advisory Opinion 01-02, a true retainer may be nonrefundable because it takes the attorney out of the marketplace and precludes him or her from undertaking other work. Such an arrangement requires that the attorney be generally available for consultation and legal services to the client. A true retainer may be a single, up-front payment to guarantee that the attorney will be available for a specified period of time, or it may be a recurring payment, where, for example, the client pays a monthly fee solely to ensure the attorney's availability to represent the client for that month.

Scarcer than Hen's Teeth

Although true retainers once were common, the State Bar does not contemplate many appropriate situations for them today. In fact, Opinion 01-02 speculates that there are probably only a handful of situations in which a client would want to pay a true retainer. Such an arrangement may be appropriate to secure the availability of an attorney whose reputation could cause a threatened lawsuit to vanish. In addition, a true retainer may be a reasonable way to ensure that an especially talented attorney is available to handle a matter; it may also be used to prevent the attorney from representing an adverse party. The

opinion goes on to note that "[o]ther than these examples ... true retainers would seem to be of little use to clients in everyday legal matters."

Cases have also helped to define the true retainer. Consistent with the State Bar opinion, cases identify two main characteristics of a true retainer: the money is (1) paid to reserve the availability of a specific attorney and (2) not used to pay hourly fees. Note also that the language of Rule 3-700 (D)(2) and the cases interpreting it indicate that a true retainer reserves the time of only a specific attorney at a firm, and not the firm in general.

In one case, the court defined a true retainer, as "a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client." (*Baranowski v. State Bar*, 24 Cal. 3d 153, 164 n. 4 (1979).)

Another court discussed the circumstances under which a law firm may retain client funds, identifying three types of payment arrangements: (1) the classic/true retainer, (2) the security retainer, and (3) the advance payment retainer. The court concluded that only a true retainer is earned upon receipt by the attorney; all other retainers must be placed in a client trust account and refunded to the client if unearned. (See *T & R Foods v. Rose*, 47 Cal. App. 4th Supp. 1, 7 (1996).)

Securing Availability

In *T & R Foods*, the court identified a true retainer as the payment of a sum of money to secure availability over a period of time, finding that the attorney is entitled to the fee whether or not services are ever rendered (*T & R Foods*, 47 Cal. App. 4th Supp. at 6).

The court went on to observe that a "security" retainer, in contrast, is a sum of money held by the attorney to secure payment of fees for future services that the attorney is expected to render. It is important to note that a security retainer remains property of the client until the attorney applies it to fees and costs for services actually rendered, and that any portion of the funds that are not earned must be returned to the client.

An "advance payment" retainer occurs when the client pays in advance for some or all of the services that the attorney is expected to perform. In such a case, the court said, "ownership of the funds is intended to pass to the attorney at the time of payment." (47 Cal. App. 4th Supp. at 7.) However, the court also found the law unsettled as to whether funds can be retained by the attorney if unearned. Ultimately, the court concluded that there was an intent expressed in the State Bar rules that funds "retain an ownership identity with the client until earned." (See *T & R Foods*, 47 Cal. App. 4th Supp. at 7.)

The fee agreement in the *T & R Foods* case did not create a true retainer because it stated that the attorneys would charge their services against the retainer, which was to be replenished by the client each month to assure that the attorneys were always holding \$25,000 on their books to cover ongoing fees. The court properly found that the \$25,000 deposit was in fact "an advance payment retainer." The court required the attorneys to segregate the funds until they had been earned (*T & R Foods*, 47 Cal. App. 4th Supp. at 6).

In cases where counsel has not properly structured a true retainer, the State Bar repeatedly finds that clients are due a refund of unearned fees, even if a payment is denominated as

nonrefundable in the parties' agreement. In other words, the actual treatment of the funds trumps the language of the retainer agreement.

In an earlier case (*Matthew v. State Bar*, 49 Cal. 3d 784 (1989)), an attorney was retained to handle a real estate fraud matter. The attorney required his client to provide a nonrefundable retainer "to ensure that his client would 'work with him on the case.'" The fee agreement required \$5,000 up front, with a \$10,000 ceiling on fees, and stated that the attorney would "bill for his time at the rate of \$70 per hour until the bill reached \$5,000." (49 Cal. 3d at 787.) The attorney represented the client for seven months, and the client paid more than \$6,000 in attorneys fees during that time. The attorney kept no time records and provided no billing statements, but he estimated he spent 32 to 40 hours on the case. After unsuccessfully seeking a refund, the client took the attorney to arbitration to recover unearned fees. The arbitration panel found in the client's favor, but the attorney still did not refund the money.

In another fee agreement, the same attorney provided for a \$1,000 nonrefundable retainer. After the client terminated that representation, a dispute arose as to unearned fees. The attorney failed to perform needed work, provided no billing statements, was unavailable, and "admitted that he was not diligent in this matter and that he was unable to work on the matter in a timely fashion due to his caseload." (49 Cal. 3d at 789.)

The California Supreme Court emphasized the seriousness of the attorney's misconduct, identifying failure to refund "unearned fees as serious misconduct warranting periods of actual suspension, and in cases of habitual misconduct, disbarment." (49 Cal. 3d at 791.) In addition to being disciplined, the attorney was required to return all unearned fees, notwithstanding the nonrefundable language in the retainer agreements (49 Cal. 3d at 792).

Proper Language

To be valid, an agreement calling for a true retainer should show that the client is purchasing something valuable. For example, the agreement may refer to specific blocks of time when a specific attorney will be available, or state that the payment guarantees the attorney will refrain from taking adverse clients. The agreement might also state that the payment secures the attorney's availability for a future engagement.

In addition to having a proper written agreement, the attorney also should be prepared to demonstrate that he or she has provided real value. For the average attorney, a true retainer is unlikely to be appropriate unless the lawyer is setting aside specific blocks of time for the client. A highly experienced or specialized attorney may justify a true retainer more easily, as long as the attorney arranges to be available and the retainer agreement reflects that. It may be appropriate to outline the attorney's specialized reputation or experience in the agreement to demonstrate the value purchased by the client.

In drafting an effective true retainer, attorneys should state as specifically as possible the time that the client is buying and what the attorney will do with that time. The attorney may agree to sit in the office and wait for the client's weekly phone calls between 10 a.m. and noon on Tuesdays. In this situation, office records should demonstrate that the attorney was available (perhaps by entering data in a time log).

True retainer funds should be placed in an attorney's general account and not in a trust account. If the attorney places funds in a trust account and bills against them, the

arrangement collapses and loses its status as a true retainer no matter what the fee agreement says.

Alternative Fee Agreements

Many clients wish to avoid hourly billing rates and prefer to pay a flat fee. Such an arrangement can be valuable to clients who want to avoid surprise bills and stay within a budget. Attorneys who perform work for a flat fee should be careful in how they structure the client relationship so as to comply with the rules governing true retainers.

A flat fee is not necessarily a true retainer; in fact, based on State Bar Opinion 01-02, in a true retainer situation attorney services (as opposed to availability) would be charged to the client separately, and no part of the retainer would be applied to pay for actual services. A flat fee for services may be acceptable if it is tied to the accomplishment of a specific milestone and refunded if the milestone is not reached.

For example, to form a limited liability company a lawyer may charge a flat fee of \$1,000 that is advanced by the client; the parties may stipulate that the fee is earned after the attorney files articles of organization and delivers the completed operating agreement to the client. Under these circumstances, the fee should be deposited in the attorney's trust account. If the attorney does not complete the specified tasks, the fee has not been earned and must be refunded.

A well-drafted flat fee agreement should state exactly what services will be performed and when the fee is considered earned. If several services are involved, a portion of the fee should be earned after each service is completed. Not only is this fair to both parties, but it also avoids confusion if the attorney's services are terminated short of the final milestone.

For clients who seek to economize, there are alternatives to the flat fee. For example, an attorney may choose to bill the client by the hour but cap the fee at a specific amount within the client's budget.

In large part, the true retainer seems to be a vestige of days gone by. Today it is rarely used correctly, although many attorneys continue to insist on collecting nonrefundable retainers. Such agreements are risky and must be structured carefully.

Not only must a nonrefundable retainer fit within the narrow definition of a true retainer, it also must be appropriate to the client's situation. The State Bar will scrutinize the arrangement to determine whether the fee is unconscionable—that is, if a client receives little or no value at all by ensuring the availability of the attorney; if the attorney has no particular reputation or expertise to justify a nonrefundable payment; or if there is "an abundance of other competent attorneys available to handle the client's matter." (See Opinion 01-02 at subsection C (Unconscionability).)

True retainers exist, but they are not very common. In most cases, advance payments are just that: advances that cover fees to be earned in the future. And remember that if the fees are not earned, they must be returned to the client at the conclusion of the engagement.

Leigh Chandler and Aaron Shechet are the founders of Chandler & Shechet, a business-development law firm based in Los Angeles (solutionsllp.com).

ARBITRATION ADVISORY 01-02

ARBITRATION ADVISORY RE: ENFORCEMENT OF "NON-REFUNDABLE" RETAINER PROVISIONS May 16, 2001

Points of view or opinions expressed in this document are those of the Committee on Mandatory Fee Arbitration. They have not been adopted or endorsed by the State Bar's Board of Governors and do not constitute the official position or policy of the State Bar of California.

INTRODUCTION

Arbitrators are frequently called upon to evaluate the provisions of a fee agreement that characterizes a payment by the client as "non-refundable" or "earned upon receipt." There are important differences, however, as to how attorneys are required to treat such payments, depending on the true nature of the payment and regardless of the language used in the fee agreement. Principally, these differences concern (1) the attorney's obligation, if any, to refund some or all of an advance payment upon discharge or withdrawal and (2) whether the advance payment should be placed in the attorney's client trust account or in the attorney's own proprietary account. This advisory will provide guidance to arbitrators in dealing with the enforceability of "non-refundable retainer" provisions in fee agreements and the rules pertaining to the placement of different forms of advance payments.

OBLIGATION TO REFUND

A. Distinction Between "True" Retainers and Other Advance Payments.

Rule 3-700(D)(2) of the Rules of Professional Conduct¹ provides that when the attorney-client relationship has concluded the attorney must:

"Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter."

Under Rule 3-700(D)(2), unless the attorney and client have contracted for a "true retainer" (also known as a "classic retainer"), the attorney must refund any portion of an advance fee that the attorney has not yet earned. This raises the question of how to distinguish a "true retainer" from other forms of advance payments. Rule 3-700 (D)(2) itself suggests that a "true retainer" is one that is paid "solely for the purpose of ensuring the availability of the member." This definition of a "true retainer" was adopted by the California Supreme Court in *Baranowski v. State Bar* (1979) 24 Cal.3d 153.

In *Baranowski*, an attorney was disciplined for failing to return advance payments to three clients. The court explained that:

"An advance fee payment as used in this context is to be distinguished from a classic retainer fee arrangement. A [classic] retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client." [Id., at 164 fn.4].

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

It is important to note that the key defining characteristic of a "true" or "classic" retainer is that it is paid solely to secure the availability of the attorney over a given period of time and is not paid for the performance of any other services. In a true retainer situation, if the attorney's services are eventually needed, those services would be paid for separately, and no part of the retainer would be applied to pay for such services. Thus, if it is contemplated that the attorney will bill against the advance payment for actual services performed, then the advance is not a true retainer because the payment is not made solely to secure the availability of the attorney. Instead, such payments are more properly characterized as either a security deposit or an advance payment of fees for services ([see footnote 2, below](#)).

