

March 24, 2010

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*Deceased

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

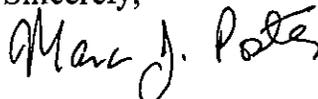
practitioners who wrongly identify a fee as nonrefundable simply do not understand the law of fees.” (Giesel, *Nonrefundable Fees: The Substance, Not the Label Matters* (May 2007) Louisville Bar Association Bar Briefs, p. 10.) Lawyers are not and should not be subject to professional discipline for inadvertence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

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Board of Legal Specialization
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March 31, 2010

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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

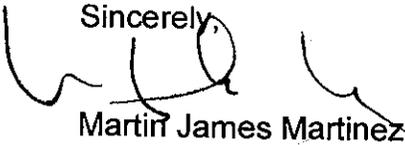
Page 4.

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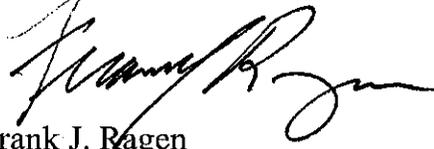
**Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e)
(4-200) (Fees for Legal Services), Abolishing Non-refundable Retainers**

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)

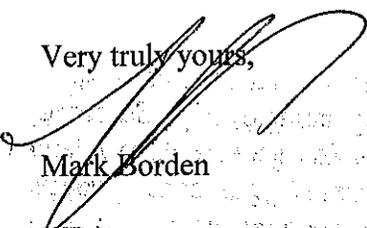
To Whom It May Concern:

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

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Aubrey Hollins
Office of Professional Competence, Planning and Development
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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)(I) 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

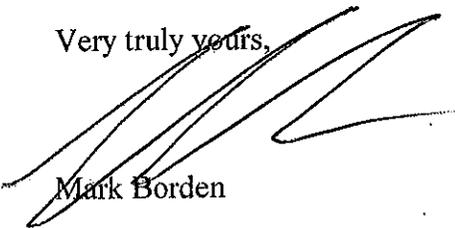
arrangement. The Board approved the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement 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
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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.

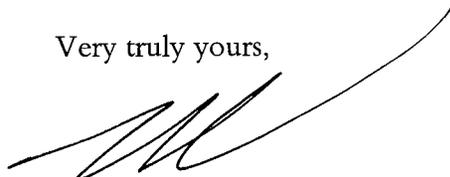
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Rex Heinke
April 2, 2010
Page 2

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 across the page.

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.

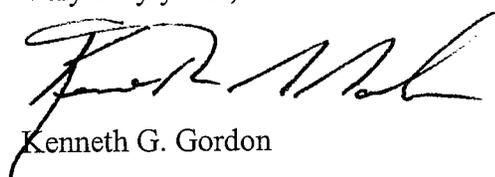
Mr. Howard Miller
April 8, 2010
Page 3

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

A COMMUNITY OF SOLE PRACTITIONERS

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April 15, 2010

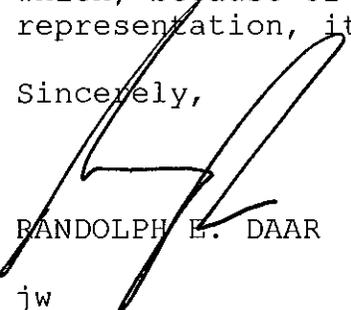
Audrey Hollins
Office of Professional Competence
The State Bar of California
180 Howard Street
San Francisco, CA 94105

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
Los Angeles, CA 90067

Re: Rule of Professional Conduct 1.5(e)

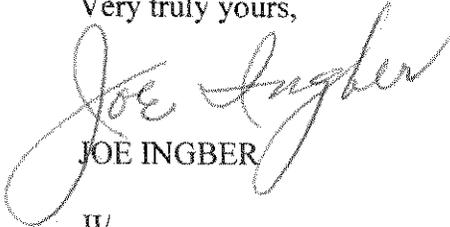
Dear Mr. Heinke:

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

J/

RICHARD A. MOSS

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PASADENA, CALIFORNIA 91101

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RICHARD A. MOSS
WILLIAM C. FLEMING, JR.
JERRY B. MARSHAK

MARK T. ROOHEK
OF COUNSEL

April 22, 2010

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 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.

CRIMINAL DEFENSE LAWYERS CLUB OF SAN DIEGO



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April 29, 2010

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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

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CRIMINAL DEFENSE LAWYERS CLUB OF SAN DIEGO

State Bar President
April 29, 2010
Page 2 of 2



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,

A handwritten signature in black ink, appearing to read "Rebecca P. Jones". The signature is fluid and cursive, with a large loop at the end.

REBECCA P. JONES
President
Criminal Defense Lawyers Club

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

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STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

April 29, 2010

Rex Heinke
Vice President - State Bar of California
Akiin Gump Strauss Hauer & Feld LLP
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



Barry Tarlow

BT/sew

Enclosure

cc: Audrey Hollins

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April 29, 2010

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2029 Century Park East, Suite 2400
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.

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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

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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

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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
Partner
Arguedas, Cassman & Headley, LLP

cc:

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May 6, 2010

Ms. Audrey Hollins
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180 Howard Street
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Re:	TITLE
RULE	
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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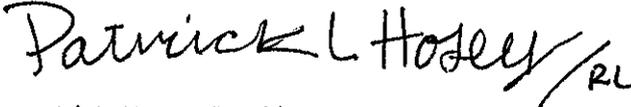
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 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,
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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.

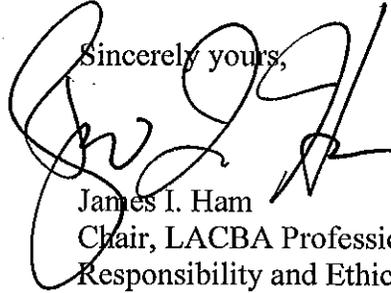
For the above reasons, PREC believes that the Rule needs to be substantially revised, without the controversial provisions in the present draft of (e)(2).

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.

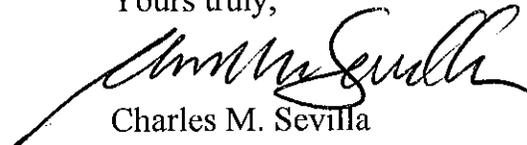
discipline. The test is whether the fee is "so exorbitant and wholly disproportionate to the services performed as to shock the conscience." (Herrscher v. State Bar (1935) 4 Cal.2d 399, 401-402 [29 P.2d 832], quoting from Goldstone v. State Bar (1931) 214 Cal. 490, 498 [6 P.2d 513, 80 A.L.R. 701].) In 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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May 12, 2010

Audrey Hollins
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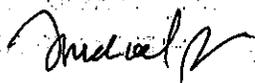
Dear Ms. Hollins:

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.

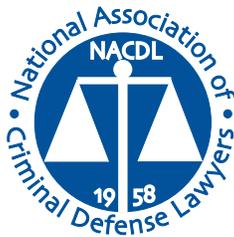
The point I want to emphasize is that many clients prefer to have a "flat fee" arrangement. Unless a client is extremely wealthy, a client is concerned about the cost of legal services and often does not want to enter into an agreement where the amount is indefinite. And while there may be attorneys 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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Executive Director
Norman L. Reimer Washington, DC

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

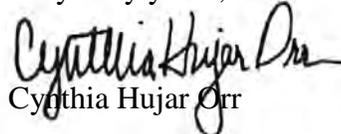
to safeguard clients from excessive charges where a client chooses to discharge counsel, or other unforeseen circumstances arise such as the death of a client or counsel prior to the conclusion of a matter.

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.

CACJ California Attorneys for Criminal Justice

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May 25, 2010

Howard B. Miller
State Bar President
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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 & Development
180 Howard Street
San Francisco, California 94105

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

Dear Mr. Miller,

As the current President of California Attorneys for Criminal Justice (hereafter "CACJ"), I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors. There are many features about the proposal that raise strong concerns for our membership, some of which I highlight herein.

California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. It is administered by a Board of Directors and its bylaws state a series of specific purposes, including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 2,000 criminal defense lawyers working in both the private and public sector from around the State of California and elsewhere, as well as members of affiliated professions. For over 36 years, CACJ has appeared before numerous courts including the United States Supreme Court as *amicus curiae* on matters of importance to the administration of justice, to our members and to our clients. We write in this capacity to urge the proposed amendment be rejected as unnecessary; essentially interfering with the ability of lawyer and client to contract in a way that benefits the client.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

CACJ California Attorneys for Criminal Justice

Re: Opposition to Proposed New Rule of Professional Conduct,
Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers
Page 2

We are unclear why the Board is now considering a ban on non-refundable fee agreements. As I understand it, there have not been a substantial number of complaints from consumers/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.

As with all fees and fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the 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). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.

As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether 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 by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.

Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and is not practical. Since the proposal would require the "flat fee" to cover contingencies (e.g., trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially 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 and represent the "gold standard" for California lawyers.¹

We also think the proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged

¹ In her article in the California Bar Journal, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee forms:

"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 Agreement", California Bar Journal (February 2010)

CACJ California Attorneys for Criminal Justice

Re: Opposition to Proposed New Rule of Professional Conduct,
Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers
Page 3

at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, s/he will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or cuts short the life of the case, the Proposal encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee", which, under this Proposal would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.

For these and other reasons, CACJ urges the State Bar Board of Governors to reject the proposed amendment (Rule 1.5(e)(4-200). Thank you for your consideration of this letter.

Very truly yours,



ANN C. MOORMAN, President
CACJ Board of Governors

cc:

Richard A. Rubin
State Bar Vice President
Richard A. Rubin Associates
7 Jackson Street
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ANN C. MOORMAN
OF COUNSEL

May 28, 2010

Audrey Hollins
Office of Professional Competence,
Planning and Development
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 Nonrefundable
Retainers**

Dear Ms. Hollins:

I am writing to respectfully express my opposition to proposed new rule of professional conduct, Rule 1.5(e)(4-200)(Fees for Legal Services). This provision expressly abolishes nonrefundable fees subject to two rather narrowly defined exceptions. Having practiced law in California for approximately forty years, I believe that the nonrefundable fee is a justifiable arrangement to accommodate the appropriate needs of attorneys and clients in a wide variety of settings. The propriety of such arrangements, arrived at by informed attorneys and prospective clients, has long been recognized by the State Bar. Since the 19th Century, thousands of California lawyers have used some form of nonrefundable retainer (falling outside the limited exceptions embodied in the present proposal), without any demonstrated pattern of abuse or misconduct.

Members of the Bar practicing in many fields, including bankruptcy, immigration, family law, criminal law, tax law and SEC law, as well as many lawyers practicing in the fields of entertainment and real estate law, have long utilized nonrefundable fee agreements. Such arrangements are often beneficial to both attorney and client, and are less subject to abuse and over-charging than hourly fee arrangements. A flat fee arrangement under which the fee becomes immediately the property of the lawyer takes into account the legitimate needs of both parties to the agreement and promotes a measure of predictability to the client's fee expectations. Hourly fee arrangements, whether or not billed against substantial retainers, can expose the client to practically unlimited fees based on legal work that cannot be accurately anticipated when the agreement is entered into. Anyone who has seen billing statements by large law firms, embracing all tasks performed by members of the firm, associates, paralegals and clerical personnel, can attest to this fact. By entering into a flat, nonrefundable fee arrangement,

attorney and client agree upon a fee they deem appropriate at the inception of the litigation. They recognize that it may transpire that the work ultimately performed by the attorney would justify a much higher fee, or for that matter, a lower fee, if measured on an hourly basis. But they have reached an agreement that provides a measure of certainty to each party to the agreement. Given a choice between an hourly fee, and a carefully written flat or nonrefundable fee, many clients will choose the latter. In my experience, such an agreement has rarely if ever led to serious disagreements later on.