A true retainer is earned upon receipt (and is therefore non-refundable) because it takes the attorney out of the marketplace and precludes him or her from undertaking other legal work (e.g., work that may be in conflict with that client). It also requires that the attorney generally be available for consultation and legal services to the client. Sometimes a true retainer will take the form of a single payment to guarantee the attorney's future availability for a specified period of time and other times as payments made on a recurring basis, such as a monthly retainer, to assure the attorney's availability to represent the client for that month. Sometimes this is referred to as having the attorney "on retainer."

As might be expected, true retainers are rare in today's legal marketplace. Due to the abundance of competent attorneys in virtually all fields of law, there are probably only a handful of situations in which a client would want to pay a true retainer. Nonetheless, true retainers do have a legitimate, if infrequent, use in the legal marketplace. As one court has noted, "A lawyer of towering reputation, just by agreeing to represent a client, may cause a threatened lawsuit to vanish." [Bain v. Weiffenbach (Fla.App. 1991) 590 So.2d 544]. In some cases, a client may perceive that only the retained attorney has the requisite skills to handle a particular matter and may want to guarantee that attorney's availability. In other cases, a true retainer may be used simply to prevent the attorney from representing an adverse party. Other than these examples though, true retainers would seem to be of little use to clients in everyday legal matters.

In other instances, a so-called "retainer" is effectively a security deposit or an advance payment of fees². A payment that represents a security deposit or an advance payment for services to be performed in the future remains the property of the client until earned by the attorney, and any unearned portion is to be returned to the client [Rule 3-700(D)(2); S.E.C. v. Interlink Data Network (9th Cir. 1996) 77 F.3d 1201]. An example of an advance payment for services would be where the attorney charges \$200 per hour and collects a "retainer" of \$2,000, giving the client credit for 10 hours of legal services to be performed in the future. If the attorney is discharged or the matter is otherwise concluded before the attorney has expended 10 hours of his or her time, the attorney must refund the balance of the advance payment that has not yet been earned. Thus, if the attorney had only expended four hours of time prior to being discharged, under Rule 3-700(D)(2) the attorney must promptly refund \$1,200 to the client. In S.E.C. v. Interlink Data Network, supra, the law firm's characterization of the fee as a "present payment for future work," which it alleged was earned when paid, was unsuccessful in avoiding a refund of the unused portion of the fee to the client's bankruptcy trustee.

B. Language of Fee Agreement Not Controlling.

Advance payments that are not "true" retainers are refundable under Rule 3-700(D)(2) to the extent they are unearned, no matter how the fee agreement characterizes the payment [Matthew v. State Bar (1989) 49 Cal.3d 784; see also Federal Savings & Loan v. Angell,

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

Holmes and Lea (9th Cir. 1988) 838 F.2d 395, 397-398]. In *Matthew*, two fee agreements provided for a "non-refundable" retainer payment. In each instance it was contemplated that the attorney would bill against the "retainer", but the attorney failed to fully perform the required services. The attorney was disciplined both for client abandonment and for failure to account for and return the unearned portion of the fees. Thus, the attorney's characterization of the retainer as "non-refundable" in the fee agreement did not abrogate the attorney's duty to return any portion of the fee that had not been earned. The Supreme Court emphasized that "Retention of unearned fees [is] serious misconduct warranting periods of actual suspension, and in cases of habitual misconduct, disbarment." [Id. at 791]. A member's failure to promptly account for and return the unearned portion of an advance fee warrants discipline [In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752].

Another case in which the language of the fee agreement did not control the characterization of the advance payment is *In re: Matter of Lais* (1998) 3 Cal. State Bar Ct. Rptr. 907. In the *Lais* case the attorney's fee agreement read as follows:

"Client agrees to pay attorney for his services a fixed, non-refundable retainer fee of \$2,750 and a sum equal to \$275 per hour after the first ten hours of work. This fixed, nonrefundable retainer is paid to the attorney for the purpose of assuring his availability in the matter."

Even though the language of the agreement stated that the advance was being paid to assure the attorney's availability and was nonrefundable, the advance was clearly also to be applied to the first ten hours of work. Therefore, the advance was not paid solely to assure the attorney's availability. The court held that the \$2,750 payment was not a true retainer and that the attorney was required to refund any amount that had not been earned.

C. Unconscionability

Civil Code section 1670.5 provides that a contract may be found to be unenforceable if its terms are unconscionable. In addition, Rule 4-200 of the Rules of Professional Conduct provides that an attorney may not charge or collect an illegal or unconscionable fee. In some cases, a payment that is properly characterized as a true retainer may nonetheless be unenforceable if it is found to be unconscionable.

The concept of unconscionability has both procedural and substantive elements [*Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1296]. Substantive unconscionability refers to the harshness of the contract terms. "Substantive unconscionability is indicated by contract terms so one-sided as to shock the conscience." [*American Software, Inc. v. Ali* (46 Cal.App.4th 1386, 1391; see also *Bushman v. State Bar* (1974) 11 Cal.3d 558, 563-566 (attorney's fee found unconscionable where it was "so exorbitant and wholly disproportionate to the services performed as to shock the conscience.")). Procedural unconscionability refers to the manner in which the contract was negotiated and the circumstances of the parties at that time [*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329]. Examples of issues relevant to a procedural unconscionability analysis are the inequality in bargaining power between the parties and the absence of real negotiation or meaningful choice [*American Software Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1391].

Presumably, both substantive and procedural unconscionability must be present before a contract will be held unenforceable. However, a relatively larger degree of one will compensate for a relatively smaller degree of the other [*Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1296-1297]. Stated another way, "a

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

compelling showing of substantive unconscionability may overcome a weaker showing of procedural unconscionability." [Carboni v. Arrospide (1991) 2 Cal.App.4th 76, 86].

Rule 4-200 sets forth eleven factors to be examined in determining whether an attorney's fee is unconscionable. Some of these factors include: (1) the relative sophistication of the attorney and the client; (2) the amount of the fee in proportion to the value of the services rendered; and (3) the experience, reputation and ability of the attorney. One case held that a fee agreement requiring the client to pay a "minimum fee" upon discharge was unconscionable [In re: Scapa & Brown (1993) 2 Cal. State Bar Ct. Rptr. 635, 652].

Unconscionability in the context of a true retainer agreement would normally not be a consideration where the client is a sophisticated purchaser of legal services, a large insurance company or a corporation for example, or where the attorney's skill and reputation are well known. As previously noted, however, the situations in which a client may have a valid reason for paying a true retainer fee are not very common. True retainers should therefore be scrutinized to see if the fee is unconscionable. For example, a client may receive very little or no value at all by ensuring the availability of the attorney if the attorney has no particular reputation or expertise and if there is an abundance of other competent attorneys available to handle the client's matter. In cases such as this, a true retainer might be unconscionable, particularly if the amount charged is very high and the client is not a sophisticated purchaser of legal services.

In examining whether a true retainer withstands an unconscionability analysis, it is important to remember that an agreement may only be avoided on grounds of unconscionability based on the facts as they existed at the time the contract was formed [Civil Code section 1670.5; Rule 4-200(B)]. "The critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties, not whether it is unconscionable in light of subsequent events." [American Software Inc. v. Ali (1996) 46 Cal.App.4th 1386, 1391].

Thus, if a client enters into a true retainer agreement with a famous criminal defense attorney because the client fears that he will be indicted and wants to ensure the defense attorney's availability, the client could not avoid the contract on grounds of unconscionability merely because the indictment never occurred. On the other hand, if the same client entered into a true retainer agreement with an attorney who had no experience or reputation in handling criminal law matters, the retainer might be unconscionable depending upon the amount paid and the sophistication and bargaining power of the client, regardless of whether the indictment occurred or not.

PLACEMENT OF ADVANCE FEES AND TRUE RETAINERS

The issue of where attorneys should place advance payments depends on the nature of the payment. Rule 4-100 provides, in pertinent part:

"All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account", "Client Funds Account" or words of similar import.....No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled"

Because true retainers are earned upon receipt, they are not "funds held for the benefit of the client." Therefore, Rule 4-100's prohibition on commingling "funds belonging to the

member" means that true retainers should be placed in the attorney's proprietary account and not in the client trust account.

Two courts since *Baranowski* [*Baranowski v. State Bar*, *supra*] have declared that it is undecided in California whether, under Rule 4-100, an advance payment for services or a security deposit must be deposited into the client trust account [*SEC v. Interlink Data Network* (9th Cir. 1996) 77 F.3d 1201, n.5; *Katz v. Worker's Comp. Appeals Bd.* (1981) 30 Cal.3d 353, n.2]. Yet, in *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, the Appellate Department of the Los Angeles County Superior Court held that under Rule 4-100 an advance fee must be deposited into an attorney's trust account, and that an attorney's failure to segregate the advance fee or security deposit from his general funds constituted a breach of fiduciary duties³. The T&R court reasoned that the language of 4-100 indicated "an intent by the State Bar that funds retain an ownership identity with the client until earned." [*Id.*, at 7].

Importantly, the T&R opinion noted that attorneys who commingle advance fees or security deposits with their own funds are not only subject to discipline by the State Bar, but also subject to civil liability for professional negligence and breach of fiduciary duty. Although the T&R opinion may not be binding on California's appellate courts, it is currently the only opinion that decides the issue one way or the other. Therefore, unless a higher court disapproves the T&R opinion, an event that is by no means certain, California attorneys are required to follow its' holding.

CONCLUSION

In the context of a fee arbitration, when presented with circumstances where the client has made an advance payment and claims entitlement to a refund of all or a portion of the advance, arbitrators should carefully consider the following issues:

- (1) Whether the retainer is a "true retainer" or a "classic retainer" that was paid solely to ensure the attorney's availability and not paid for the performance of any particular legal services;
- (2) Whether the retainer merely represents an advance payment or security deposit for actual legal services to be performed in the future. A provision that the attorney will charge an hourly rate to be billed against the retainer is a conclusive indicator that the payment is an advance payment or a security deposit that is refundable unless fully earned;
- (3) If the payment represents a true retainer fee paid solely to ensure the availability of the attorney, whether the fee is unconscionable in light of the facts as they existed at the time the agreement was formed; and
- (4) To the extent it may bear upon the fees, costs, or both to which the attorney is entitled [See Business & Professions Code section 6203(a)], whether the attorney complied with Rule 4-100(A) in placing the advance payment in the appropriate account.

Footnotes

1. All references to a "Rule" or "Rules" refer to the California Rules of Professional Conduct.

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

2. An "advance payment" would typically be applied toward the client's bill at the end of the current billing period. A "security deposit" is one held by the lawyer throughout the representation and refunded to the client once all services are completed and the attorney has been paid. For convenience, a security deposit is sometimes applied to the final invoice.

3. Note that all advances for costs and expenses must be placed in a client trust account because they are funds held for the benefit of the client [Stevens v. State Bar (1990) 51 Cal.3d 283].

See also:

RRC - 4-200 [1-5] - 11-30-09 Cooperstein (Minn) Memo re Flat Fees, etc.

RRC - 4-200 [1-5] - D.C. Bar Counsel re Flat Fees (12-2009).doc

May 19, 2010 Sondheim E-mail to RRC:

I have been reviewing the many adverse comments received regarding this rule and offer the following thoughts:

1. This is the easy one. The Dashboard refers to the Washington rule, but it is not listed in the State Variations. Shouldn't we include it so those reading the Dashboard know what we relied upon? In addition, in light of Randy's link to a Minnesota memorandum, should we also include some rules of other states listed in that memorandum which prohibit a fee from being called "non-refundable"?