In crafting the proposed rule change, the Special Commission for the Rules of Professional Conduct has not given adequate consideration to the historic viability of nonrefundable fee arrangements, and has instead concluded that such arrangements should be prohibited, except under express conditions. This position was taken by the Commission without notifying the membership of the State Bar or the lawyers and Bar Associations who opposed the earlier 2008 version of this draft rule. It is regrettable that the Board of Governors adopted this 2009 proposal without input from those members or groups. All ethical lawyers would agree that unconscionable fees should be prohibited, and they are prohibited by a number of standing rules. Thus, lawyers are prohibited from charging excessive fees (Rule 1.5(a)) and are required to refund unearned fees upon withdrawal from representation (Rule 1.16). These prohibitions against unconscionable and excessive fees clearly apply to nonrefundable fees; they dictate that under a nonrefundable retainer agreement, if a lawyer does little or no work, the client is entitled to a refund.

With these recognized and effective protections in place, there is no reason to adopt a new rule essentially barring nonrefundable retainers. I am aware of no identifiable pattern of abuse by California lawyers resulting from the current rules, which mandates this sweeping change. Without supporting evidence the Commission, in recommending adoption of this rule, asserts that “charging a nonrefundable fee is inimical to California’s strong policy of client protection . . .” the Commission fails utterly to demonstrate that clients need protection from a pattern of misconduct by State Bar members involving nonrefundable retainers. The proposed change constitutes an unwarranted interference with freedom of clients and lawyers to make informed decisions regarding the terms of legal representation.

The exceptions to the abolition of nonrefundable retainers embodied in Rule 1.5(e) do not adequately address the problems that would be created by such a prohibition. Sub-division (1) of Rule 1.5(e) provides that a lawyer may charge what is referred to as a “true retainer” paid by the client to insure the lawyer’s availability during a specified period or on a specified matter. This subsection provides, however, that any such “true retainer” be “in addition to and apart from any compensation for legal services performed.” This is highly problematic because it would, by its terms, prohibit lawyers and clients from agreeing that a retainer to secure the lawyer’s availability may also be used, in whole or in part, to compensate the lawyer for work actually performed. There would appear to be nothing wrong with such an arrangement, but under sub-division (1), it would disqualify the client’s payment as a “true retainer” meaning that the funds paid are not, after all, the lawyer’s property on receipt.

Similarly, the second exception to the proposed outlawing of nonrefundable fees is rife with problems. At the outset, sub-division (2) appears to affirm that a lawyer may charge a "flat fee" for specified services and that, if the parties agree, the flat fee becomes the lawyer's property on receipt. This is a fair statement of a nonrefundable fee agreement, and the first four requirements, expressed in small Roman numerals, for such an agreement should not be controversial. However, requirement (v) completely undermines the validity of the agreement by providing 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." It seems obvious that if any portion of a "nonrefundable" fee may be refundable, then the entire fee cannot be the lawyer's property. Lawyers pay income taxes on nonrefundable fees and, under this paragraph, they may have to do so even though the fee may be refundable.

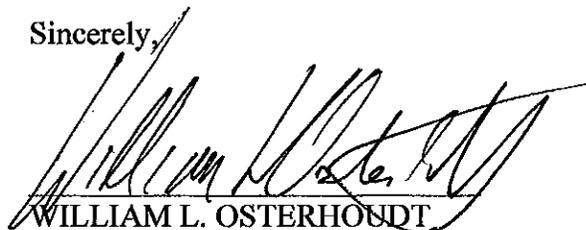
If the Commission is concerned about the unscrupulous lawyer who seeks to retain a substantial fee after doing little or no work, or after being discharged immediately, there are ample protections in place to discourage and prohibit such misconduct. It is neither fair nor logical to seek to address this hopefully rare "problem" by providing that nonrefundable fees may be refundable after all. This provision will invite needless disputes and even litigation about the circumstances under which a "nonrefundable" fee must be refunded in part. In this connection Comment [5] to the proposed rule change is particularly problematic because it provides that "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 will be required, unless the situation is adequately explained to the client." The rule provides no guidance as to what this means. As a practical matter it is often impossible, in any complex civil or criminal case, for the practitioner to know what services "probably will be required" at the outset of the representation. In the criminal context the lawyer will normally not receive discovery from the prosecution until he or she has entered an appearance in the case and will thus not know, much less be in a position to "adequately explain" the services that will "probably" be required. Therefore the parties not infrequently agree on a nonrefundable retainer earned when received in conjunction with other provisions including but not limited to hourly fees to accommodate representation at possible future stages of the litigation.

The problem with the proposed rule, as augmented by comment (v), is that it would require the lawyer to anticipate all of these stages and arguably, to embrace them within his or her agreement. I believe that this provision could lead to Bar complaints and litigation that, in the absence of real problem, should be discouraged and avoided. The meaning of "foreseeable that more extensive services will be required" and "adequately explained to the client" in comment (v) are the stuff of which administrative complaints and civil litigation are made. In practice this provision, while appearing to preserve the parties right to enter into nonrefundable fee arrangements, completely undermines this right. In the end, the present system is not broken so as to require the fix embodied in the proposed rule change. I respectfully urge that the proposal be rejected,

or at a minimum, that it be withdrawn pending a full opportunity for members of the Bar and various affected Bar Associations to comment.

Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "William L. Osterhoudt". The signature is written in a cursive style with some loops and flourishes. It is positioned above a horizontal line.

WILLIAM L. OSTERHOUDT

IMHOFF & 
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June 3, 2010

Rex Heinke, Esq.
Akin Gump Strauss Hauck & Feld LLP
2029 Century Park E, #2400
Los Angeles, CA 90067

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear Mr. Heinke:

I am writing to voice my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). By way of background, my areas of practice is criminal defense.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) 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:
-
- (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/ProposedRulesB1B6.pdf> (at p. 10)

My concerns about this proposed new rule include the following:

1 It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);

2 It is internally inconsistent and confusing (the fee is the "lawyer's property on receipt," but the client is told s/he/it "may be entitled to a refund" under certain circumstances);

3 It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace;

4 It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed";

5 It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged;

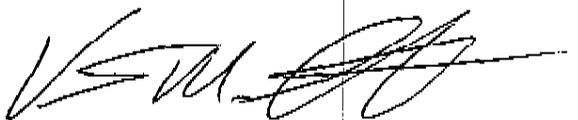
6 It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule; and

7 It was submitted to the State Bar Board of Governors for preliminary approval without the *prior* public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.

Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.

Thank you for considering my views.

Very truly yours,



Vince Imhoff
Managing Director

IMHOFF & 
ASSOCIATES, PC
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Tel: (800) 887-0000 • Fax: (310) 315-1152
www.criminalattorney.com

June 3, 2010

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

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear Ms. Hollins:

I am writing to voice my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). By way of background, my areas of practice is criminal defense.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) 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:

-
- (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.

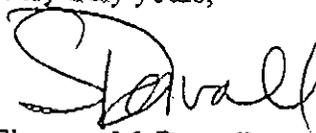
See: <http://www.calbar.ca.gov/calbar/pdfs/ethics/RPC/ProposedRulesB1B6.pdf> (at p. 10)

My concerns about this proposed new rule include the following:

1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);
2. It is internally inconsistent and confusing (the fee is the "lawyer's property on receipt," but the client is told s/he/it "may be entitled to a refund" under certain circumstances);
3. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace;
4. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed";
5. It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged;
6. It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule; and
7. It was submitted to the State Bar Board of Governors for preliminary approval without the *prior* public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.

Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis. Thank you for considering my views.

Very truly yours,



Shannon M. Dorvall

LAW OFFICES OF
THOMAS S. WORTHINGTON

OF COUNSEL:
CHESTER J. PHILLIPS, JR.
(831) 772-9747

THE STATE BAR OF CALIFORNIA, BOARD OF LEGAL SPECIALIZATION
CERTIFIED SPECIALIST - CRIMINAL LAW
(831) 758-1688

OF COUNSEL:
CAROLYN KEEBLEY
ANDREW G. LIU
(831) 755-0460

June 4, 2010

Lowell T. Carruth
McCormick Barstow et al LLP
P.O. Box 28912
Los Angeles, CA 90007
Via Email: carruth@mccormickbarstow.com

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105
Via Facsimile: (415) 538-2171

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

Re: Opposition to Proposed Rule 1.5(e)(4-200)

Dear Mr. Carruth, Ms. Hollins, and Mr. Miller:

Our office opposes the proposed new rule of professional conduct, which would, for all practical purposes, abolish non-refundable retainers.

We are a small law firm consisting of five lawyers, all independent contractors. Our practice is limited almost exclusively to criminal defense and bankruptcy.¹

I have personally practiced criminal law for nearly 40 years. Three other attorneys in the firm are also very experienced lawyers, and the fifth started in December 2009, immediately after passing the Bar exam. Our practice covers Monterey County and, to some extent, Santa Cruz, San Benito, and Southern Santa Clara Counties. This geographic area is almost entirely rural and "small town." We rarely have any big

¹ With regard to the bankruptcy portion of our practice, we must of course comply with the rules and regulations established by the United States District Court. Therefore, our fee arrangements in those cases are not relevant to this letter.

corporate clients. Our success is based on hard work and the personal service and attention we can devote to our client's cases.

Even after 40 years of practice, I still take calls in the middle of the night and on weekends. We receive desperate calls from bewildered parents whose children have been in a terrible accident where someone was killed, or who have been charged with the most serious crimes on the books. Spouses call to say that after decades of marriage and neither having been in any trouble in the past, a terrible charge has been levied against one or the other. Or, accused person calls directly from the jail or shortly after being released on bail, completely bewildered and having no idea what they should do to protect their constitutional rights.

When we receive those calls, every lawyer and member of the staff in our office swings into action. The number of tasks competing for *immediate* attention are innumerable—

- visiting the client to get him or her settled down and to make sure the client makes no further statements to law enforcement
- assure that there is no witness tampering or hiding evidence
- exercise of Fourth and Fifth Amendment privileges
- advice regarding cooperation when law enforcement appear with search warrants and arrest warrants
- immediate contact with investigators, psychologists, psychiatrists, accident reconstruction experts, and other professionals to collect and preserve evidence before it deteriorates or is lost
- preparation of good character letters and bail motions.

All of these activities cause the time and expenditures in criminal cases to be "frontloaded." Untold hours are often spent in the first few days after retainer, and yet to the untrained eye, it may appear that little has been accomplished. In the practice of criminal law, a "true retainer" to assure the availability of the lawyer to perform these kinds of tasks on an emergency basis is uniquely required.

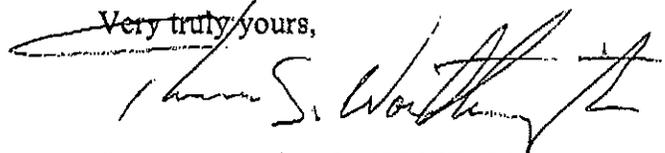
But perhaps the most important reason that a "true retainer" should be allowed in criminal cases is that, often, the reputation of the law firm is critical to the outcome of the case. In addition to the tasks mentioned above, immediate contact with the law enforcement agency and District Attorney's office is essential. Negotiation with the District Attorney at an early stage is often critical. A demonstration of cooperation can lead to the filing of lesser charges and an opportunity for the client to make bail. Sometimes the best advice we can give the client is an early admission of guilt, which is given great weight by the courts in deciding on the ultimate disposition. And yet, the more effective our negotiations with the District Attorney at this early stage of the proceedings, the more likely it is that a good result will be accomplished without the expenditure of the kind of time that would be involved if the case is left to languish in the congested criminal justice system.

Thus, it is our reputation, knowing what to do, and hard work at the beginning of a case that often gets the client the best results. And that sometimes happens without the expenditure of enough hours to justify the retainer if the "reasonableness" of that retainer is always measured by the hours expended.

On the other hand, when cases become enmeshed in the criminal justice system, continued time after time after time, set and reset for trial, the initial retainer is frequently burned up before the case is resolved. We all know what happens in a criminal case if the lawyer tries to withdraw because the client ran out of money. "Denied, counsel." Rightfully so. Even if this were not a legal reality—even if the lawyer *could* find other valid grounds to withdraw—the reality in a small town atmosphere is that the lawyer simply cannot do that.