2. One of the commentators appears to think that the flat fee goes into the trust account. I suggest we make it clear that not only is it the lawyer's property on receipt, but also that it should not be placed into the trust account.

3. I perceive that one of the major problems with subparagraph (e) that is of concern to commentators is item (v). Perhaps it could be removed from (e) and a comment be added stating that a flat fee may also be subject to other rules relating to legal services. For example, the fee may become unconscionable or the fee agreement may be modified if the lawyer decides to credit the flat fee against hourly work. By putting this principle in the comment we help eliminate the sting which many commentators feel from its placement in the rule and, in any event, we are not changing the principle under which flat fees currently operate.

May 21, 2010 KEM E-mail to RRC:

Greetings:

1. In response to Harry's point #1, below, I've attached a recently-issued Missouri Formal Opinion 128 (5/18/10) concerning non-refundable fees. The link for the opinion is:

<http://www.mo-legal-ethics.org/modules.php?name=News&action=view&id=64&PHPSESSID=f96c1be7f56dc7617efd7c2555ce6517>

2. Also, here's an interesting exchange from December that appears on lawyers.com:

<http://community.lawyers.com/forums/t/92422.aspx>

This is precisely the kind of situation that paragraph (e) is intended to avoid.

3. As to Harry's item #3, I recommend against moving (e)(2)(v) into the Comment. Paragraph (e)(2) provides:

(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.** (Emphasis added).

There is no reason to remove (e)(2)(v), which is at the heart of the protection afforded clients under the provision, except as an attempt to offer an olive branch to the criminal defense bar. However, it will have as much effect on their opposition to the provision as the Commission's attempt to revise the notice requirement in 1.11(e)(2) had on the position of George Cardona's office. Our whole point is that the fee is not non-refundable until it is earned. Requiring lawyers to state in the fee agreement that the client might be entitled to a refund is the only provision that will catch a client's attention. The other four subparagraphs are fine, but the only one that will have any meaning to the client is item (v). More important, I don't think that moving (v) into the Comment will have any effect on the opposition; they don't want to be regulated in this regard, period. We've been told by the public commenters that honorable criminal defense lawyers will naturally return any part of a fee that is not earned. However, it is not the honorable lawyers for whom the rules are written.

Attached:

RRC - [1-5] - Missouri Formal Ethics Op. 128 (Nonrefund Fees) (05-18-10).doc

May 21, 2010 Sondheim E-mail to KEM, cc RRC:

The problem with the Missouri Opinion is that it goes to far. It requires the fee to be placed in the trust account, a requirement that the Commission rejected. We need language used in states where the fee cannot be called "non-refundable," but need not be placed in the trust account.

With regard to your reference to 1.11(e)(2), as I recall RAC removed this provision entirely. I would not want to have the same thing happen to 1.5 (e)(2)(v). I think one of the concerns with (e)(2)(v) is that the language permits an argument that the fee is subject to seizure for bankruptcy and by IRS because it may be deemed to still be property of the client. We need to deal with this issue in some way to make it clear that we are not changing the status of such fees under current law and current rules, other than prohibiting them being called "non-refundable."

May 21, 2010 KEM E-mail to Sondheim, cc RRC:

1. As far as I know, California is the only state that does not require that an advance fee be placed in the trust account, so I don't think we will find any authority in other jurisdictions similar to the California approach. Ellen will have a better read on that but when I looked at this a few years ago, that was my conclusion.

2. As to the other point, if we take (v) out of 1.5(e)(2), then the key component of that provision is gone. First, I was part of a panel on bankruptcy when I noted the California position on advance fees being placed in a trust account. The BK judge on the panel took exception when I pointed out that the Cal. Rule does not require that advance fees be placed in a trust account. He said that his approach (and from what I gathered, also the approach of the 75+ lawyers in the room who viewed me with something bordering on contempt) was that any advance fees, regardless of how denominated, were to be placed in the trust account. I'm not sure that we should look to the BK cases from the 1990's as a reflection of what is actually occurring in the BK field. If members of the Commission are aware of different practices elsewhere (i.e., outside of Orange County), please let me know. However, I note that we haven't heard any complaints from the BK bar to date. The only criticisms have come from the criminal defense bar. I'm not sure this is an issue for BK lawyers and, unless we know with certainty that it is, we should not be including this in our arguments.

3. Second, as to the criminal defense bar, my point is that deleting subparagraph (v) will not convince the criminal defense bar to withdraw their criticisms (just as our revisions of 1.11(e)(2) did not convince the U.S. Atty to withdraw its criticisms of 1.11(e)). I also think that removing subparagraph (v) -- which requires criminal defense lawyers to place in their fee agreements a statement that if the services are not completed, then the client MAY be entitled to a refund -- is the only part of 1.5(e)(2) that has meat on its bones. In effect, it let's the client know up front that if the lawyer doesn't do the work that was agreed to at the outset of the relationship, that's unconscionable, and the client should get something back. Putting the provision in the fee agreement up front is disclosure, and will enable the client to make an informed decision as to whether the client wants to go the route of a large up front fee to cover everything, or a smaller fee with add ons that might arise down the road. The members of the criminal defense bar in their public comments repeatedly state that the client is permitted to make a decision to go w/ the flat fee or not. This disclosure ensures it is an informed decision. Instead of our proposed revision, however, the public commenters argue that Rule 4-200, which prohibits charging an unconscionable fee, is the solution. But how will the client know about Rule 4-200 (or 1.5)? Requiring up front disclosure will at least give the client a heads up that he or she has a remedy against the lawyer if the lawyer expends little or no effort, notwithstanding the lawyer's statement that the fee belongs to the lawyer upon receipt.

a. As to the public commenters' argument that 1.5(e)(2) will permit seizure of the fee, the money is earned on receipt UNLESS an eventuality occurs (e.g., charges dropped or an early plea deal) that would render the fee received unconscionable because the lawyer provided only a fraction of the services contemplated at the beginning of the representation. The client is paying consideration. It is still the lawyer's money and not subject to seizure unless and until it can be shown that the lawyer's services fell short of what the client and lawyer agreed to at the beginning of the representation. We are not changing the law by prohibiting non-refundable fees. The key point is that it is earned on receipt -- and is thus the lawyer's money -- unless an event occurs afterwards that might require a refund. Call it a condition subsequent (even if the Restatement (2d) Contracts struck that term).

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

b. If we make any change, it should not be to move subparagraph (v) into a comment. Rather, we might consider a new comment that explains what we mean when we state "the agreed-upon legal services have not been completed." That seems to be the real concern, i.e., the fear that a client might come after them after they've provided substantial services that warrant full payment, but may not have included ALL of the services that possibly might have been rendered when the parties signed the fee agreement. The comment could state something along the following lines:

"Subparagraph (e)(v) requires that a lawyer retained on a flat fee basis must include in the fee agreement a statement 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.' Subparagraph (e)(v) does not require a refund if all of the possible services that the lawyer might have been provided under the agreement were not necessary. For example, if the lawyer had agreed to represent the client for a flat fee to the conclusion of a trial on the matter, but was able to negotiate a settlement or plea agreement after expending substantial effort on the client's behalf, the client would not be entitled to a refund. On the other hand, if the lawyer and client entered the same agreement but the matter was terminated before the lawyer had expended any effort, or after little effort by the lawyer, then it is likely that the client would be entitled to a refund of at least part of the fee. See paragraphs (b) and (c) of this Rule concerning unconscionable fees."

That's done on the fly. It can be improved substantially but the general idea is to assuage the real concerns of the criminal defense bar.

May 23, 2010 Kehr E-mail to KEM, cc RRC:

I've been looking around for an explanation for the reaction described in your paragraph 2, and I think the attached provides it. The bankruptcy judge and lawyers present didn't recognize the difference between a rule applicable only in bankruptcy and the disciplinary rule applicable in all situations.

Attached:

RRC - [1-5] - Guidelines re Retainers - Trustee - C.D.Cal.pdf

May 23, 2010 KEM E-mail to Kehr, cc RRC:

Your attachment is helpful and is what I understood to be the case, i.e., that the BK lawyers are subject to BK court rules on retainers (and that the BK court -- or at least the U.S. Trustee that issued the attachment -- apparently doesn't recognize a "true retainer" or is misusing the term; what is described is an advance fee). At any rate, regardless of what the California Rule provides, it appears that BK lawyers still must conform their conduct to the BK court rule if they want to continue to practice before the BK court. Therefore, we shouldn't expect that they will complain about 1.5(e); they already are limited in the property interests they can claim in advances that their BK clients might make to them. Do you agree?

My principal point is that the BK lawyers have not complained so we probably should not group them with the criminal defense bar as lawyers who might be adversely affected by proposed Rule 1.5(e).

May 23, 2010 Sondheim E-mail to KEM, cc RRC:

In an effort to clarify my views, I offer these additional comments.

1. For me the basic reason for 1.5(e) was to (a) clarify what constitutes a true retainer and (b) prohibit clients from being deceived by an attorney stating that a fee is "non-refundable." Attorneys should not be permitted to do the latter. Thus the lawyer cannot term a fee as "non-refundable," but can call it a flat fee which becomes the lawyer's property upon receipt. This purpose is accomplished by the first two sentence of (e)(2) regardless of what is required in (e)(2), items i-v. Thus, contrary to what you deem the "heart of the protection afforded to clients," I deem the "heart of the protection" to be prohibiting a deceptive designation of the fee. Indeed, some parts of i-v might be appropriate for all written fee agreements, whether for a flat fee or other type of fee, but they are not essential. Items i-v may, in the view of some, be additional protections which it might be nice to have, but are not necessary to what needs to be accomplished, any more than having screening in a number of our confidentiality rules. Screening might be helpful, but, in the view of some persons, was not essential to the underlying principle of imputation. While I can live with items i-iv, I believe v needs to be removed.

2. My suggestion to remove item v is not to offer "an olive branch to the criminal defense bar," which is how you view it. Indeed the comments received regarding this rule do not just come from the criminal defense bar, but also include comments from bar associations (L.A. and San Diego County bar associations). Rather than offering an olive branch, I think we need to assess whether this item has either inherent flaws or creates issues which need to be avoided.

3. As pointed out in the comment received from Charles Sevilla, (e) (2) "adds uncertainty to the rules." On the one hand, this provision says the flat fee is the property of the lawyer and, on the other hand, it may not be the property of the lawyer if, as indicated by Mr. Sevilla's comment, it may be "subject to a client right of refund." There is a tension between these two concepts which I think should be avoided in the rule itself because it does not tell the client the whole story which is dependent upon the applicability of other rules. Leaving out the aspect of refund makes the rule neutral on this issue and leaves the client in the same position as he or she would be in under the current rules, except that the client would not have been told that the fee is non-refundable. It may or may not be refundable and there is no need to raise this possibility at the outset of an attorney-client relationship because it can lead to other serious problems which I discuss below. Indeed, the Sample Fee Agreement provision set forth by the State Bar (see Tarlow, p. 6, fn. 3 for the cite) suggests that, instead of being neutral, the fee agreement might provide that "unless the attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under this Agreement, the fee will be earned in full and no portion of it will be refunded once the agreed-upon legal services have been performed." (Slight changes made to the provision to reflect our language.)