Thus, for a small practice to be financially viable, we must balance our caseload. Some cases resolve quickly, partly because of our excellent reputation. Others take forever no matter what we try to do. It is the cases that resolve quickly that give our firm the financial ability to represent clients who cannot manage the fees and costs involved when their cases drag on forever.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas S. Worthington". The signature is fluid and cursive, with a long horizontal stroke at the end.

THOMAS S. WORTHINGTON

TSW/bc

MICHAEL E. HANSEN
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MHANSEN@CRIMINAL-DEFENSES.COM

June 3, 2010

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

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear State Bar Leaders and Representatives:

I am writing to voice my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). By way of background my practice is solely comprised of representing criminal defendants in Federal and State trial courts.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) 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:

(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/ProposedRulesB1B6.pdf> (at p. 10)

My concerns about this proposed new rule include the following:

1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);
2. It is internally inconsistent and confusing (the fee is the "lawyer's property on receipt," but the client is told s/he/it "may be entitled to a refund" under certain circumstances);
3. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace;
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7. It was submitted to the State Bar Board of Governors for preliminary approval without the *prior* public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.

Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.

Thank you for considering my views.

Very truly yours,

A handwritten signature in black ink, appearing to be 'MEH', with a long horizontal line extending to the right.

Michael E. Hansen

LEROY DAVIES
Attorney at Law
State Bar No. 123556
341 "H" Street
Crescent City, CA 95531

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Ldavies@ladslaw.com

Fax (707) 465-6534

June 3, 2010

Audrey Hollins,
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105
audrey.hollins@calbar.ca.gov

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear State Bar Leaders and Representatives:

I am writing to voice my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). By way of background I have more than a decade in criminal defense, during my 25 years as a member of the bar. I also practice in the areas of guardianships, conservatorships, dissolution of marriage, child support and spousal support.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) 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:

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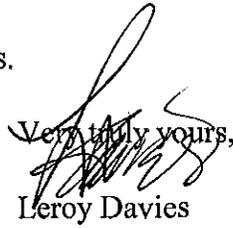
to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

My concerns about this proposed new rule include the following:

1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);
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7. It was submitted to the State Bar Board of Governors for preliminary approval without the *prior* public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.

Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.

Thank you for considering my views.


Very truly yours,
Leroy Davies

June 4, 2010

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

Bradley T. Paulsen
4945 Pinnacle St.
Riverside, CA 92509
(707) 673-6982

ATTN: Audrey Hollins

**RE: Public Comment on Rules of Professional Conduct of the State Bar
State Bar Assigned Commission & Board of Governors Proposed Draft**

Dear Ms. Hollins, Commission, and Board of Governors:

First, I would like to thank the California State Bar, Commission, and Board of Governors for proposing a comprehensive public comment program pertaining to the Rules of Professional Conduct. The State Bar is one of the most powerful, if not the most powerful, governing boards in the State of California. Everything in the State is affected by the performance, discipline, integrity, interpretation of law, and ethical values of attorneys. I appreciate your attention to my comments regarding my public comment on some of the proposed rules as noted below.

I would like to give some of the reasons why I am so passionate about the State Bar's request for public comment.

I have worked in the construction industry since 1973 and have experienced many excellent attorney performances, but what compelled me to write this public comment are the atrocities some attorney groups are imposing on everyone in the State of California. I can only speak for the areas of law that have involved and impacted me; therefore, I am reviewing the proposed new and amended rules based on the needs for discipline or procedures from this point of view. I implore that you scrutinize these areas of concern considering my front line experience with the issues.

Please note that my letter/public review demonstrates there is no rational or legal point of view for an attorney to solicit the public with flyers, door to door, mail or phone, except for their own monetary gain. The attorneys confuse the consumer (homeowner) by not candidly

disclosing many of the issues that will directly affect him/her and the value of his/her home, for years to come (see attached copy of flyers).

I also refer to the Senate Bill SB 800 and the Civil Code in the bill. Currently, there are soliciting attorneys targeting the neighborhoods throughout the State of California with misleading flyers and information targeting the builders in the State of California. **It is like the Wild West, where there is no sheriff in town to uphold the law and the soliciting attorney groups are taking over for profit with blatant disrespect for administration of civil justice.** Under Title 7 (Civil Code §907) (a) refers to an SB 800 Claim document having the same force and affect as a notice of commencement of a legal proceeding. The problem is that the regulations and procedures are not being enforced by the judicial system. An SB 800 Claim is not a legal action, yet the judicial system is not governing the soliciting attorneys appropriately to ensure the public or the builders are protected from their manipulation of the laws, instead the system is allowing these groups to proceed with no regard to the procedures that were previously laid out. In this **NO Law Zone**, costs are born by all parties, except the Soliciting Attorney Groups. **You can see why so many of the builders, subcontractors, insurance companies and unknowing families need the State Bar of California's help in this matter.**

Examples: The Soliciting Attorney Groups do not notify the homeowners that they will have to disclose their home to future buyers, lenders, and insurance companies, that their home is involved in an SB 800 Claim or lawsuit for what the attorney groups' claim are construction defects. The Soliciting Attorney Groups fail to disclose that the builder is willing to take care of their warranty items as outlined in their contract and the SB 800 process. The SB 800 laws listed under Chapter 2: Actionable Defects (Civil Code Section 896) and (Civil Code §910), Homeowners Notice of Claim of violation of functionality standards make "Functionality Standards" the basis for a cause of action dealing with the construction of a home brought by the homeowner. This would only apply if the builder is aware of the request and/or failing to comply. The SB 800 Senate Bill laws are entitled "The Right To Repair Law or Fix It Law".

All builders take a tremendous pride in the communities/homes they build and their warranties they provide. Civil Code §900 – Fit & Finish One –Year Warranty is not one of the 45 "Functionality Standards", and is not a basis for any action seeking recovery of damages arising out of, or related to, deficiencies. The Soliciting Attorney Groups solicit and create SB 800 Claims, whereby they submit "Fit & Finish" items, manufacturer warranty items, lack of maintenance items, and occupant abuse items as the complete or majority of the claim items submitted. In many cases, they do not even view the items, but rather submit a pre-printed list of items to start their claim. **It is common to hear homeowners, in a filed action, state they are not aware of being involved in an SB 800 Claim or**

lawsuit. If they are not aware of the claim, how did their name end up in the filing? Some of the homeowners state that they only sent back a questionnaire. Others were so perplexed, that they requested documentation proving they are listed in the claim or lawsuit. Per the Daily Journal article dated May 26, 2010, ***“Some of our clients’ homeowners are being added to suits without even being aware of it,”*** said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper’s building industry and risk management practice group. ***“I can’t tell you the number of times I’ve seen a defect claim that says ‘defective stucco’, and the house doesn’t even have stucco”.***

The Soliciting Attorney Groups are not keeping current with the claims they file. Opposing council must demand that homes be dismissed that have been foreclosed on or a change in ownership. The Soliciting Attorney Groups are only interested in the quantity of homes and the end result settlement opportunity. Many of the Soliciting Attorney Groups are not familiar with a Builder being involved with the community that they have targeted, so they aggressively go to the Claimants/Litigants to tell them not to communicate or follow the warranty procedures that have been agreed to in the purchase agreement with the Builder, even if the builder is ready to service the home. **This is a form of highway robbery for a Soliciting Attorney Group to instruct a homeowner to not follow his/her contract with the Builder.**

Per Civil Code §910, Homeowner’s Notice of Claim of Violation of Functionality Standards Section 910 states that; **Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following pre-litigation procedures:**

- (a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant’s claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant’s name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder, and shall describe the claim in reasonable detail sufficient to the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and affect as a notice of commencement of legal proceedings.**
- (b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated documents;**

and, if a homeowner seeks to do so, that request shall not satisfy the notice requirements of this section.

In reference to Section 910, the Soliciting Attorney Groups are instructing homeowners to not communicate with the builder or allow them to service warranty items requested. **This is in direct violation of Civil Code §910 (b).** The Soliciting Attorney Groups lure the individuals in by stating to the homeowner they will get a check. These deceiving tactics are blatantly noted in the solicitation flyers without any acknowledgement from the courts or California State Bar. The Soliciting Attorney Groups fly under the radar so that is one reason why this Public Comment is so desperately needed and appreciated.

The main issues retrieved from the information noted above and in this Public Comment are to assist in amending the Rules of Professional Conduct and find a way to enforce the Rules of Professional Conduct of the State Bar of California, especially pertaining to disregard to following Civil Code, twisting the Law/Civil Code, extrapolation tactics and direct misconduct pertaining to ethics. This occurs in the Soliciting Attorney Groups' programs. **Soliciting should be banned.** **There should be random reviews of attorney claim/case performance to ensure attorneys are complying with the law and the Rules of Professional Conduct.** This problem has created extreme costs and red tape, which may affect you, your children, grandchildren, and the citizens of the State of California, if it has not already done so.

I appreciate the hard work and dedication of the California State Bar, the Commission, Board of Governors, and the Supreme Court, especially with the limited funds in the State budget. If no action is taken to avert this continued blatant disregard for public concern, the State budget will become even further in debt. The above noted tactics have begun to impact many California families financially such that they have moved from California in order to survive the financial burdens imposed upon them by the frivolous spending of tax dollars for attorney fees. In addition, many businesses have chosen to relocate out of state and new ones refuse to start a business in California due to the litigious environment. We need these tax dollars and job creation in order to get California back on track. Do not scare these businesses away.

The State Bar of California must help its citizens. You are the only entity that can make a change.

Rule 1.0 Purpose and Scope of the Rules of Professional Conduct

Rule 1.0 (a) (1) & (2) to Protect the public and protect the interest of clients. *The Soliciting Attorney Groups noted above are not disclosing issues that will affect the public, but rather adversely affect the client.*

Some issues per ConAm Economic Research Study from November 11, 1996 that will directly affect the public and clients are as follows:

Litigation/Claims increase the cost of housing. *Why is California's housing market so expensive?*

Litigation/Claims cause insurance to go up.

Litigation/Claims force builders to raise their prices.

Litigation/Claims burden the judicial system and expend judicial resources.

Litigation/Claims reduce competition in the marketplace as smaller builders are forced out of business. *If small builders cannot afford to build in California, they will bypass California for their business ventures.*

Note, the California State Contractor's License Board posts quarterly the names of contractors that are disciplined or have had their license revoked or suspended. There should be a public listing for attorney conduct and discipline matters. The public needs to stay involved with the State Bar process and proceedings, etc.

Rule 1.0 (a) (4) To promote respect for, and confidence in, the legal profession.

As noted above, the Soliciting Attorney Groups do not promote respect, but set the stage for their monetary gain by enticing the homeowner with a check of unknown amount. Since the homeowner's homes are warranted and builders honor their warranties, the Soliciting Attorney Groups use the homeowner and their home with the upfront propaganda and unproven solicited flyers/statements as a pawn to confuse and add the homeowner to the Claimant lists.

Rule 1.0 (b) (2) A willful violation of these Rules is a basis for discipline.

See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Again, Senate Bill SB 800 gives the builder the right to repair, but the homeowner needs to let the builder know if they have a problem. The builders do respond when given the chance or opportunity.

Question: How is the Board of Governors summoned or requested to review and/or discipline members as provided by law? The general public very rarely reads or hears of discipline issues for attorneys. From what I see, all attorney groups refrain from notifying the California State Bar when they see violations taking place, as to not draw the Bars' attention to them. This is used to the benefit of the Soliciting Attorney Groups. As I will say over and over again, the opportunity for Public Comment is so important.

Rule 1.1 Competence

Rule 1.1 (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

The Soliciting Attorney Groups repeatedly and knowingly fail to follow the Civil Code §910 and other areas as outlined above in this public comment. They are reckless in their actions, since they have not been disciplined and only intend on driving up the costs for the builders to settle, in lieu of, going to court. Some mediators and arbitrators do not take into account the attorneys willful failure to follow Civil Code and Ethics. The State Bar is not involved, so it goes on.