4. Although you seem comfortable with the idea that " it is still the lawyer's money and not subject to seizure unless and until it can be shown that the lawyer's services fell short of what the client and lawyer agreed to at the beginning of the representation," I do not have the same comfort level. By putting v in the rule we are raising the level of controversy between lawyers and the IRS, the SEC, bankruptcy proceedings, etc. (Incidentally, I did not raise the issue of bankruptcy because of a concern that the bankruptcy bar would find the provision objectionable, but because the fee paid to a non-bankruptcy lawyer may be impacted in bankruptcy proceedings by being deemed assets of the client who ends up in bankruptcy.) The language of v raises the risk of the fee being subject to arguments for its seizure or forfeiture, irrespective of whether these arguments will ultimately prevail. (See the comments of Mr. Gordon regarding

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

tax matters and Mr. Perlis, a former Assistant Director of Enforcement at the SEC.) Of course, I recognize that this risk exists at the present time, but we are increasing the risk for all lawyers by using the specific proposed language in v in our effort to alert clients who may be entitled to a refund from those lawyers (and I like to believe there are not too many) who do not perform what they are obligated to do. The language provides the IRS, SEC, etc. with one more arrow in their quiver.

5. Furthermore, the language also may create thoughts by any client regarding how to get back part of the flat fee, i.e. a claim that not all the "agreed-upon legal services have ... been completed." A client hires a lawyer in the belief that the lawyer will provide legal services to resolve a matter in the best manner possible and is willing to pay a flat fee to achieve that end; but at the same time we are telling the client the lawyer may not provide you with all the legal services you expected. Talking about "legal services that have not been completed" raises issues at the inception of the relationship which need not be raised. The fee agreement should spell out what services the client can expect.

6. Your proposed comment, which I realize "was done on the fly," suggests that there should be a weighing between "substantial effort" and "little effort." Yet the lawyer's entitlement to the flat fee is not dependent upon the amount of effort it has taken to resolve the matter, but whether the lawyer has done whatever is required (whether substantial or little) to either resolve the matter or to competently represent the client up to the point agreed upon.

Although this e-mail may appear to be a comprehensive presentation of my views, it too was done "on the fly" as I am presently swamped with other matters, including looking after my grandchildren whose parents are out of town for a few days. So I may have other thoughts when I get a chance to review this e-mail and further reflect upon the matter.

May 23, 2010 Martinez E-mail to Sondheim, cc RRC:

The refund aspect is a large part of the Rule. Removing it would not make the rule neutral because the Rule already tips the scales in favor of the lawyer by stating that the flat fee is the lawyer's property. If the lawyer fails to perform the called upon services the client should get a refund. We need to spell it out. Failure of consideration should be available to the client under appropriate circumstances which can be addressed in a comment. "Failure of consideration is the failure to execute a promise, the performance of which has been exchanged for performance by the other party. Among other situations, the failure may arise from the wilful breach of the promise." *Bliss v. California Cooperative Producers* (1947)30 Cal.2d 240, 248.

As for the uncertainty pointed out by Mr. Sevilla and LACBA, I suggest that the concept in (v) be merged into (iii) so that (iii) reads:

(iii) that the fee is the lawyer's property immediately on receipt, subject to the right of the client to a refund of all or a portion of the fee if the agreed-upon legal services are not performed.

The remaining concerns can be addressed in a comment, as Kevin suggests. But leaving the refund aspect out of the rule would too strongly suggest that the fee is the lawyer's property and that the client has no recourse.

May 24, 2010 Difuntorum E-mail to Sondheim, cc RRC:

Here are links to rules that could be cited as supportive of the Commission's proposed approach. These are the rules mentioned on page 7 of Minnesota Bar memo in describing jurisdictions that permit advance flat fees to be considered the property of the lawyer.

Wisconsin Rule 1.15(4)(m)

<http://www.wisbar.org/am/template.cfm?template=/cm/contentdisplay.cfm&contentid=65735>

D.C. Rule 1.15(d)

http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/rule_one/rule01_15.cfm

Washington Rule 1.5(f)(2) [This one is already cited on the 1.5 Dashboard.]

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garp_c1.05

May 25, 2010 Sondheim E-mail to KEM, cc RRC:

Having reflected upon this rule some more, I suggest the following as a fall back position in an effort to find a middle ground between you and me.

Raul has suggested that (iii) and (v) be combined. Following through on this suggestion, (iii) could read as follows:

"(iii) that, **unless the lawyer withdraws** before the completion of the services or otherwise fails to perform services contemplated under this Agreement, the fee will be earned in full and no portion of it will be refunded once the agreed-upon legal services have been performed."

This wording is more supportable than what we propose for the following reasons, while at the same time alerting the client to the protection that we seek to provide:

1. It is the language currently suggested in the Sample Fee agreement set forth by the State Bar (see my earlier email), slightly amended to fit into what we propose. Thus there is already precedent for this language.

2. A number of the commenters refer to this language by adopting Tarlow's analysis of our proposal (see Ragen's Exhibit 1, at p. 11; Borden, item 13; Moss, item 13). Tarlow states that this fixed fee clause is "widely-used." Thus we are not changing anything that members of the criminal defense bar and others are currently using and there should be no basis for objecting to our using this language. Whatever problems there may be relating to seizure or forfeiture of the lawyer's fee are already inherent in the current "widely-used" language.

Why reinvent the wheel?

May 25, 2010 Martinez E-mail to Sondheim, cc RRC:

Harry, under your proposed version of (iii) the fee isn't earned until the services are performed. This means the fee is still the client's property until the services are performed and can be seized by third parties. Under my version, the fee is earned on receipt "subject to" a refund. Perhaps the fix is to add the words "on receipt" after "earned in full" in you version.

May 25, 2010 Melchior E-mail to RRC:

I am quite sure that I dissented from our treatment of advance fees but do not have the time to get involved in this argument at the moment.

I had a case recently in which the lawyer wrote an engagement letter which stated as clearly as possible that the fee was an availability fee, earned upon engagement. But he then added that he would not charge for some hours of time because of the availability payment, and the OCTC charged that it was NOT an availability fee despite its language. I had to study the field, and I concluded that the Review Department had undermined what I read as the Supreme Court's intent in the Baranowsky case, and that now, in California, there were availability fees in the abstract only -- i.e., if the client paid the lawyer ONLY for availability and NO work would be credited against that payment. Of course, in real life that doesn't happen.

I think that anything short of going back to Baranowsky undermines the positions which bankruptcy and criminal defense lawyers MUST take, and that we are engaging in (or in any event supporting) a destructive enterprise if we don't straighten this out. But I don't think that my views have a chance.

My apologies for not being able to get more involved; but client work comes first. This debate explains one more reason why our work is not helpful, though we have all certainly tried.

May 25, 2010 Martinez E-mail to Sondheim, cc RRC:

Harry, I'm fine with it but, I think we need a comment indicating that the rule is not intended to address all circumstances under which the client may be entitled to a refund. After all, this is a matter of contract law and there are other circumstances where the client might be entitled to a refund, such as where the lawyer performs the services negligently-- i.e., a failure of consideration. We are not overruling traditional contract defenses. Either way, I don't think it will appease Tarlow and others who insist there be no rule that prohibits non-refundable fees.

May 25, 2010 Sondheim e-mail to Martinez, cc RRC:

Then how about this:

"(iii) that, the fee is earned in full upon receipt and, unless the lawyer withdraws before the completion of the services or otherwise fails to perform services contemplated under this Agreement, no portion of it will be refunded."

While this is a variation of the Sample Fee agreement, I believe it is defensible as based upon the "gold standard" supported by Tarlow and others.

May 25, 2010 Difuntorum E-mail to Drafters, cc RRC:

Please consider the attached redraft of the rule. It contains my suggested revisions to the Commission's regulation of true retainers and flat fees. My objective was to address the concerns of the opposition comments as well as issues raised by the existing Commission minority dissent. My view is that there is a real issue of potential confusion when attempting to address the issue of "earned on receipt" and so my redraft backs off and takes a less is more approach. Note that my version of (e)(2) limits the required disclosures to only flat fees which are paid in advance.

In addition, attached for historical reference is the letter from the Supreme Court identifying issues of confusion in the Commission's 1992 submission.

Attached:

RRC - 4-200 [1-5] - Rule - DFT12 (05-25-10)RD - Cf. to DFT11 (12-14-09).doc
RRC - 4-200 [1-5] - 05-11-95 S.Ct. Letter re 3-700 & 4-100.pdf

May 25, 2010 Tuft E-mail to RRC:

Leave it to Randy to bring clarity to this muddled discussion. I am all too familiar with the Court's letter remanding the prior commission's submission of rules 3-700 and 4-200 since I was given the thankless task on COPRAC to come up with a rule in response to the court's letter that reconciles the treatment of advance fees with the requirement that all unearned fees be refunded to the client. Randy's draft is a step in the right direction. However, I personally favor deleting proposed rule 1.5(e), particularly in view of the comments received that demonstrate wide spread confusion over advance fees that this rule engenders. To return to basic principles, no advance fee paid by a client is the lawyer's property unless and until the fee is earned and that includes fixed or flat fees. A true retainer by definition is earned on receipt but fees paid in advance of rendering services for which the fee is paid are not earned on receipt and are refundable unless earned. Whether a fee is earned depends on the particular facts.

Washington's rule addresses flat fees in the context of a requirement that all advance fees be placed in a client trust account. California does not currently have that requirement and, thus, our proposed rule serves a different purpose than Washington by allowing lawyers to contract with clients to deem a flat fee paid in advance to be the lawyer's property whether or not the lawyer actually earns the fee. A rule that allows lawyers to contract in this manner may benefit lawyers but is not in the public interest. If we continue down this road to accommodate certain members of the criminal defense bar, we will likely receive another letter similar to the one the bar received in 1995.

May 25, 2010 Sondheim E-mail to Difuntorum, cc RRC:

I believe the portion of the rule I suggested in my May 25 email does not have the type of ambiguity that concerned the Supreme Court in 1995 because it indicates that if the lawyer withdraws before the completion of services or otherwise fails to perform the services contemplated there may be a refund. In 1995 the Supreme Court was concerned that the rule proposed seemed to exempt advance fees from the requirement of a possible refund.

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

While your crystal ball is as good as mine, I doubt if your proposal will be deemed to address "the concerns of the opposition comments" any better than what I propose. At least what I propose can be defended on the bases I set forth in my email since it relies upon something that the opposition comments indicate is currently "widely used."

May 26, 2010 Difuntorum E-mail to Sondheim, cc RRC:

To me, trying to key off Mr. Tarlow's approach is inherently flawed because it is a magic words approach. The Supreme Court's letter can fairly be read as a criticism of any magic words approach to regulating advance fees. As Mark points out, "no advance fee paid by a client is the lawyer's property unless and until the fee is earned and that includes fixed or flat fees." Using contract terms that say "earned on receipt" do not make the fee actually earned and will involve, as Raul emphasizes, issues such as a failure of consideration. It is fact dependent. For example, a failure of consideration could occur in circumstances not covered by your proposed language for (iii). A lawyer may fully perform and not withdraw before services are completed but the client may discover subsequently that a serious violation of ethics occurred (ala Pringle v. La Chappell), such as a fee split or a conflict, and that may void some or all of the lawyer's entitlement to the fee. It is problematic to try to craft a rule that comprehensively captures all possible situations where a purported "earned on receipt" fee must be refunded.