Rule 1.4 Communication

Rule 1.4 (a) (2) reasonably consult with the client about the means by which to accomplish the clients objectives in the representation.

As explained above, many homeowners do not even realize they are involved in a Claim/Lawsuit, nor do they know why. The soliciting attorney supplies the propaganda literature that certain problems are prevalent in the community without even investigating or observing the home first for the sole purpose of making a monetary settlement for the attorney group. The Soliciting Attorney Groups leave the homeowners wondering if they really do have a problem, then they tell the homeowners not to talk with their builder, because the builder will take care of warranty items for their customers. This is not accomplishing the clients' objectives, because they don't know what the objectives are. In many cases, the client only assumes that they may receive a settlement check. The Soliciting Attorney Groups use this tactic to enlist the client and gain his/her attention.

Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Soliciting Attorney Groups only follow the course of a witch hunt to find a construction defect to build their settlement demand and do not inform the homeowners that the builder will take care of any warranty deficiencies. The builder will perform the work, in most cases, immediately; while the Soliciting Attorney Group takes months and sometimes years to settle, leaving little or no work being performed to the home. The homeowner may receive a small settlement check years after the fact, which by this time, if something was in need of repair would most certainly have deteriorated or escalated to further repair necessary. These tactics are disgusting and gives the complete legal profession a negative reputation.

Rule 1.5 Fees For Legal Services

Rule 1.5 (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.

In reviewing court records on open and closed cases/SB 800 Claims, you will notice the amounts of money the Soliciting Attorney Groups are demanding. These demands by the Soliciting Attorney Groups PROVE that they are acting in an unconscionable manner. You will notice they use the rule to "aim high and then settle for as much as you can get", instead of representing a client on a legitimate claim (Functionality Standard) request by the client, using realistic numbers for cost, etc.

Rule 1.5 (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.

When a Soliciting Attorney Group settles a lawsuit or SB 800 Claim for a client without discussing or considering the costs the client will incur from being in a construction defect lawsuit/claim in which the client has to disclose his/her home as defective and possibly affecting the home warranty, the client will not gain. Again, in most cases, no repairs to the home are performed and the settlement will not usually even cover the proposed defects.

Rule 1.7 Conflict of Interest: Current Clients

Rule 1.7 (a) (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The Soliciting Attorney Groups serve the SB 800 Claims and lawsuits for their personal interest of monetary gain through the settlement of the numbers of homes that they can claim to have defects. The use of extrapolation is rampant and the actual concerns or needs of the individual client are foregone. As noted earlier, many clients have stated they did not even know of the SB 800 Claim or lawsuit, so their interest is not taken into consideration. Many homeowners have personally told me that they had an item they wanted serviced which was not even listed. The reason for this is that the Soliciting Attorney Groups are only concerned with the quantity of claimants they can name in the filing. As you are fully aware, the money is in the numbers. In some cases, they do an inspection on a few homes and may not even discover any issues with the home, yet they still list the owner as a Claimant. As you are aware, the SB 800 process is the "Right To Repair", but the same attorney groups tell the homeowners not to talk to the builders or let them do any work.

Rule 1.7 (b) (4) Each affected client gives informed written consent.

As noted previously, many clients are unaware they are involved in a SB 800 Claim or lawsuit, or even know what it is about. Some have only sent in the survey as requested by

the Soliciting Attorney Groups. See attached Soliciting Attorney Group "Homeowner Profile Sheet". Through this deception, the homeowner is added to a SB 800 Claim or lawsuit.

Rule 1.8.6 Payments Not From Client

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) The client gives informed written consent at or before the time the lawyer has entered in the agreement for, charge, or accepted compensation from on other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

Comment (noted in the proposed new or amended rules)

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client, except where the lawyer also represents the payer in the same matter.

I personally experienced a Soliciting Attorney Groups' client who was involved in a construction defect mass action lawsuit who had a severe mold problem in the home from a slow leak at the ceiling. The client was a single mother with two small children who worked as a nurse. The builder learned of the mold (severe mold covering 100 to 200 sq ft) and told the homeowner they would service/repair the mold and leak item. The builder offered to have the crew there within a day to get started and would put the mother and children in a hotel during the repairs. The Soliciting Attorney Group, an extremely aggressive firm, told the homeowner not to talk with the builder or allow them to service the home. The minimum range of builder's repair cost for this severe mold and leak would be in the neighborhood of \$10,000.00 to correct. I was told by a homeowner in the neighborhood that the case settled for approximately \$500.00 per home to the homeowners. This single mom was left with a defective home, potential health hazard, no builder warranty, and no recourse. The system failed this family by allowing Soliciting Attorney Groups to solicit this homeowner into a mass action lawsuit and then allowing the Soliciting Attorney Groups to deceive the homeowner with a small settlement amount. The catalyst for the claim was the fees the Soliciting Attorney Group stood to gain.

Again, random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 Claims.

I hope this public comment, along with all other public comments, will benefit and assist the State Bar of California with the amendments of the Rules of Professional Conduct. Please feel free to contact me if you have any questions, etc. I am extremely passionate about the failure of the system to protect the public.

Thank you for your time in these important matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Bradley T. Paulsen", written over a horizontal line.

Bradley T. Paulsen
Concerned Citizen

/encl

MAK

www.maklawyers.com

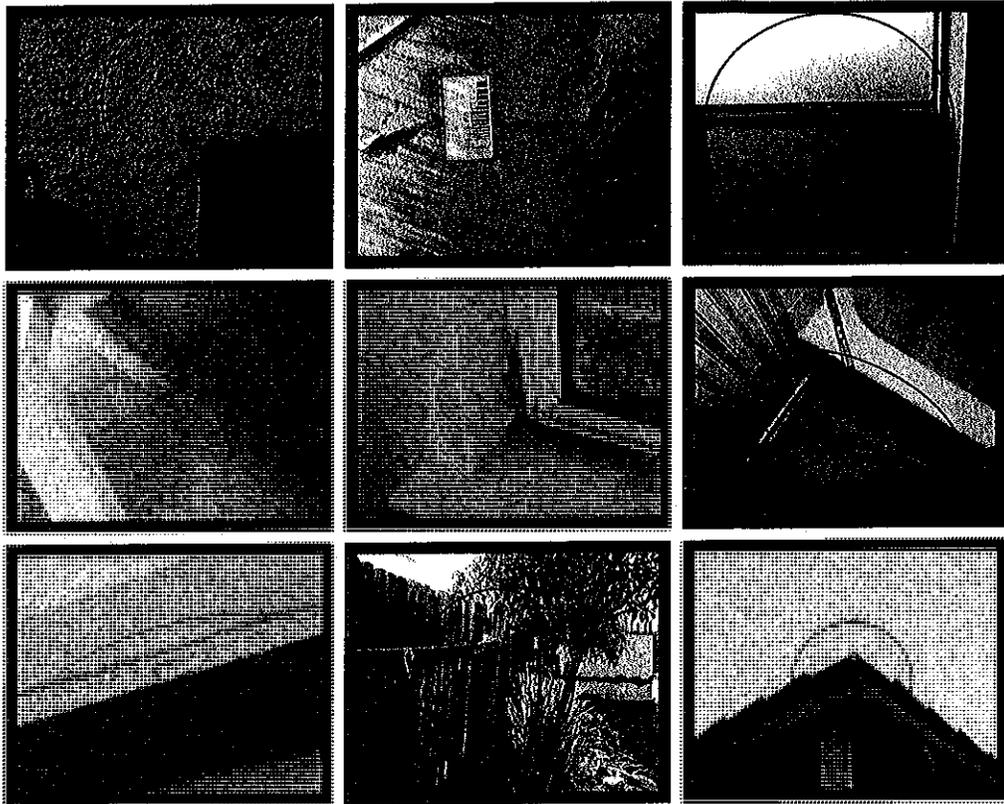
MILSTEIN, ADELMAN &
KREGER, LLP

NEWSLETTER

NUMEROUS

HOMEOWNERS IN YOUR CORONA COMMUNITY HAVE FILED A LAWSUIT AGAINST THE BUILDER FOR CONSTRUCTION DEFECTS! YOU CAN STILL JOIN TOO!

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm



THE ABOVE PICTURES ARE A RANDOM SAMPLE OF VISUAL INSPECTION PHOTOGRAPHS TAKEN BY OUR EXPERTS FROM SIMILAR COMMUNITIES.

of Milstein, Adelman & Kreger, LLP, in Santa Monica and San Francisco. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California, including Riverside County. The attorneys have agreed to advance all costs of the litigation; **therefore there are no out-of-pocket costs to the homeowners.** **Original ownership is not required to participate.** Each home will be **inspected individually.** Enclosed is a profile sheet for your completion. Whether or not you choose to participate in the litigation, the information you

provide will be helpful to your community and their efforts in this action. For additional information, fill out and return the postage-paid reply card enclosed or contact:

Anneke Stewart, Esq.
extension 135 or

Lisa Appelbaum
extension 146 or

**2800 Donald Douglas
Loop North
Santa Monica, California
90405**

**Toll Free: (888) 835-
8055**

Fax: (310) 396-9635

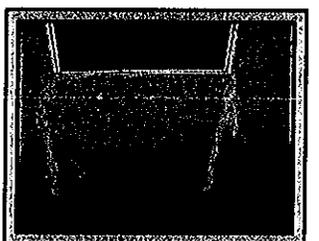
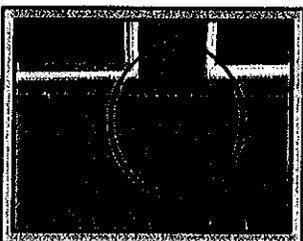
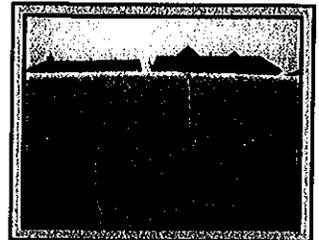
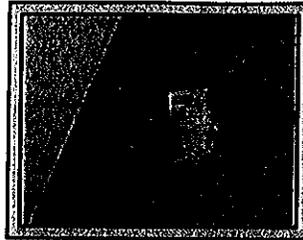
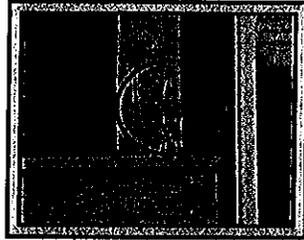
Numerous homeowners in your Corona community continue to join lawsuit against the builder for construction defects. If you are also experiencing problems with any of the following, you may want return the enclosed paperwork: Leaking Windows & Damage to Sills, Condensation between the Double Pane, Cracking/Damaged Stucco, Mold & Mildew Growth, Roof Installation & Resulting Leaks / Water Damage & Separation of Roof Eaves, Poorly Framed Windows & Doors, Carpet Installation, Peeling / Cracking Paint, Poor Priming (Cracks in Exterior Wood Trim), Moisture Intrusion through Foundation, Plumbing Deficiencies, Electrical Installations, Heating & Cooling System Deficiencies, Door Jamb Separation, Insect Intrusion, Cabinet & Drawer Problems, Cracking Concrete & Slabs, Tile & Grout Installation / Cracking, Fence & Gate Damage, Landscape, Grading & Drainage Problems & Others.

This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.

MVAK

MILSTEIN, ADELMAN &
KREGER, LLP

January 2000



These pictures are from your development. They are a sample of photos of the particular types of defects homeowners from your community have reported or are experiencing.

NEWSLETTER

HOMEOWNERS IN YOUR MORENO VALLEY COMMUNITY FILE LAW SUIT FOR CONSTRUCTION DEFECTS AGAINST THE BUILDER OF THEIR HOMES,

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and Concord. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases

for over a decade throughout California. The attorneys have agreed to advance all of the costs of the litigation; therefore there are **no out-of-pocket costs** to the homeowners. Original ownership is **not** required to participate.

Enclosed please find a profile sheet for your completion and prompt return by either **fax** or in the **postage-paid envelope** we have provided. Whether or not you choose to participate in the litigation, the information you provide will be very helpful to your Moreno Valley community and their efforts in this action.

For additional information, please fill out and return the postage-paid reply card enclosed or contact:

David S. Grove, Esq.

Extension 123 or

Lisa Appelbaum

Extension 146

2800 Donald Douglas Loop
North

Santa Monica, California
90405

Toll Free: (888) 835-8055

Fax: (310) 396-9635

HOMEOWNER PROFILE SHEET

Please complete as much information and mail or fax back to (310) 396-9635 so that a firm representative may contact you with more information

HOMEOWNER NAMES: _____

PROPERTY ADDRESS: _____

MAILING ADDRESS (if different): _____

PHONE NUMBERS: HOME: _____ ALTERNATE: _____

MR. WORK PHONE: _____ MRS. / MS. WORK PHONE: _____

NAME(S) OF TENANT(S) (if any): _____

TENANT PHONE: _____ OWNER EMAIL ADDRESS: _____

ARE YOU THE ORIGINAL OWNER? _____ PURCHASE DATE? _____

HOW MANY PEOPLE LIVE IN YOUR HOME? _____ 1 OR 2 STORY HOME? _____

NAME OF THE DEVELOPER? _____ WHAT YEAR WAS THE HOME BUILT? _____

BEDS: _____ BATHS: _____ SQUARE FEET: _____

DID THE BUILDER INSTALL THE FRONT LANDSCAPE? YES: ___ NO: ___ (Check One)

Please CIRCLE the categories of defects that you have visually observed since purchasing your house:

- STUCCO CRACKS DRYWALL CRACKS ROOF TILE CRACKS
- CEILING STAINS WINDOW STAINS WINDOW LEAKS
- ANT / INSECT INTRUSION CONCRETE / SLAB CRACKS POOR PAINTING
- MOLD AND MILDEW ELECTRICAL PROBLEMS WOOD SIDING PROBLEMS
- CABINET PROBLEMS DISCOLORED VINYL / LINOLEUM PLUMBING
- PROBLEMS
- YARD DRAINAGE PROBLEMS HEATING & COOLING PROBLEMS OTHER: _____

Please explain the above-circled defects. You may use additional sheets if necessary.

Clayton M. Anderson, APC
Construction Defect Division



Joel M. Kriger, APC
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.
Gordon C. Meurs
William M. Siakinger
Matthew R. Schosch
Mary C. Tyler

**Homeowner Construction Defect Claims
Trial Attorneys - Insurance & Contract Claims**

8220 University Avenue, Second Floor
La Mesa, CA 91941-3837
(619) 589-8800
(800) 425-6397 • Fax: (619) 464-5414
<http://www.a-k.com> • E-mail: a-k@a-k.com

CALIFORNIA OFFICES
Riverside / San Bernardino
Orange
Los Angeles / Kern
San Diego / Imperial
Sacramento Area

June 27, 2008

Re: [Redacted] **Construction Defects***
Our File Reference # P 119-LMRO

Dear Homeowners:

The La Mesa law firm of Anderson & Kriger has been contacted by homeowners within the [Redacted] Residential Housing Development regarding problems with the construction of their homes. Based on our experience, some or all of the following problems may also exist within your homes:

- ◆ Drainage / Soils Problems
- ◆ Stucco Cracks
- ◆ Concrete / Foundation Cracks
- ◆ Electrical / Plumbing Problems
- ◆ Mold / Mildew in Walls / Showers
- ◆ Broken or Cracked Tile / Grout
- ◆ Roofs / Windows Leaks
- ◆ Tub / Shower Leaks
- ◆ Vinyl Flooring Discoloration

We would like to provide an opportunity for other homeowners to join this group action to resolve these types of defects. If you have already retained legal counsel for these construction defects, please disregard this correspondence. Please note that prior repair efforts made by the developer/builder do not prevent subsequent liability for construction defects. We have a local office in La Mesa to serve your needs with individual attention to you and your home. One of our recent trials resulted in a \$1.3 million dollar verdict for our clients.

Your legal rights include:

- (1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.
- (2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.
- (3) That you can become a participant in this lawsuit with no out of pocket cost.

These cases are being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to participate or have our contingent fee agreement thoroughly explained to you, please do not hesitate to contact our office at (619) 589-8800 or toll free at (800) 425-6397.

Sincerely,
ANDERSON & KRIGER

Jodie Wacht / JKW
Jodie Wacht, Paralegal

**Para recibir un copia del acuerdo de honorarios en Espanol o para informacion a cerca de derechos legales en relacion a los defectos de construccion, por favor llame al (909) 456-6467 y pregunte por Mary J.*

Note: This advertising communication is intended to and is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.



Homeowner's Contingent Attorney Fee Agreement

A Professional Law Corporation

THIS AGREEMENT

is made this _____ day of _____, 20____, at _____, California between the LAW

OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is:

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%)

From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial, including any appropriate finance or interest expenses incurred on all of the above listed litigation expenses. Service providers may have other business relationships with Attorney.

4. No settlement shall be made of the entire Client's claim without the approval of the Client. If the Attorney recommends that Client accept a reasonable settlement offer, but the Client rejects the offer, the Attorney may decline to provide further legal services as discussed below. Client agrees if the majority of Client's sign a settlement agreement to accept a lump-sum settlement offer, the agreement will bind each individual Client.

5. The Attorney, at its sole discretion and expense, may obtain the assistance of any other attorney or law firm in the prosecution of the claims of the Client.

6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

Please sign and date on the reverse side of this form.

ANDERSON & KRIGER - A PROFESSIONAL LAW CORPORATION

OFFICES IN SAN DIEGO, TEMECULA, RIVERSIDE, ORANGE COUNTY ANTILOPE VALLEY, SAN JOAQUIN VALLEY, SACRAMENTO

CASE NAME [REDACTED]	CASE NUMBER
-------------------------	-------------



7. Client shall fully cooperate with Attorney. Client and Attorney agree that the successful prosecution of Client's claims is a joint effort, that such claims are part of a very complicated California judicial proceeding, and Client's cooperation shall include, but is not limited to:

- a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;
- b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;
- c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;
- d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;
- e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.
- f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

8. Client gives the Attorney the power and authority to execute all pleadings, claims, contracts, settlements, checks, releases, dismissals or related documents. The Attorney's Client Trust Account shall receive all monies paid to the Client based on any settlement or judgement and such funds shall thereafter be disbursed to the Attorney, for expenses and the Client as provided in this Agreement.

9. **NOTICE:** LEGAL FEES ARE **NOT SET BY LAW BUT ARE NEGOTIABLE BETWEEN ATTORNEY AND CLIENT.** ATTORNEY MAINTAINS INSURANCE COVERAGE APPLICABLE TO THESE SERVICES. CLIENT IS RESPONSIBLE FOR OBTAINING ANY NECESSARY INCOME OR OTHER TAX ADVICE APPLICABLE TO THIS MATTER.

10. It is further agreed that Attorney has made no guarantees regarding the success of the construction defect claims and all expressions regarding possible success, if any, are matters of the Attorney's opinion only.

EXECUTED

on the _____ day of _____, 20____.

ANDERSON & KRIGER

By: _____

ATTORNEY ON BEHALF OF ANDERSON & KRIGER

By signing below, clients acknowledge they have read and agreed to all terms outlined above:

CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME _____

MAILING ADDRESS _____

CITY, STATE, ZIP _____ E-MAIL _____

HOME PHONE _____ WORK PHONE _____

CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME _____

MAILING ADDRESS _____

CITY, STATE, ZIP _____ E-MAIL _____

HOME PHONE _____ WORK PHONE _____

CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME _____

MAILING ADDRESS _____

CITY, STATE, ZIP _____ E-MAIL _____

HOME PHONE _____ WORK PHONE _____

FOR A&K USE ONLY

GRANT DEED _____

NOC _____

CLIENT OWNERSHIP REVIEWED BY _____

Homeowner's Contingent Attorney Fee Agreement

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is made this _____ day of _____, 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

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California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%)

From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, finance or interest expenses incurred in financing of expert fees, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial. Service providers may have other business relationships with Attorney.

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6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

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(Continued on reverse)

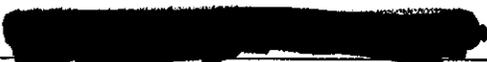
————— Please sign and date on the reverse side of this form. —————

ANDERSON & KRIGER • A PROFESSIONAL LAW CORPORATION

RIVERSIDE OFFICE • 2155 CHICAGO AVE., SUITE 300 • RIVERSIDE, CA 92507

(866) 273-9742 • (951) 787-7146 • FAX (951) 787-7168 • EMAIL: a-k@a-k.com • WEBSITE: <http://www.a-k.com>

OFFICES IN SAN DIEGO, TEMECULA, RIVERSIDE, ORANGE COUNTY, ANTELOPE VALLEY, SAN JOAQUIN VALLEY, SACRAMENTO

CASE NAME 	CASE NUMBER
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A Professional Law Corporation

Construction Defect & Community Association Law

2155 Chicago Avenue, Suite 300

Riverside, CA 92507

(951) 787-7146

Fax: (951) 787-7168

FINAL NOTICE !

The Riverside law firm of Anderson & Kriger is currently proceeding with a lawsuit in the [REDACTED] Housing Development on behalf of many of your neighbors. We have been given a final opportunity to revise the complaint, adding additional homes. This is your opportunity to join the ongoing lawsuit.

Some of the problems that your neighbors are experiencing include:

- **Roof leaks and/or loose, slipping or cracked tiles**
- **Stucco and/or drywall cracks**
- **Inadequate paint**
- **Water ponding in front or back yards**
- **Dust, wind and/or water coming in through and around windows**
- **Plumbing problems.**

Take a moment and look around your home for indications that you are experiencing some of these problems. If you are noticing staining around your windows, or on your ceilings, or more problems, please call us, we can help.

Anderson & Kriger has been helping homeowners obtain compensation for defective homes for 20 years. We have a local office in downtown Riverside to serve your needs with individual attention to you and your home. We will arrange for an expert to inspect your home and will handle all legal aspects of your case with no money out of your pocket.

This case is being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to join your neighbors in their ongoing lawsuit, please sign and return the enclosed Contingency Fee Agreement or feel free to contact our Riverside office at (951) 787-7146 for additional information.

Thank you,
Anderson and Kriger

Rhonda Harrington

Rhonda Harrington

• select Print from the File menu above

REAL ESTATE • May. 26, 2010

Searching For Cracks In Construction Law

Truce Breaks Down Between Developers, Builders and Lawyers Over Fixes to Housing Defects

By Jason W. Armstrong

Daily Journal Staff Writer

Seven years ago, California homebuilders won extra liability protection when tiles started slipping off roofs and cracks began snaking across stucco walls.

Senate Bill 800, known as the "Right to Repair Law," gave builders the chance to fix defects in their products before being sued if they complied with a lengthy list of pre-litigation filings and procedures.

Now, builders are urging lawmakers to re-tool SB 800 cracking down on what developer lawyers said is a recent increase in plaintiff attorneys filing defect lawsuits without giving their clients sufficient opportunity to make repairs.

The problem, according to the builder attorneys, is that plaintiff lawyers are looking for cracks in the law by seizing on instances in which companies didn't file "every single piece of paperwork" correctly under SB 800, such as notices of the law's provisions on a property's title. They also accuse consumer attorneys of sidestepping the law by soliciting class-action clients through mass mailings, instead of working with developers through the statute.

"In the past two years, we've seen a strong increase in [instances] in which the plaintiff's law firm made no attempt to go through the process or notify the builder, and instead went straight to the lawsuit," said Alan H. Packer, a partner with Newmeyer & Dillion in Walnut Creek, which represents several major builders, including Irvine-based Standard Pacific Corp.