Instead, a rule on flat fees paid in advance could avoid the magic words approach and attempt to add client protection by: (1) taking the term "nonrefundable" out of the fee agreement lexicon; (2) requiring a writing (under penalty discipline unlike the State Bar Act provisions); and (3) requiring notice to clients that a flat fee paid in advance does not alter the client's right to terminate a representation and does alter the client's right to claim a refund (with the issue of whether a refund actually is warranted to be determined by the facts of the particular situation). My redraft attempts to redirect the rule to this type of client protection and steer away from the challenge of explicating the difficult oxymoron of the refundable earned on receipt fee. My approach will not satisfy Mr. Tarlow but it will undercut his complaint that a rule of discipline is tackling the legal issue of fee entitlement in an incomplete and confusing manner.

By the way, the sample written fee agreements are not a held out by the State Bar as a "gold standard." To the contrary, there is an express disclaimer stating that: "This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code Section 6147 but may not address varying contractual obligations which may be present in a particular case. The State Bar makes no representation of any kind, express or implied, concerning the use of these forms." Mr. Talow, however, cites the Bar's sample fee agreement language because it fits his magic words approach to flat fees paid in advance.

Lastly, if there is no Commission consensus on revising the current proposed rule, then I recommend that the Commission reconsider the ABA approach of requiring all advance fees to be placed in a client trust account until earned, including fixed/flat fees consistent with the interpretation in some jurisdictions.

May 26, 2010 Difuntorum E-mail to RRC:

I have revised my suggested redraft to clarify that true retainers and flat fees are not "exceptions" to the prohibition against nonrefundable fees. I also fixed some nits and added a new comment which explains the prohibition against a "nonrefundable" fee by citing Matthew v. State Bar. Changes are highlighted.

Attached:

RRC - 4-200 [1-5] - Rule - DFT12.1 (05-26-10)RD - Cf. to DFT11 (12-14-09).doc

May 26, 2010 KEM E-mail to RRC:

A few points and questions in response to Randy's fine work:

1. I generally agree with Randy's approach but wanted to point out that it will fall flat in addressing the policy issue the criminal defense bar has raised, i.e., that if the fees are not viewed as earned upon receipt, then they will be subject to seizure. The "earned upon receipt," while magic words and meaningless if the facts don't support it, nevertheless provides the criminal defense lawyers with some comfort and a defense against the government's attempt to seize the client funds that were used to pay the fee.

a. I'm not sure how to deal with this in light of the S.Ct.'s 5/11/1995 letter. In essence, we have been saying in former (e)(2) (i.e., pre-Randy's proposed modifications) that the fee is earned on receipt, . . . unless it is not. We don't say it quite that way; rather we achieve that by expressly stating that the flat fee is earned on receipt but then caution that the lawyer must explain in the fee K that the client might be entitled to refund if it turns out the agreed upon legal services were not completed. The "earned upon receipt" language addresses the seizure issue; the refund language -- and a refund can only be measured after the services have been provided or not -- addresses the client protection issue and S.Ct. concerns that a fee is not the lawyer's until earned.

b. Here is how Arizona has addressed the issue. Perhaps that is an approach we can take:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

* * *

(3) a fee denominated as "earned upon receipt," "nonrefundable" or in similar terms unless the client is simultaneously advised 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).

I think an important point in the Arizona language is the client's right to discharge the lawyer. One of the key rationales in New York's Cooperman opinion that rejected the concept of a non-refundable fee was that it interfered with the client's absolute right to discharge the lawyer (sure, the client can discharge the lawyer, but if the client has already paid a multi-K non-refundable fee, can the client afford to do so?) Accordingly, I also think that the "unless the lawyer withdraws" language in the form fee agreement and cited to by the criminal defense bar is wrong. The issue is not whether the lawyer "withdraws," the issue is the client's right to discharge the lawyer. The client should be entitled to a refund whether the lawyer withdraws or the client fires the lawyer before the lawyer has completed the agreed upon services.

c. As I mentioned in an earlier e-mail, we seem to be dealing with a condition subsequent, an event that might occur to discharge a previously-incurred obligation (e.g., no work done discharges the client's obligation to pay). We seem to contemplate this concept in the second sentence of our paragraph (b), which provides:

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

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.

Perhaps we can highlight that sentence by referring back to it in a comment.

2. Paragraph (e). I would not change the language as Randy suggests (substituting "enter into" for "make") unless we make the same change in paragraph (a).
3. Paragraph (f)(1) [Formerly (e)(1)]. I'm not sure why Randy changed proposed (e)(1). Was it only to shorten or simplify it? I'm fine with that but I thought we had adopted the definition in 1.5(e)(1) as a more complete explanation of a true retainer than is currently found in the California rules. Note that we removed the definitions of true retainer from Rules 1.15 and 1.16.
4. Paragraph (f)(2). I'm not sure I agree with the deletion of "if the agreed-upon legal services have not been completed" at the end of (f)(2).
5. Comment [10]. Whether comment [10] is deleted depends upon how the Commission resolves item #1, above.
6. Summary. As Harry and Randy have observed, this journey began with the Commission's decision to prohibit "non-refundable" fees. As you might recall, the initial public comment version did not have all the bells and whistles re true retainers and flat fees. That came after public comment was received from the criminal defense bar and Raul discovered the proposed Washington Rule 1.5(f). We incorporated those changes but have not assuaged the concerns of the criminal defense bar. I don't agree with Mark that "our proposed rule serves a different purpose than Washington by allowing lawyers to contract with clients to deem a flat fee paid in advance to be the lawyer's property whether or not the lawyer actually earns the fee." I think that what we wrote addressed the seizure issue and was not simply intended to provide criminal defense lawyers with a way to make an advance fee their property. However, I think Randy has made great strides in resolving the earned upon receipt vs. refund conundrum. We will have to decide, however, whether we need to address the seizure issue.

May 26, 2010 Difuntorum E-mail to KEM, cc RRC:

Kevin: [See some quick replies, in CAPS, interspersed in your message below.](#) –Randy D.

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Wednesday, May 26, 2010 1:11 PM
To: Difuntorum, Randall
Cc: Harry Sondheim; Raul Martinez; Marlaud, Angela; McCurdy, Lauren; Lee, Mimi; snyderlaw@charter.net; slamport@coxcastle.com; kevin_e_mohr@csi.com; mtuft@cwclaw.com; CommissionerJ2@gmail.com; ignazio.ruvolo@jud.ca.gov; linda.foy@jud.ca.gov; rlkehr@kscllp.com; kmelchior@nossaman.com; pecklaw@prodigy.net; jsapiro@sapirolaw.com; pwwapnek@townsend.com; kevinm@wsulaw.edu
Subject: Re: ADDITIONAL Public Comments Received for Rule 1.5 - through 5-19-10

Greetings all:

A few points and questions in response to Randy's fine work:

1. I generally agree with Randy's approach but wanted to point out that it will fall flat in addressing the policy issue the criminal defense bar has raised, i.e., that if the fees are not viewed as earned upon receipt, then they will be subject to seizure. The "earned upon receipt," while magic words and meaningless if the facts don't support it, nevertheless provides the criminal defense lawyers with some comfort and a defense against the government's attempt to seize the client funds that were used to pay the fee.

MY SUGGESTED APPROACH IS TO ABANDON THE "EARNED ON RECEIPT" CONCEPT AS NOT HELPFUL. UNDER MY SUGGESTED APPROACH, THE RULES ARE SILENT AS TO THE DETERMINATION OF A LAWYER'S LEGAL ENTITLEMENT TO A FLAT FEE. WHAT CRIMINAL DEFENSE LAWYERS HAVE AS COMFORT AGAINST SEIZURE CONCERNS IS WHAT THEY HAVE ALWAYS HAD SINCE *BARANOWSKI*, NAMELY THE OPTION OF NOT DEPOSITING AN ADVANCED FLAT FEE INTO THE CLIENT TRUST ACCOUNT. IN ADDITION, THEY HAVE THE ABILITY TO USE ANY CONTRACT LANGUAGE, OTHER THAN "NONREFUNDABLE" OR SIMILAR WORDS, TO DESCRIBE HOW AND WHEN A FEE IS EARNED.

a. I'm not sure how to deal with this in light of the S.Ct.'s 5/11/1995 letter. In essence, we have been saying in former (e)(2) (i.e., pre-Randy's proposed modifications) that the fee is earned on receipt, . . . unless it is not. We don't say it quite that way; rather we achieve that by expressly stating that the flat fee is earned on receipt but then caution that the lawyer must explain in the fee K that the client might be entitled to refund if it turns out the agreed upon legal services were not completed. The "earned upon receipt" language addresses the seizure issue; the refund language -- and a refund can only be measured after the services have been provided or not -- addresses the client protection issue and S.Ct. concerns that a fee is not the lawyer's until earned.

THE HEART OF THE PROBLEM IS THE LEGAL ISSUE OF ENTITLEMENT TO A FEE. I SUSPECT THAT THE COURT WILL WANT A HIGH LEVEL OF CERTAINTY THAT THE RULE HAS IT RIGHT IF THE RULE ATTEMPTS TO ADDRESS THAT ISSUE. I AM NOT CONFIDENT THAT A DISCIPLINARY RULE SHOULD OR COULD ADEQUATELY ADDRESS THE ISSUE OF LEGAL ENTITLEMENT TO A FLAT FEE. THERE ARE TOO MANY VARIABLES. HOWEVER, I DO BELIEVE THAT THE RULES CAN BAN CERTAIN FEES AS A MATTER OF PUBLIC POLICY (SUCH AS A CONTINGENT FEE IN A CRIMINAL MATTER).

MY SUGGESTED APPROACH WOULD BAN NONREFUNDABLE FEES BUT IT WOULD NOT ADDRESS HOW OR WHEN FEES BECOME THE LAWYER'S PROPERTY. JUST BECAUSE A FEE IS SUBJECT TO A CLAIM FOR A REFUND DOES NOT MAKE IT THE CLIENT'S PROPERTY. IF I BUY A SHIRT AT NORDSTROM WHERE THERE IS A LIBERAL RETURN/REFUND POLICY, THEN THAT SHIRT IS MINE AND THE MONEY I PAID BELONGS TO NORDSTROM. LATER, IF I SEEK TO RETURN THE SHIRT AND GET A REFUND, THEN THAT ACTION CHANGES OWNERSHIP AT THAT LATER TIME BUT NOT PRIOR TO THAT TIME. MY APPROACH ASSUMES THAT ALL FEES ARE SUBJECT TO REFUND BUT TO ME THAT IS A NEUTRAL FACTOR ON THE ISSUE OF LEGAL ENTITLEMENT, ESPECIALLY UNDER EXISTING CALIFORNIA LAW THAT PERMITS DEPOSIT IN AN ACCOUNT OTHER THAN THE CLIENT TRUST ACCOUNT.

b. Here is how Arizona has addressed the issue. Perhaps that is an approach we can take:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

* * *

(3) a fee denominated as "earned upon receipt," "nonrefundable" or in similar terms unless the client is simultaneously advised 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).

I think an important point in the Arizona language is the client's right to discharge the lawyer. One of the key rationales in New York's Cooperman opinion that rejected the concept of a non-refundable fee was that it interfered with the client's absolute right to discharge the lawyer (sure, the client can discharge the lawyer, but if the client has already paid a multi-K non-refundable fee, can the client afford to do so?) Accordingly, I also think that the "unless the lawyer withdraws" language in the form fee agreement and cited to by the criminal defense bar is wrong. The issue is not whether the lawyer "withdraws," the issue is the client's right to discharge the lawyer. The client should be entitled to a refund whether the lawyer withdraws or the client fires the lawyer before the lawyer has completed the agreed upon services.

I AGREE WITH THE POLICY THAT ALL FEES ARE POTENTIALLY REFUNDABLE REGARDLESS OF WHETHER THE LAWYER WITHDRAWS BEFORE SERVICES ARE COMPLETED. HOWEVER, I DO NOT FAVOR ARIZONA'S APPROACH BECAUSE IT IS A MAGIC WORDS APPROACH THAT PERMITS LAWYERS TO USE THE INHERENTLY MISLEADING LABEL OF "NONREFUNDABLE."

c. As I mentioned in an earlier e-mail, we seem to be dealing with a condition subsequent, an event that might occur to discharge a previously-incurred obligation (e.g., no work done discharges the client's obligation to pay). We seem to contemplate this concept in the second sentence of our paragraph (b), which provides:

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.

Perhaps we can highlight that sentence by referring back to it in a comment. A NEW COMMENT ALONG THESE LINES MIGHT BE HELPFUL.

2. Paragraph (e). I would not change the language as Randy suggests (substituting "enter into" for "make") unless we make the same change in paragraph (a). I MADE THIS CHANGE IN ORDER TO USE THE EXACT SAME LANGUAGE OF PARA. (d), AS BOTH (d) AND (e) WOULD BE PROVISIONS THAT BANS ON CERTAIN FEES. IF "MAKE" IS THE PREFERRED TERM, THEN MAYBE PARA. (d) SHOULD BE MODIFIED SO THE PROVISIONS ARE CONSISTENT.

3. Paragraph (f)(1) [Formerly (e)(1)]. I'm not sure why Randy changed proposed (e)(1). Was it only to shorten or simplify it? I'm fine with that but I thought we had adopted the definition in 1.5(e)(1) as a more complete explanation of a true retainer than is currently found in the California rules. Note that we removed the definitions of true retainer from Rules 1.15 and 1.16.

I MADE THIS CHANGE BECAUSE I BELIEVE TRUE RETAINERS ARE NOT AS PROBLEMATIC AS FLAT FEES. I WANTED TO RETAIN AS MUCH AS POSSIBLE OF THE STATUS QUO ON TRUE RETAINERS.

4. Paragraph (f)(2). I'm not sure I agree with the deletion of "if the agreed-upon legal services have not been completed" at the end of (f)(2). IF THIS PHRASE IS RETAINED THEN IT SHOULD BE MODIFIED TO BE NON EXCLUSIVE SINCE IT DESCRIBES ONLY ONE EXAMPLE OF A FAILURE OF CONSIDERATION. PERHAPS SOMETHING ALONG THE LINES OF THE FOLLOWING: "IF THE AGREED-UPON LEGAL SERVICES HAVE NOT BEEN COMPLETED, OR FOR SOME OTHER VALID REASON." AS I HAVE

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

REVISED THE LANGUAGE, THE EXPLICIT REFERENCE IS TO “THE CLIENT’S RIGHT TO **CLAIM** A REFUND. . . “ BY ADDING THE TERM “CLAIM,” THE LANGUAGE SIGNALS THAT THE RULE ITSELF IS NOT DICTATING THE OUTCOME OF A CLIENT’S EFFORT TO OBTAIN A REFUND, INSTEAD, IT IS LEAVING THE WHOLE ISSUE OPEN.

5. Comment [10]. Whether comment [10] is deleted depends upon how the Commission resolves item #1, above. **THIS COMMENT GOES TO THE LEGAL ISSUE OF ENTITLEMENT AND OWNERSHIP AND MY SUGGESTED APPROACH IS TO STEER CLEAR OF THIS.**

6. Summary. As Harry and Randy have observed, this journey began with the Commission's decision to prohibit "non-refundable" fees. As you might recall, the initial public comment version did not have all the bells and whistles re true retainers and flat fees. That came after public comment was received from the criminal defense bar and Raul discovered the proposed Washington Rule 1.5(f). We incorporated those changes but have not assuaged the concerns of the criminal defense bar. I don't agree with Mark that "our proposed rule serves a different purpose than Washington by allowing lawyers to contract with clients to deem a flat fee paid in advance to be the lawyer's property whether or not the lawyer actually earns the fee." I think that what we wrote addressed the seizure issue and was not simply intended to provide criminal defense lawyers with a way to make an advance fee their property. However, I think Randy has made great strides in resolving the earned upon receipt vs. refund conundrum. We will have to decide, however, whether we need to address the seizure issue. **OKAY.**

May 27, 2010 Difuntorum E-mail to KEM, cc RRC:

I want to revise my position on your item #4 below. I now believe that the language at issue must be deleted as no amount of modifications can salvage it.

Several commenters (including: Cristina Arguedas; LACBA PREC; and Criminal Defense Lawyers Club of San Diego) make the point that one of the most problematic aspects of the public comment version of Rule 1.5 is the inclusion of the phrase "if the agreed-upon legal services have not been completed" as operative language in the mandatory notice that alerts a client to the client's right to a refund of a flat fee paid in advance. The commenters essentially are saying that in the real world of criminal defense a flat fee might appear to a client to be a windfall legal fee where the lawyer's flat fee agreement specifies the scope of legal services to cover arraignment, trial and sentencing but the lawyer is able to end the matter by obtaining a dismissal at, or even before, arraignment. Because the rule directs the client's attention to the issue of completion of services, the mandatory notice misleads the client about the client's right to a refund. It misleads because basis of the fee agreement is a commoditization of services that would otherwise be accounted for on an hourly basis. Granted, in some situations there may be an issue of an excessive fee that might rise to the level of unconscionability, but even that situation is not about completion of services, it is about value gauged against the price. Accordingly, I now believe that any notice to a client regarding a refund for a flat fee should not refer to completion of services.

* * *

4. Paragraph (f)(2). I'm not sure I agree with the deletion of "if the agreed-upon legal services have not been completed" at the end of (f)(2). **IF THIS PHRASE IS RETAINED THEN IT SHOULD BE MODIFIED TO BE NON EXCLUSIVE SINCE IT DESCRIBES ONLY**

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

ONE EXAMPLE OF A FAILURE OF CONSIDERATION. PERHAPS SOMETHING ALONG THE LINES OF THE FOLLOWING: "IF THE AGREED-UPON LEGAL SERVICES HAVE NOT BEEN COMPLETED, OR FOR SOME OTHER VALID REASON." AS I HAVE REVISED THE LANGUAGE, THE EXPLICIT REFERENCE IS TO "THE CLIENT'S RIGHT TO **CLAIM** A REFUND. . . " BY ADDING THE TERM "CLAIM," THE LANGUAGE SIGNALS THAT THE RULE ITSELF IS NOT DICTATING THE OUTCOME OF A CLIENT'S EFFORT TO OBTAIN A REFUND, INSTEAD, IT IS LEAVING THE WHOLE ISSUE OPEN.

May 28, 2010 Difuntorum E-mail to Sondheim, cc RRC:

In follow-up to our telephone conversation yesterday afternoon, I attach a revised draft of my suggested revisions to proposed Rule 1.5. Changes to my previous draft are marked with yellow highlighting. (Note that the Word file is legal size and the PDF file is letter size.)

This latest draft differs substantively from my prior draft in two ways. First, this version does not prohibit an agreement for a nonrefundable fee. Instead, it prohibits a fee based on a fee agreement that states or implies that fees paid are nonrefundable under any circumstance. Second, this version states that a flat fee agreement may state or imply that it is the intent of the parties that the fees paid pursuant to the fee agreement are earned when paid. While this tilts somewhat back toward "magic words," perhaps you will find this approach to be a better balancing of the interests of clients and criminal defense attorneys.

Attached:

RRC - 4-200 [1-5] - Rule - DFT12.2 (05-28-10)RD - Cf. to DFT11 (12-14-09).doc

RRC - 4-200 [1-5] - Rule - DFT12.2 (05-28-10)RD - Cf. to DFT11 (12-14-09).pdf

May 29, 2010 Sondheim E-mail to Difuntorum, cc RRC:

Thanks for trying to find a middle ground which is acceptable to both of us. I can live with what you propose, but suggest that (f)(2)(ii) be slightly changed to read: "that the fee agreement does not alter the client's right to claim that the client is entitled to a refund of some or all of the fee paid."

May 31, 2010 Sondheim E-mail to RRC:

1. I encourage you to use Randy's latest draft of 1.5, as slightly modified by me. This draft takes care of "non-refundable," provides the client with notice of the right to terminate representation and the possibility of a refund, without all the bells and whistles of our current draft, many of which caused criticism by the criminal defense bar and bar associations. At the same time it permits immediate retention of the fee which can be put in the lawyer's personal account. We will obviously need to change and add some appropriate comments.
2. In light of one of the commenter's comments (Martinez, p. 48) which is not directly answered in the RRC Response, I would include a RRC comment making it clear that the fee can be placed in the lawyer's personal account.
3. Our current RRC Response to the commenters implies we have made changes "to address the commenter's concerns." Obviously the commenters do not think we have addressed their concerns. If we continue to retain this litany and do not adopt item 1, supra, I think it should be

changed to read: "In an effort to somewhat alleviate the commenter's concerns, the Commission redrafted subparagraph (2).

May 31, 2010 Martinez E-mail to RRC:

It seems Randy's current version takes us full circle to where we started. The confusion in the rule that was mentioned by LACBA is still present: that is, the rule says inconsistently that the lawyer's fee is earned when paid, yet the client can still claim a refund. The rule fails to explain when the client may claim a refund. And by removing the language--"if the agreed-upon legal services have not been completed"--it becomes even more unclear. I think we are being a bit schizophrenic about this rule and are having trouble finding a middle ground.

Also, the suggestion that the agreement can "imply" that that the fee is earned invites lawyers to include ambiguous/stealth provision in the agreement. There is no room in contract law or rule drafting to "imply" things. It's either there--i.e., express-- or it's not.

May 31, 2010 Kehr E-mail to RRC:

Before being swallowed up in the non-refundable fee issue that is the subject of all the public comments, I have a few other drafting suggestions that I want to get out of the way.

First, at the fifth line of paragraph (b), we have "constitutes or would constitute". While the double statement might be logically complete, I think it adds nothing to the practical meaning of the paragraph and makes more complex what in any event is quite a long sentence. I would remove "or would constitute" so that the flow of the sentence is: "A fee is unconscionable ... if it ... shock[s] the conscience ... or constitutes" This has the added benefit of pairing the two verbs as "shock the conscience" in the second line of the paragraph is not stated in the subjunctive.

Second, beginning at the end of the fifth line, we have "an improper appropriation". Why not simplify this by saying: "a misappropriation"? This would be slightly shorter and punchier and has the same meaning.

Third, paragraph (d) begins: "A lawyer shall not make an arrangement for" The corresponding phrase in paragraph (e) is: "A lawyer shall not make an agreement for" I see no reason to not use the same language in both places. MR 1.5(d) uses "arrangement", and that seems to me to work. We ought to use the same word in our paragraph (e), which also would be consistent with what we already have in paragraph (a). I would do the same by using "make" in paragraphs (d) and (e), as Randy suggested in his 5/28/10 redraft. This is briefer than the MR's "enter into" and has the added benefit of tracking the language of paragraph (a).