Plaintiff attorneys, Packer said, "are trying to leave through the exit before they come in the entrance. All builders want is to see what needs to be fixed before they get sued."

Packer, who is a member of the California Building Industry Association's legal action committee, said the trade group has been "actively evaluating a variety of approaches" on reforming SB 800. He declined to elaborate.

Several lawyers who count on construction defect suits as their bread and butter denied wrongdoing in their filing strategies. Those include Kenneth S. Kasdan, a name partner with construction-defect firm Kasdan Simonds Riley & Vaughan, who said SB 800 has not driven builders to do complete, timely repairs, and that lawsuits are crucial to get real results. Kasdan's firm, which has offices in Irvine, Palmdale, Concord and Arizona, filed 164 defect cases involving 7,500 California homes that fall under SB 800.

In some cases, the homeowner sued because he or she did not accept the company's repair, Kasdan said. In other instances, his firm brought suit because the builder didn't fulfill SB 800 guidelines.

"You have to go through very specific steps. If the builder doesn't comply with those, the homeowner can

go directly to a lawsuit," Kasdan said.

State lawmakers passed SB 800, or Civil Code Sect. 895, in 2002. Also known as the "Fix-It Law," the statute, which applied to any home built after Jan. 1, 2003, was a compromise between developers and builders and plaintiff attorneys to more quickly resolve construction-defect claims while cutting back on the number of lawsuits. Less litigation and quicker fixes, the legislators reasoned, would help builders get insurance and lead to more housing being built at a time when limited new supplies were causing home prices to escalate. The law also narrowed the definition of defects to those affecting the "functionality" of a home.

The raft of "pre-litigation procedures" builders must follow to stave off suits includes responding within 14 days to a homeowner complaint. If the owner has an attorney, the builder must include that person on all subsequent communications. Also, the company must record a notice of SB 800's pre-litigation procedures on the property title, and must conduct inspections of the property within 14 days of being notified about the problem.

Within 30 days of the inspection, the builder can make a written offer to repair the defect and compensate the homeowner for damages. If it makes an offer, the developer also must include a written proposal to mediate the dispute if the homeowner chooses that route.

Homeowners have 10 years to file suit in most instances if the builder doesn't make a repair offer, flouts any of the pre-litigation processes or doesn't fix the problem correctly.

As the decade-long statute of limitations to file cases begins to wind down for homes not covered under SB 800, plaintiffs' lawyers are increasingly filing suits in developments where the law does apply, and builder lawyers accuse them of sidestepping the legal process.

"Some of our clients' homeowners are being added to suits without even being aware of it," said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. "I can't tell you the number of times I've seen a defect claim that says, 'defective stucco,' and the house doesn't even have stucco."

Carpenter, who was part of the negotiating team of lawyers who drafted SB 800, also said plaintiff's attorneys are "carpet bombing" neighborhoods with lawsuit solicitation letters to "strike fear into homeowners that something is wrong with their houses."

In a notice distributed this month, which was obtained by the Daily Journal, Santa Monica-based Milstein, Adelman & Kröger asked residents of several streets in the 1,170-home master-planned Fairway Canyon development in Beaumont to contact the firm about joining a suit targeting a litany of alleged problems, including drywall damage, leaking windows, mold and cracking stucco. The mailer said previous builder repairs would not "prevent homeowners from participating" in the suit.

Such notices are legally sound, said Milsten Adelman name partner Mark Milstein.

"As long as ethical rules are followed, you can send those out," he said.

Milstein, who also was part of the legal team that worked on SB 800, said builders often do not adequately respond to homeowner complaints.

"A number of builders have been trying to do repairs as part of the process," Milstein said. "We're finding, in most instances, [companies] are not repairing to SB 800 standards."

Packer said his builder clients are not getting a chance to make repairs before being sued.

"There is something fundamentally wrong with how this litigation is going forward," he said.

Builders battling construction defect cases have had mixed results.

In a recent Placer County case, lawyers for Folsom-based Elliott Homes persuaded a judge to stay a defect case against the developer, which plaintiffs filed after Elliott Homes neglected to record certain documents on the property's title under SB 800, so the builder could take steps to comply with the law.

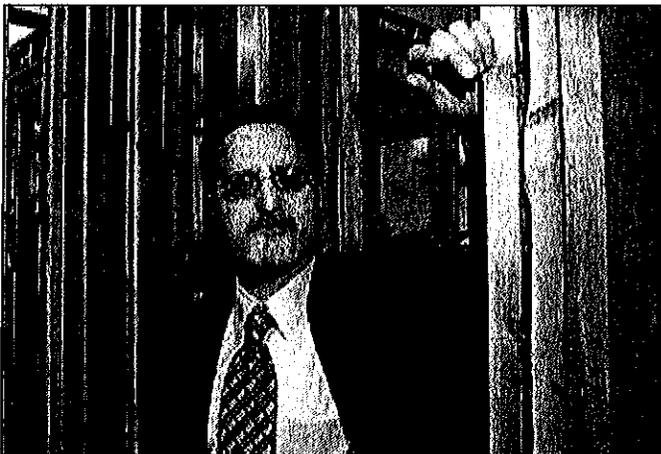
In a separate Sacramento County case, another judge earlier this year let a similar suit proceed because documents weren't recorded as specified by the statute.

"This is still new legislation, and how it will be interpreted is still being played out," said Richard H. Glucksman, a name partner with Chapman Glucksman Dean Roeb & Barger in Los Angeles, who represents homebuilders and general contractors in construction-defect litigation.

In one of the few published decisions involving SB 800, Standard Pacific Homes in August 2009 persuaded an appellate court to grant a writ of mandate staying a case in which a group of homeowners accused the company of building a defective San Bernardino County development. In the case, the 4th District Court of Appeal said the homeowners could not simply accuse Standard Pacific of not following certain code sections of SB 800 it was their burden to prove the builder didn't comply. *Standard Pacific Corp. v. Garlow*, E046844.

The justices tossed the case back to the trial court, which stayed it in December. The case is pending.

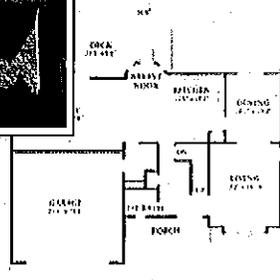
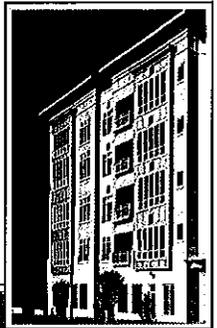
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Protecting Your Home's Equity

Vital information for homeowners from Citizens Against Lawsuit Abuse and the Construction Quality Committee of the Building Industry Association



BIA Orange County Chapter
17744 Sky Park Circle, Suite 170
Irvine, CA 92614



Construction
Quality and Sustainable
Building Committee



For Most Of Us, Our Home's Equity Is Our Greatest Asset. It Needs Protection.

As builders of the American dream, homebuilders take great pride in their work. California homes are built to some of the most rigorous standards in the nation. Homebuilders believe in the quality of their products and stand behind them with customer service staff dedicated to helping homebuyers with problems that may arise after they move in.

For many California homeowners, lawsuits alleging construction defects have led to the loss of their homes' equity, or the inability to access that equity. In this brochure, we will share with you studies that show how construction litigation might jeopardize your home investment and often does not even lead to repairs. And, we will show you positive alternatives to litigation, such as working with your builder to resolve any problems you may have.

This brochure is provided to you by Citizens Against Lawsuit Abuse, which is dedicated to stopping irresponsible lawsuits that assert unfounded claims, or seek unsubstantiated damages, and by members of the Building Industry Association (BIA), who are dedicated to building quality homes and providing quality customer service both to original and future home purchasers.

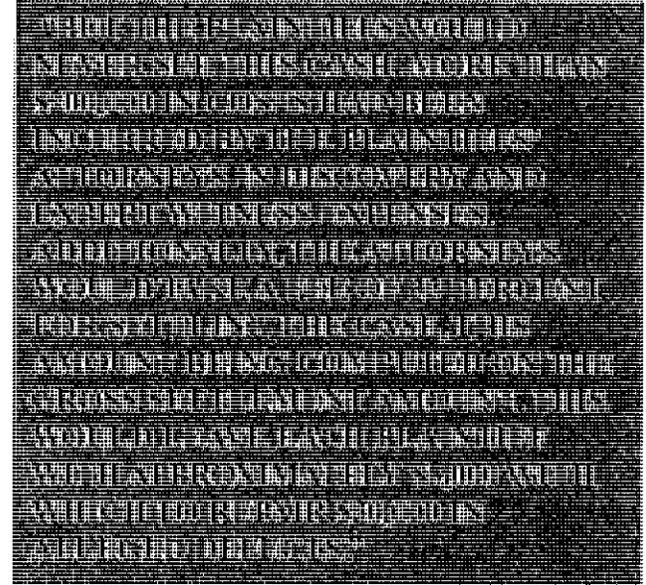
Litigation Reduces Home Values

The average litigated construction dispute in California generally takes two to five years to resolve. As the dispute drags on, it runs up costs and drives down housing values.

An article in the Santa Clarita Valley Signal entitled "A Tale of Two Tract Home Owners" illustrates why. It tells the story of a family that wanted to sell their small home and buy a larger one in order to accommodate the growth of their family. However, because they had joined a construction defect lawsuit months earlier, they were told by their realtor that they would have to disclose the approximate \$30,000 in defects their attorney was claiming on their behalf and provide a buyer with a credit in that amount! The homeowners reluctantly decided to put their purchase plans on hold.

Two years later, the lawsuit finally settled for one-

fees were deducted, the homeowners were left with only \$5,000 to repair \$30,000 in alleged defects. This meant that the homeowners still would be required to disclose the defects they could not afford to repair and give a credit to any prospective purchaser for those defects. By comparison, the article stated that homes that had not joined the lawsuit appreciated in value and were selling much more easily.¹



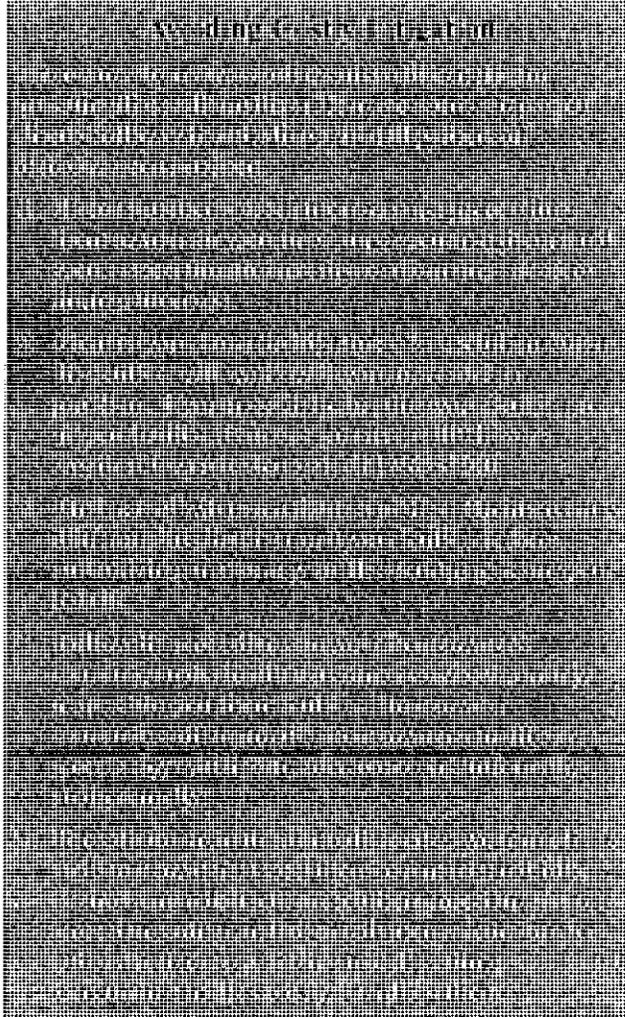
Similarly, a study of litigated and non-litigated properties by ConAm Research of San Diego showed that the value of condominium units in litigated projects dropped more than 10 percent, when compared to units in non-litigated projects. The study also found that homes in non-litigated projects were able to resell more quickly.²

Why? California law requires disclosure in real estate transactions. When you put your home up for sale, your realtor will be required to disclose that your home is, or was, involved in a construction defect lawsuit and identify any items that you claimed are defective in your home. Lenders often are reluctant to make home loans on projects that are, or have been, involved in litigation. And what prospective buyer would choose a home involved in a defect lawsuit over one free from litigation? Worst of all, what if the prospective buyer asks to see your repairs and you have to tell them that few, if any, of the supposedly-necessary repairs were ever made?