Turning now to the non-refundable fee issue ---

1. In Randy's 5/28/10 redraft, I like the idea of focusing on what the fee agreement communicates to the client b/c the key question is whether the lawyer misleads the client. However, I don't think that Randy's suggestion in what he has as paragraph (e) hits the spot. I prefer the Arizona approach recommended by Kevin in his 5/26/10 email. My suggestion is as follows (with my substantive changes to the Arizona language underlined): "Except as stated in paragraph (f), a lawyer shall not make an agreement for, charge, or collect a fee denominated as "earned on receipt",

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

“nonrefundable”, or similar terms unless the client simultaneously is advised in writing that the client nevertheless may discharge the lawyer, and that any termination of the lawyer-client relationship before the completion of the lawyer’s agreed services may entitle the client to a refund of all or part of the fee based on the value of the lawyer’s services.

- a. The underlined language is b/c the client should be entitled to a refund if the representation ends prematurely for any reason, and not just b/c the client fires the lawyer as stated in the Arizona rule.
 - b. I have remove Arizona’s reference to paragraph (b) b/c we have them as elements pertinent to the issue of unconscionability. I don’t think that, in context, we need to add any explanation of “the value of the lawyer’s services.”
2. I do not support Randy’s 5/28/10 redraft of what was (e)(1). The prior version is more complete b/c it contains the important concept that a true retainer does not to any extent compensate the lawyer for providing legal services. However, I continue to disagree with the penultimate sentence of what was (e)(1) b/c I do not believe that the requirement of a writing is part of current California law. As I will explain later in this message, I believe we are the firmest ground if we tell everyone, and in particular the disapproving commenters, that this rule is consistent with their current duties under California law. This would permit us to say to the criminal defense bar that their problem is not with us.
 3. If the Commission adopts the suggestion in my paragraph 1, paragraph (f)(2) could be limited to its first sentence. I do not support Randy’s second sentence.
 4. Proposed Comment [6A] is ok as far as it goes, but it omits the interference with the client’s absolute right to terminate a representation.
 5. As I suggested earlier, I do not support our attempting to make any change in California law through this rule with respect to refundability or seizure. It should be obvious that criminal defense lawyers and lawyers handling civil matters of a criminal nature, and their clients, face multiple problems, but they are not caused by this rule. Funds that are the result of alleged (unproven) criminal or other wrongful conduct are subject to seizure, and courts routinely order lawyers to pay over to receivers funds received by them from the client. I personally have seen this in enforcement proceedings involving the SEC and the Commodity Futures Trading Commission. Similar problems exist with claims of bankruptcy trustees and with creditors outside of bankruptcy. This raises complex and subtle policy issues that I don’t believe we should attempt to resolve. To better understand my view, here is how I suggest we respond to the first of the commenters, Randolph E. Daar:

The Commission believes that proposed paragraphs (e) and (f) accurately state current California law. See proposed Comment [6A]. The risk to lawyers and clients that a fee will be seized through actions taken against a client or the lawyer by law enforcement or regulatory authorities, by a bankruptcy court or trustee, or by a creditor exists by reason of other bodies of Federal and state law. It is outside the authority of this Commission to resolve the potential problems created by other applicable statues, regulations, or appellate opinions. In addition, the Commission does not agree that our current rules adequately protects client (or provide adequate notice to lawyers of their legal obligations).

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

Current rule 3-700(D)(2), which is carried into proposed Rule 1.16(e)(2), only says that a lawyer must refund unearned fees. This leaves unclear that, under current California law, there is no payment for legal services that can be made non-refundable by agreement between lawyer and client to the extent that the lawyer has not actually performed the services for which payment was made.

6. I agree with the suggested change to Comment [7] in Randy's 5/28/10 redraft, but I would eliminate the comma after "charged".
7. I *do not* support Randy's change in Comment [8] from "is not" to "might". I would state this definitely.
8. I *do* support Randy's changes to the next sentence in [8] and to the parallel language in [9] to the extent that it eliminates the repetition of language found in the Rule and adds a reference to section 6148. However, I would not include the "such as" language. Everything in 6148 is pertinent and entitled to equal weight. I would stop with the reference. Additional editing to [9] will be needed if the Commission accepts my earlier suggestions.
9. I don't understand why Randy has suggested removing the Comment [10] reference to true retainers. I agree with removing its reference to flat fees b/c that reference is wrong. A flat fee is not the lawyer's property until earned, so it can go in the client trust account until then just as can any advance fee for legal services.
10. I agree with the spirit of Randy's change to Comment [11], but the suggested drafting might be taken by some readers to mean that a lawyer could escape discipline under this Rule by refunding the excessive portion of a fee. That is not correct under the "make an agreement for" language. I would end the first sentence with the first use of "fee" in the second line of [11] and add a second sentence saying: "To the extent a fee is unconscionable, it never can be considered to have been earned."
11. I recommend adding to Rule 1.16, Comment [10]: "With respect to a lawyer's obligation to refund unearned fees under paragraph (e)(2), see Rule 1.5(e) and (f)."

May 31, 2010 Tuft E-mail to RRC:

1. I am in agreement with Raul and, I think, Kurt on this troublesome rule. While I agree that Randy has made a valiant effort to make this a client protection rule, draft 12.2 as revised still has major flaws and would be an unfortunate departure from California law. According to the "Dashboard" and the "Introduction" the rule has been revised to permit "nonrefundable" flat fees so long as certain requirements in the rules are satisfied. But no California authority supports this approach and case law rejects the idea that a lawyer can claim a right to a fee that has not been earned. (see page 210). Thus, under current law, lawyers cannot make agreements that state "or imply" that the parties intend that the a flat fee paid in advance "or otherwise(?)" is earned with paid.
2. Arizona's rule provides no help. Notice that the client has the right to terminate the relationship does not change the fact that the lawyer has a contract that says that the fee was "earned on receipt." Cooperman was not decided on the fact the client did not know he or she could change counsel. Instead, the concern was that the client's unfettered right to do so would be compromised by having paid the lawyer the entire fee in advance and

allowing the lawyer to claim that it was "nonrefundable or "earned on receipt." The disincentive to change counsel under this proposed rule is no different. Besides, Arizona and Washington's rules are intended to create an exception to the requirement in those jurisdictions that all advance fees must be placed in a client trust account. This rule has a different objective and one that is without precedent.

3. The second notice affords no better protection. Currently, lawyers have an affirmative duty to promptly refund all unearned fees. This rule changes this fundamental duty by telling clients they have the right to "claim a refund" or "is entitled to claim a refund" of some or all of the fee paid under a contract that says the fee was "earned on receipt." A client who elects to chance counsel under this rule, particularly if it is without cause, will be in a fee fight. I agree with Raul that clients have a right to a refund of unearned fees and this rule compromises that right.
4. We have come full circle, as Raul suggests, and we end up with an inherently inconsistent rule that weighs heavily in favor of lawyers. If adopted, the rule would be used by all lawyers, and not just those who may have a legitimate concern about the threat of fee forfeiture in a particular case. The legal profession is moving away from the standard billable hour and fee arrangements with flat or fix fee components are becoming more the norm. It would be very easy for any lawyer to claim that all flat fees components paid before work is done are "earned on receipt."

June 1, 2010 Melchior E-mail to RRC List:

Rule 1.5, fees for legal services: I assume that the objections of the criminal bar will be the subject of significant discussion at our meeting. I dissented from the adoption of this rule previously; but the current discussion from the bar, including internal correspondence within the Commission in consequence, has crystallized the issues for me; and I will ask you to indulge me.

There clearly is a disconnect here between our concerns – essentially what we call “client protection,” and those of our correspondents who are worried that any qualification of the concept of the fee being “fully earned” at the time of payment will put the fee at risk of seizure by various government entities. The writers do not take much note of the client protection concerns; and with all respect for my colleagues, I didn’t see much concern in our internal exchanges for the fears of seizure which have been expressed, at times with the support of extensive research and briefing, by our commentators.

I believe that both points are valid, and that there has as yet been no real effort by the Commission to consider and to accommodate the concerns of the protesters. (Placing the payment in the lawyer’s trust account or general account is a secondary issue: the critical question is whether the front end fee* “belongs” to the lawyer on receipt, or whether it is only a deposit against future earnings. If we can resolve that issue, the question where to place the money will largely solve itself.)

- I will use the term “front end fee” to avoid the definitions which have attached to other labels and which are causing us legitimate concerns.

There is a logical fallacy in believing that money can both be fully earned and not fully earned at the same time. It is of course possible for a payment to have some characteristics of both; but here, definitions matter strongly. In particular, I understand that there is no question that to the

extent lawyer L holds funds that belong to client C, certain authorities can in proper circumstances seize C's property while it is in the hands of L. Common instances are, primarily, the right of the government to seize what it considers to be stolen or diverted moneys of a criminal defendant, C, deposited anywhere including in the trust account of C's lawyer L. Similar rights of sequestration exist with respect to assets of a bankrupt client C, who may have paid his lawyer L a deposit to assure the lawyer's payment for services during bankruptcy administration, or where the client engages the lawyer for almost anything, but perhaps particularly to contest a tax assessment, and the IRS levies a jeopardy assessment and obtains an instant right of seizure. In all these cases, if the lawyer is not paid, the lawyer will not accept the engagement; and in each instance the client needs a lawyer and is prepared to pay. The true adverse interest at that point is that of the authorities who have the potential of seizing the assets. When this subject came up before the Commission in the 1980s, someone argued that the suspects had access to the public defender; so, protecting the possibly tainted assets with which the lawyer would be paid against seizure did not matter. But that argument did not prevail, and I have not heard it this time.

If we want to protect the parties' mutual expectation that the client can pay the lawyer in advance and that the lawyer will be paid at the outset without fear of retroactive sequestration, we cannot have the front end fee be not deemed paid in full on receipt. If we go that way, we will then have to separately address the other issue, how to protect the client against the possibility that the lawyer will not perform as contracted.

That brings me to the law on point. As I mentioned in an earlier message, I had a legal matter recently which required me to parse this part of the law. I wish that I had then been aware of the material Randy provided with his 5/19/10 email, but the Chandler/Shechet article had not been published yet when I needed it. That article, and the accompanying State Bar Arbitration Advisory, correctly state the law as it now stands: "True retainers," and only true retainers, are fully earned on receipt; but every other form of arrangement involving fees paid in advance – however defined and structured – is not a true retainer and is not earned until (and unless) work defined in the engagement letter has been performed. But a "true retainer" is "rare in today's marketplace," to quote the Arbitration Advisory; and that is a generous description. Under the case law as it has developed since Baranowski, for better or worse, if there is an expectation that even the slightest smidgen of work will be performed and payment for it covered or contained in the front end payment, that payment is not a true retainer. It thus becomes subject to seizure in appropriate circumstances, and is not an unchallengeable assurance for payment to the lawyer as s/he sets out on the case journey.

If we want to protect the expectations of both client and lawyer that the fee, once paid, will actually compensate the lawyer for the entire expected engagement, we have to start at the beginning, meaning that we must redefine the front end fee as actually and fully earned even though the services have not been fully performed. That is not in itself a corruption of legal or economic standards: for example, there are accounting standards which allow the taking of a payment for future deliveries into income when received, subject perhaps to a reserve against nonperformance. Thus, a fee paid to a plumber or to a lawyer on December 31 for work to be done the next year is income to a cash basis taxpayer in the calendar year of receipt. If I am paid for a carload of wedgies to be delivered in due course, I have received the payment as income when I receive the money, though I may have to post a reserve for the cost of manufacture and delivery of the goods. Thus, from an ordinary business and accounting perspective, there is nothing wrong with a provider being paid in advance for what he provides. If there is a nondelivery, the buyer has his recourse, which we all know well.

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

But, it will be said, clients need protection against greedy lawyers who may rip them off by promising what they then do not deliver. To be sure, we want to protect clients against such conduct; and as we all know, unfortunately such things do happen. Our proposed rule does protect clients against such conduct – although only in a limited sense, since it only prescribes (states) that a fee is not fully earned on receipt unless it is a true retainer fee (which everyone agrees is an antiquated fossil). From there, we have tried with little success to justify our traditional direction that an advance fee must not be placed in the trust account: why not, if it is not fully earned and the client retains an interest (though inchoate) in the money?

I said many sentences earlier that we are arguing about the wrong issues: whether to put the money in the trust account or the general account? I suggest that is not the issue; and a very bright IRS agent might well be able to seize an “advance fee” out of the lawyer’s general account under our version because it has not yet been fully earned, even though the label says it’s that lawyer’s money. And why do we have to worry whether the lawyer places the money in box 1 or in box 2, if a persistent challenger can take it away in either place?

So I think that we are fighting the wrong war: not the wrong battle but the wrong war. If we believe, as I do, that the more important thing from the standpoint of both client protection (so that client can have and pay for the lawyer of his choice) and lawyer protection (if that subject can be mentioned at all) is that at the outset client can pay lawyer an amount which they agree would cover the full gamut of the defined services, then we need to recharacterize – and to relabel – such a payment in terms which place it in the lawyer’s “fully earned” account and give the client no immediate further interest in the money or in any part of it. Only then is the money safe from sequestration, and the lawyer fully compensated and fully committed to stay the course.*

- If the money is paid to the lawyer but then seized by public authority, the lawyer could presumably ask to be relieved from the engagement because the client failed to keep his commitment to pay for the lawyer’s services.

Kevin and others may argue that this formulation will give shady lawyers a way to collect money up front and then fail to perform. Obviously, our law has many means of recourse against such conduct; but if my colleagues are convinced that further recourse is specifically needed, we can deal with that situation as a separate matter, but using a redefinition of an earned advance fee as the point of departure.

And as long as I am devoting my holiday to this material, let me add an observation: Particularly in this day of criticism against the billable hour, I do not necessarily see any occasion for a refund if lawyer is able to persuade the prosecution early on to drop the matter against his client without charges, or to achieve a similar “quick and easy” victory. Presumably, lawyer and client have considered the possible permutations of the course the case may take. The flat fee would cover a trial which unexpectedly lasts three times as long as planned: why would it not cover a quick solution because the chief complaining witness had fled the jurisdiction? But that is not the point on our agenda.

June 1, 2010 William Balin E-mail to RRC List:

I have been on both sides of this issue, and it seems to me that the Washington (State) approach is best: the money is considered the lawyer's, but the lawyer must deposit the funds into trust pending the end of the case, or something like that. I know, if it's the lawyer's money, isn't that co-mingling? But trust fund rules are not malum in se, but malum prohibitum, and we

should be able to redefine what should be placed into trust so that both the lawyer and the client are protected.

Criminal defense lawyers and some others will grumble that this deprives them of having the money to spend, but that is no different from submitting a bill to the court at the end of a court appointment and being paid then.

June 1, 2010 Difuntorum E-mail to Sondheim, cc RRC:

I've revised the comments to Rule 1.5. I have also made some changes to the rule text in response to feedback from you, Raul, Mark and Bob Kehr. I am not sending this latest draft to the entire Commission because I believe this can await Friday's discussion. However, I have copied some of the Commission members who have been closely tracking this issue in case they have input.

The main change to the comments is Comment [6A]. The clean version is pasted below.

REVISED COMMENT [6A]:

"Prohibited Designation of Fees as Nonrefundable

[6A] Paragraph (e) prohibits the designation of a fee as nonrefundable because such fee arrangements pose a risk of confusing both lawyers and clients about a lawyer's duty to refund a fee. A statement in a fee agreement that fees paid are "nonrefundable" under any circumstance does not abrogate a lawyer's potential obligation to refund all or a portion of a fee to a client. See *Matthew v. State Bar* (1989) 49 Cal.3d 784 [[263 Cal.Rptr. 660]. Paragraph (e) does not prevent a lawyer from making an agreement for a fee which is earned upon receipt. Depending on the terms of the specific fee arrangement and other facts, a fee characterized as earned upon receipt may become the property of the lawyer upon receipt. As indicated by case law, however, a client may be entitled to refund notwithstanding the characterization of the fees paid. Paragraph (e) does not predetermine the result of a dispute over the issue of ownership of a fee or a client's claim for a refund. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act (see Bus. & Prof. Code §6200 et. seq.) Nothing in this rule is intended to prejudge the outcome of fee arbitration proceedings as this rule, like any law, must be applied to the facts of a particular matter. As a disciplinary standard, paragraph (e) narrowly prohibits the designation of a fee as nonrefundable because that characterization oversimplifies potentially complex fact bound issues that are not resolved by mere reference to the terminology used in a fee agreement."

My objective in rewriting the comment was to clarify the limited scope of the prohibition on the use of the designation "nonrefundable." I wanted to distinguish the legal issue of ownership and refund rights. In addition, I assume that concerned lawyers will read the Supreme Court's decision in *Matthew*. Your comments and edits are welcomed and appreciated. I do realize that the criminal defense commenters will object because this comment undermines the power of the magic phrase "earned on receipt" but I believe that advance fee payments presently are a trap for lawyers due to excessive reliance on the terms used in fee agreements and inadequate attention to client understanding of the fee arrangement.

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

Regarding the client protection side of the equation, I strongly recommend that you visit the Client Security Fund (CSF) page at the Bar's website where the CSF Annual Reports are archived.

(Go to: http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10486&id=1382)

At this page you can review CSF reports from 2000 to 2009 and if you look at each report you will see that the category of "unearned fees" regularly accounts for either (or in some years, both) the largest number of applications paid or the highest dollar amounts of payouts from the fund. In 2009, for example, 59.6% of applications paid were for "unearned fees" (the #1 category) and \$1,305,829.00 were paid out for "unearned fees" (the #2 category, misappropriation was #1). While I recognize that all of this misconduct may not be the result of advance fees that are unavailable for a required refund (see p. 2 of the 2009 report outlining the various types of "Dishonest Conduct" that qualify for CSF payout), some change in the law is needed to address this trend. As I stated in a prior message, if a compromise cannot be reached on Rule 1.5, then I recommend that the Commission reconsider the ABA approach of requiring all advance fees to be placed in a client trust account until earned, including fixed/flat fees consistent with the interpretation in some jurisdictions.

Attached:

RRC - 4-200 [1-5] - Rule - DFT12.3 (06-01-10)RD - Cf. to DFT11 (12-14-09).doc

June 1, 2010 Tuft E-mail to Difuntorum, cc RRC:

Two questions, Randy (even though I continue to be opposed to this rule): (1) why is revised comment [6] not limited to flat or fixed fees and (2) if a lawyer is permitted to claim that the fee belongs to the lawyer prior to earning the fee, why shouldn't the client be required to acknowledge the transfer of rights to the money in writing? It seems to me we are getting very close to a rule 1.8(a) situation. I believe lawyers will find it difficult to distinguish between agreements that result in an ownership or possessory interest in client property and this rule.

Your statistics are compelling and I agree that we should join the rest of the country in requiring advance fees be placed in a client trust account if we are unable to provide adequate client protection in rule 1.5.

June 1, 2010 Difuntorum E-mail to Tuft, cc RRC:

Good questions, here are some thoughts.

1) We could limit the ban on the designation "nonrefundable" to flat/fixed fees paid in advance but this has two downsides. First, it could feed the perception that the Commission is targeting a particular segment of the Bar for regulation. Second, the resultant public protection would be too limited since even lawyers who purport to charge "true retainers," "hybrid fees," or "evergreen deposits" can fall into a trap by overly relying on the term "nonrefundable." I know it is quite optimistic but taking "nonrefundable" out of fee agreements might help prevent a lawyer's misunderstanding of fee arrangements and avoid the *In re Fonte*, *Matthew v. SB*, and *In re Laís* outcomes.

2) Paragraph (f)(2) would require a writing for a flat fee paid in advance and this writing requirement would augment the existing statutory obligations. Still, you correctly point out that this doesn't go as far as the 1.8(a) protocol. Perhaps a cross reference to proposed Rule 1.8.1

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (6/1/2010)**

could be added to clarify that a so-called "earned on receipt" flat fee paid in advance at the outset of the lawyer-client relationship, without more, ordinarily is not an adverse interest. The public comments received indicate that "earned on receipt" fee arrangements are asserted by some lawyers as the basis of an immediate transfer of ownership and RPC 3-300 compliance apparently is not being performed by these lawyers. So the issue you raise exists now, at least to the extent that many lawyers are confused about what "earned" really means. Ideally, a proposed Rule 1.5 could alert lawyers that these issues are not as simple as they seem and also prompt better fee agreements and improved accountability in the handling of the advance fees that are received.

June 1, 2010 Julien E-mail to RRC:

I am not surprised that we have received so many comments on this rule because it appears to hit lawyers where it hurts. Somewhere we should have told them that a "nonrefundable retainer" which is refundable is, by definition, an oxymoron.

June 1, 2010 Julien E-mail to RRC:

I agree with you regarding the issue where there is any confusion where lawyers think that the rule allows a client to refuse to pay for any work the lawyer has done, should be clarified. I note that at least one commenter seems to think this so there is some confusion. Your fix seems adequate in your comment 1 on "nonrefundable retainers".

June 2, 2010 Sapiro E-mail to RRC List:

1. I am grateful to Harry, Kevin, and Randy for their "trial loge." They have done a great job of exposing drafting concerns regarding paragraphs (e) and (f).
2. Regarding Randy's proposal for paragraph (e) attached to his May 28th email, I am concerned about the use of the word "or implies." Because this is a disciplinary rule, I would prefer that it only address an express agreement. To me, what an agreement "implies" is too amorphous a concept to be a proper subject of discipline. I would delete the phrase "or implies."
3. I would change the phrase "will be non-refundable under any circumstance" to "will not be refundable under any circumstance." To me, that slight change in wording changes the emphasis and eliminates potential nuances that might make the rule ambiguous.
4. Regarding the second sentence in Randy's proposed paragraph (f)(2), I do not think we need to refer to the intent of the parties. I would delete the phrase "it is the intent of the parties that." In addition, I think the second reference to the fee agreement in the second sentence of paragraph (f)(2) is redundant. I would reword the sentence to state:

A lawyer's agreement for a flat fee, paid in advance or otherwise, may state or imply that fees paid pursuant to it are earned when paid.

5. In proposed Comment [9], I suggest that we consider the last sentence further. The wording of it implies that client confusion occurs at the time the fee agreement is made. That typically is not the mindset of a client at the time of hiring the lawyer. The question whether to terminate the lawyer-client relationship is not usually something that arises at the time the client hires the lawyer. Instead, it arises later, when there are disagreements between the lawyer and the client. Then, the client might look at the fee agreement and decides that he or she cannot end the employment of the lawyer because the money for fees has already been spent. I suggest that the “because” clause be changed:

. . . because clients who have entered into an agreement for a flat fee paid in advance may not later understand that they can terminate the lawyer-client relationship and, depending on the circumstances, might be entitled to claim a refund if they have terminated the relationship or if the lawyer has failed to perform the services required under the agreement.