Litigation Can Hurt Your Ability To Refinance

What if you need to refinance while your lawsuit is slowly creeping through the judicial system? According to ConAm Research, most lenders simply will not refinance loans on properties involved in defect litigation.³

The reason is simple. Homeowners involved in such litigation must notify lenders of their defect allegations and the costs being claimed to repair them. In some cases, attorneys have even claimed that repair costs exceed a home's purchase price. In others, homeowners must state that their home is worth less than its potential market value – maybe even less than the amount still owed on the house.



Litigation Increases The Cost Of Housing

Why is California's housing market so expensive? While there are many factors, California's housing prices can be attributed, in part, to the onslaught of construction defect litigation over the last decade.

Litigation is costly. It increases the costs of construction. It causes insurance premiums to go up. It forces builders to raise their prices. It burdens the judicial system and expends judicial resources. It reduces competition in the marketplace as smaller builders are forced out of business. Ultimately, these costs are passed onto the consumer in the form of higher home prices. Homeowners should therefore ask themselves: "Is construction defect litigation really the answer?"

When The Construction Defect Lawyers Call

You received this brochure because, at some point, a construction defect lawyer may approach you about joining a lawsuit – even if there is no real problem with your home, or tract.

Why are you being targeted? Defect litigation is big business, and law firms market aggressively in neighborhoods throughout the state looking for that business. Lawyers will tell you that it is less expensive to settle a lawsuit than it is to defend one. Some may flash big dollar signs at you in an effort to put a lawsuit together. And, if you are a homeowners association board member, they may even scare you into believing you will be sued by your fellow homeowners if the association does not file a lawsuit.

But the big dollars they promise aren't always a reality once a lawsuit is settled, or tried.

When money is awarded after a trial or settlement, much if not most of it goes to pay for lawyers' fees, expert witnesses and the "destructive testing" they do on your home. Often, only a small portion of the funds recovered remains to be spent on home repairs, and, generally, those funds are much less than the real cost of any repairs that actually need to be made.

If this matter can be resolved easily and quickly by contacting your builder – which is often the case – isn't that in your best interests and the best interests of your homeowners association?

Checklist for Homeowners

1. How can I tell if my home has a problem? If there are any signs of a problem, I should call a professional to inspect the home.
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The Orange County Business Journal reported that many construction defect attorneys and their expert witnesses run up legal bills and grossly inflate repair estimates to attempt to force settlements.⁴

Outrageous Estimates & Destructive Testing

The Orange County Business Journal reported that many construction defect attorneys and their expert witnesses run up legal bills and grossly inflate repair estimates to attempt to force settlements.⁴

How would you feel about paying a contractor nearly \$90 just to have your showerhead tightened? In one case, the trial attorneys sought \$28,000 for showerhead repairs, or \$90 per showerhead. The same case sought \$12,000 for squeaky floors, \$28,000 for bathtub repairs and \$215,000 for chipped sinks.

Trial attorneys often attempt to "prove" "defects" through destructive testing. This may include cutting holes in walls, pulling off roof tiles or ripping up flooring, just to look for "defects" that you did not know previously existed and that have not caused any damage to your home. They may even shoot high-pressure water directly against a window for a prolonged period to see if it leaks. That hardly duplicates any natural condition your home is likely to be exposed to! Worse, destructive testing is a dusty, invasive and noisy process that can leave your walls, custom paint colors and faux finishes not looking the same again.

You May Lose And Have To Pay For The Lawsuit

What happens if you don't win the case? You don't recover any money, of course, but that doesn't mean you're off the hook.

You and your homeowners' association may be left responsible for paying all the lawyer and expert witness fees and the costs of their testing, as well as court costs. For example, a group of 19 homeowners in Orange County was ordered by the court to pay

\$508,000 to a defendant after losing at trial. The homeowners' attorney, however, was not ordered to pay anything.⁵

You also may meet with resistance if you change your mind and want to be dismissed from the lawsuit after it is filed. For many attorneys, the profit they make from construction defect lawsuits often depends on the number of homeowners they are able to sign up. Too few homeowners may mean that the cost to prosecute the lawsuit exceeds the amount of profit the attorneys stand to make. Not surprisingly, trial attorneys, therefore, often resist dismissing homeowners from a lawsuit. Some homeowners have even reported being charged litigation costs by their lawyers before being allowed to get out of the case. And even then, they had to wait months to be dismissed.

You may also lose control of your right to have repairs made to your own home. Homeowners have reported that some attorneys require that any settlement be approved by at least a majority of the homeowners in the case. If this happens, you may not be able to accept an advantageous settlement because some of your neighbors object. Other attorneys may not allow you to settle because, if repairs are made, the attorneys will have trouble getting paid.

Repairs: Too Little and Too Late

In the unfortunate event of a legitimate construction issue, are you willing to live in your home for the years it can take to conclude a lawsuit before repairs are made?

You have an alternative! You can work with your builder and have the problem corrected quickly – perhaps even years before repairs could be made if you chose to litigate.

Most builders will gladly make legitimately needed repairs to your home. By avoiding litigation, you get what you want: to have the problem repaired quickly, completely and with the least amount of inconvenience.

California's New Construction Law: Facilitated Repairs

In 2003, California enacted a new law (Civil Code sections 895 et seq.), which applies to certain types

of new residential construction purchased on or after January 1, 2003. This law is designed to informally resolve construction defect claims. It better defines what constitutes a defect, and allows a builder to provide you with detailed maintenance expectations up front, so you know how to maintain the quality of your home.

Under the new law, if a homeowner is unable to resolve a construction defect claim informally through such things as customer service, or the warranty process, the homeowner must follow a series of mandatory pre-litigation procedures before filing a lawsuit against a builder. These procedures are referred to in the homeowner's purchase documents and CC&R's and are designed to ensure that legitimate repairs are made without requiring a lawsuit. In addition, if these procedures fail to solve the problem, the new law allows for the use of alternative dispute resolution such as arbitration, or judicial reference, which generally is less costly and faster than a court trial.

The Alternative: Cooperative, Mutually Beneficial, Private Resolution

The Building Industry Association wants to help you enjoy the American dream of homeownership and encourages you to use alternatives other than litigation to preserve that dream.

The best immediate solution to avoiding the hassles and cost of litigation is to work directly with your builder. If you find yourself, or your association, being approached by defect attorneys, we advise you to consider the alternatives. Go to your homeowners' association board meeting and ask that they pursue alternatives before signing on with attorneys. Contact your builder. In the unlikely event that your homebuilder is unresponsive, or if you have difficulty tracking down your homebuilder, call Citizens Against Lawsuit Abuse at 714-259-8400 and they will help you locate the correct customer service representative. If this fails to solve the problem, consider utilizing the claim and dispute resolution procedures specified in your purchase documents, such as mediation, arbitration, or judicial reference.

Together, we can find resolution and preventative measures to avoid, or reduce, construction disputes.

About Our Sponsors

Citizens Against Lawsuit Abuse (CALA) is a non-profit legal watchdog group whose mission is to educate consumers on the costs of lawsuit abuse and serve as a watchdog group over those special interests who seek to abuse the system for financial gain at the expense of consumers.

The Trade Contractor Council of Southern California (TCC) was created by the Building Industry Association to provide a forum for trade contractors to focus on issues that affect their business, and to promote quality construction.

The Associated General Contractors of California (AGC) is committed to improving the profitability of its members through excellent services in: Safety and Health; Education and Training; Employee and Labor Relations; Government Relations/Legislation; and the commitment to skill, integrity, and responsibility.

The Building Industry Association of Southern California (BIA/SC) is a non-profit trade association that serves the 1,800 companies that comprise its membership, and their 250,000 employees. As a regional voice of the building industry, BIA/SC works closely with its chapters, councils and members to make sure housing supply keeps pace with the rapidly growing job market and population.

The Construction Quality Committee (CQC) advocates for solutions to construction disputes through education on and advocacy of quality construction practices and customer service.

We'd Like To Hear From You!

Comments: _____

Name: _____

Address: _____

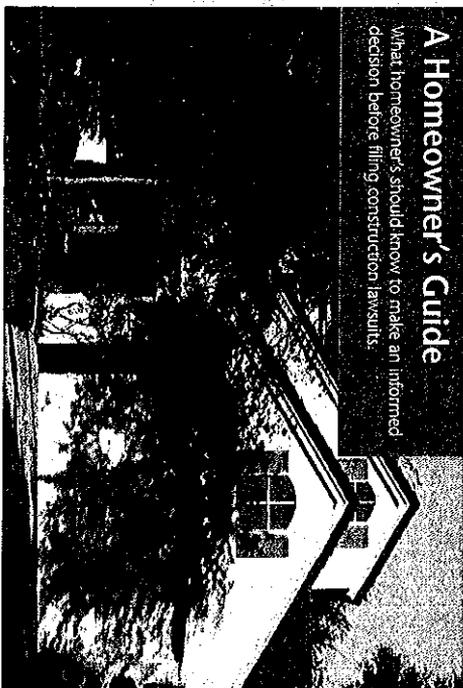
City/State/Zip: _____

Phone: _____

E-mail: _____

Our Builder/HOA/Property Mgmt. Co: _____

Think Before You Litigate!



A Homeowner's Guide

What homeowner's should know to make an informed decision before filing construction lawsuits.



Neighbors Protecting
H O M E V A L U E S

www.NeighborsProtectingHomeValues.com



Think Before You Litigate!

Unnecessary construction lawsuits can label your home as defective - lowering the value of your home, your neighborhood and ultimately reducing your personal assets.

And Make An Informed Decision

"The average litigated construction dispute in California may take two to five years to be resolved. As they drag on, they run up costs and run down housing values." - *(Citizens Against Lawsuit Abuse)*

Homebuilders are responsible for building communities and building dreams - they take their job very seriously. The safety and well being of you and your family is paramount to the development of the entire community as well as each and every home. Homebuilders recognize your home is one of your greatest assets and stand behind the quality of their product. If you have any questions or concerns at anytime we encourage you to contact your homebuilder. A capable customer service staff is available to assist you. Your homebuilder is dedicated to helping homeowners with construction related issues.

Unnecessary construction lawsuits have been a growing problem throughout California,

causing homeowner's to lose their greatest source of equity. Your homebuilder is dedicated to assisting you in identifying legitimate problems and making necessary repairs. This brochure will assist you in identifying how participation in unnecessary lawsuits may jeopardize one of your greatest investments, provide information regarding the right questions to ask and how to remove yourself from a lawsuit.

When you find your neighborhood being solicited by an aggressive law firm looking for business, we encourage you to use this handbook to assist you in making an informed decision.

Think before you litigate.

Neighbors Protecting Home Values



Be an Informed Homeowner

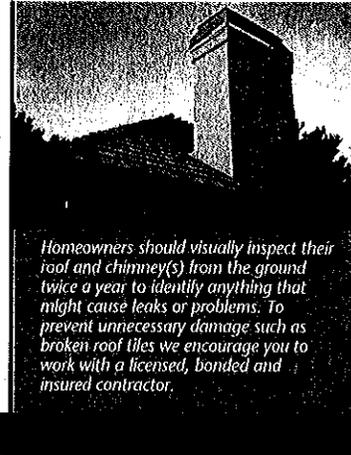
Under the law if your home was sold after January 2003 you must contact the homebuilder first so they have the opportunity to mitigate any legitimate construction concerns. Homeowners are often unaware under California law there are multiple home warranties covering

more than just the original homebuyer.

Remember there are alternatives to unnecessary lawsuits.

When attorneys are approaching your neighborhood looking for participants in lawsuits make an informed decision:

- 1 Contact your homebuilder first to solve your problem.
- 2 Personally speak with your neighbors and/or homeowner association to discuss alternatives to litigation – such as meeting with your homebuilder.
- 3 Assess your situation and make sure proper maintenance has been performed on your home and any problems are truly construction related.



Homeowners should visually inspect their roof and chimney(s) from the ground twice a year to identify anything that might cause leaks or problems. To prevent unnecessary damage such as broken roof tiles we encourage you to work with a licensed, bonded and insured contractor.

What Questions Should I Ask?

When an attorney approaches you about bringing a lawsuit against your homebuilder make an informed decision and begin by asking the right questions.

- What are the specific problems in my home and how much will it cost to repair them?
- Can you show me the problems in my home?
- Why shouldn't I call my homebuilder first?
- How much do you anticipate the award being for the lawsuit?
- Who pays for the experts, testing and court costs if we lose the lawsuit?
- If we win the case and an award is received where does the money go?
- How are you paid?
- How long does it take to complete a lawsuit?
- When I sell my house do I have to disclose the lawsuit and whether or not repairs were made to my home?
- If we win, will there be enough money to repair my home?



Be An Informed Homeowner

Frequently Asked Questions:

Will a lawsuit harm my home's value or my neighborhood?

An unnecessary lawsuit concerning the construction of your home could lower the value of your home and the ability to sell your home in the future. "When a subdivision is in litigation against its builder, the property value for the entire neighborhood drops significantly. In fact, the adverse impact on property values can even affect homeowners who decline to participate in the litigation."

(The Business Journal / August 30, 1999)



Don't forget to clean out and inspect your home's gutters and down spouts twice a year to make sure they operate as intended.

When I sell my home, will there litigated defects require disclosure to potential buyers?

Under California law you must provide full disclosure when selling your home, which includes everything regarding material problems with the construction of your home and any other facts and events relating to your home. This offer of the home must provide any potential buyer with a written disclosure statement listing all defects to the property known to the seller.

The offer. The statement must be presented to the potential buyer prior to accepting their offer. You must disclose all known material facts relating to the property and disclose the potential selling price on the property (10% down) depending on their experience the defect list.

Will litigation affect my ability to buy another house or get another mortgage loan? What about refinancing my home or obtaining a second mortgage, home equity loan?

Yes. In California's full disclosure law your lender will be just one of the many lenders that may be required to provide you with the full disclosure when you buy or refinance your home.

Getting an unnecessary lawsuit may also prevent homeowners from ever being able to sell or refinance a home, at least without paying all of the required repair costs first.

How long does it take to settle a lawsuit?

If you are considering filing a lawsuit, there are many factors to consider. It is a very lengthy process and can take as long as 18 months to two years to be settled. Settling out of court or mediation shows housing options. The lawsuit may also require mediation.

Settling out of court takes less time than litigation. Litigation involves many court-related expenses, including attorney fees, court costs, and other expenses throughout California.

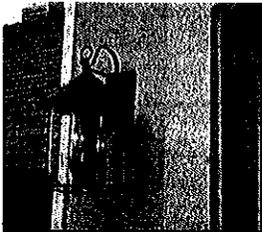
How much will you really get from the settlement? Will my mortgage lender require some of the possible settlement proceeds from the litigation?

The amount of "net recovery" may be very different from what you would expect. If you are settling out of court, you may not receive as much as 75% of your settlement could be for the attorney and their staff's costs in the case. Some "net recovery" also often goes to the repair contractor for quality issues, additional claims, or if you have other legal bills. The amount is negotiable for other parties, but it is important to understand what you should be able to expect of the

lender's release if they are approved.

Lenders may also require proceeds from the settlement during the time of sale as a result of the suit. Litigation developments usually take a long time to resolve. It is important to understand the lender's release or litigation fund the settlement cost.

(The Business Journal / August 28, 1995)



Be sure and check the condition of siding, paint, masonry, stucco or EIFS and wood trim twice a year to maintain its good looks and confirm adequate weather protection.

Will the lawsuit affect my ability to obtain homeowners insurance?

Most likely – if your home is labeled as defective it will be much more costly to insure, expect your premium rates to skyrocket in the future. In fact, homeowners insurance may not be available at all, rendering your house nearly impossible to sell.

Shouldn't the City building codes and inspectors prevent construction defects from occurring?

Cities are interested in making sure all homes meet building code requirements and inspect each home at various stages of construction before it is approved. Inspections may include for example window flashings for water tightness, roofing, plumbing, fire blocking and installation of exterior waterproof paper are to be completed by city building inspectors. All inspection records are on file at the City building departments

and available for the homeowner's review. In order to protect future homebuyers cities often require homeowners to repair the defect(s) with settlement funds, list the defects on a disclosure statement to potential lenders or buyers and the city may also file a correctional or information lien on the home title to assure protection of future owners.



Although interior caulking around windows is not a required or necessary feature, many homeowners choose to include it. If caulking is included in your home's construction around windows, doors and other areas it should be inspected once a year to make sure water, air, dust and insects are kept out.

What if I have a legitimate concern about my home?

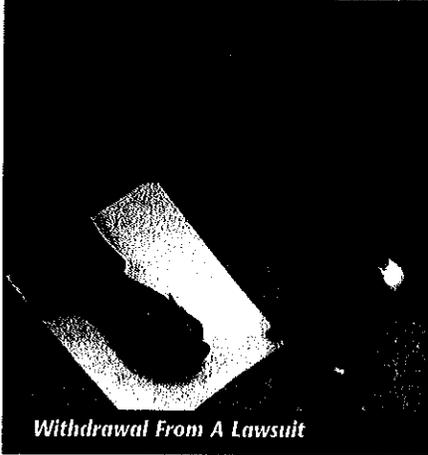
There are instances where homeowners have legitimate concerns about the quality of their home's construction and they must first contact the homebuilder directly to arrange for repairs rather

than joining an unnecessary lawsuit. If the builder will not resolve the legitimate problems, complaints may be filed with the appropriate governmental agency and trade associations.

Will proper home maintenance prevent defects?

Under California law homeowners are expected to maintain their homes - performing preventative maintenance on a regular, seasonal and one time task basis. Homeowners are often provided with suggested maintenance checklists by their insurance companies and encouraged to follow

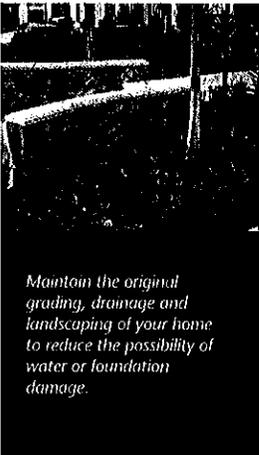
manufacturer's recommendations. Insurance companies recommend homeowners use licensed contractors for any task they are unprepared to complete - doing it properly the first time will save homeowners time and money in the long run.



Withdrawal From A Lawsuit

How do you withdraw from a lawsuit?

If you and/or your neighborhood have filed a lawsuit and you would like to decline and/or withdraw participation send a letter to the lawyers organizing the lawsuit stating "I understand that you filed a lawsuit on my behalf against my homebuilder. I have decided not to pursue the lawsuit. Please dismiss me from the case now and send me something in writing confirming that I have been dismissed."



Maintain the original grading, drainage and landscaping of your home to reduce the possibility of water or foundation damage.

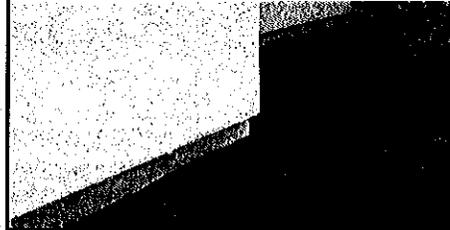
THINK BEFORE YOU LITIGATE!

Give your homebuilder a call – you will be pleasantly surprised! For additional information and facts about how proper housing maintenance may eliminate homeowner concerns we encourage you to visit our website at www.neighborsprotectinghomevalues.com

Think Before you Litigate!

Frequently Called Phone Numbers

My Homebuilder	_____
Homebuilder's Customer Service	_____
Licensed Maintenance Person	_____
Gardener	_____
Pool Maintenance	_____
City Services	_____
Other	_____
Other	_____
Other	_____



Twice a year homeowners should inspect the foundation, basement or crawl space to identify any leaks or problems. The "weep screed" or lip at the base of the home's exterior walls should not be blocked by cement, soil, etc. - it is a necessary part of your home construction and facilitates proper drainage.



Neighbors Protecting
H O M E V A L U E S

Hollins, Audrey

From: John duree [jduree@pacbell.net]
Sent: Thursday, June 10, 2010 2:52 PM
To: Hollins, Audrey
Subject: proposed change in fee agreements 1.5

Dear Ms. Hollins:

I am an AV rated, certified specialist in criminal law who has been in private practice for 29 years. I have used flat fee, non-refundable retainers in at least 85% of my cases. I have never had a fee dispute with a client in a flat fee case, because my contracts are simple, straightforward and fair. My clients appreciate agreements of such a nature because they know the total amount my representation will cost. They are beneficial to me because I do not have to concern myself with time keeping or collections and our decisions on how to proceed in the case are not cost-based; unlike civil cases, my cases are usually about liberty, not money, and assessing strategies on the basis of their cost is simply not done in my practice.

My initial agreements are for flat fee amounts through the preliminary examination. If the case goes beyond that point, I reach a new agreement or withdraw. My clients are clearly informed of this limitation at the outset, and I have never had a dispute on this issue. The reasons for this limitation are: First, most cases resolve at, before or immediately after the prelim--to charge a fee based on going through trial when less than 5% of my cases go that far would be unnecessarily expensive to the client. Second, case law does not require a motion to withdraw if the attorney wishes to do so between the prelim and the next appearance. It is a natural breaking point in the litigation. Third, I do not know how extensive a jury trial will be until I have done the review and investigation of the matter, which, in my practice is largely done prior to the prelim. Postponing the fee agreement for trial allows me to make a fair estimate of the extent of work trial would require and hence, to set a fair fee. The timing also gives my clients the opportunity to decide whether to continue with me or to seek other counsel after they know the total fee.

I have charged hourly fees in a number of cases, generally when my client is a corporation or quite wealthy. The reason I am willing to bill hourly in such cases is that the client is sufficiently financially strong that I am confident that my bills will be paid. I have found that my total fees are substantially higher when I bill hourly. Hourly billing would not be an effective method of paying for representation for me or for most of my clients.

I am not sure why the state bar is considering a change to rules governing fee agreements to get rid of a fair and workable method for attorneys and clients operating in the criminal justice system, but I hope, on full reflection, it will decide against such change.

Thank you for your consideration of this letter.

John Duree #65684



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
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Rule 1.5 Fees for Legal Services [4-200]

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I have been a licensed attorney since 1972. My practice has been limited to criminal defense. For the past 38 years, I have been charging a flat fee service based on my experience in dealing with every type of criminal offense. I have found, over the years, that my clients would much rather know, up front, what the handling of a case is going to cost. If my fees aren't acceptable to them, I can always refer them to an attorney that might charge less. If the handling of a case takes much less time than anticipated, I have the ability to refund fees if I wish. In all my years, I might have had one or two clients, out of hundreds, who have asked for any type of refund. It's been my experience most criminal defense attorneys in California charge a flat fee. Not only does a client feel more assured knowing what the fees are going to be, I believe an all inclusive fee encourages more attorney-client contact. I tell my clients to call with any problem or question. This approach promotes better trust; the client knows I'm not encouraging contact so I can bill for an extra 15 minutes.

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My primary practice is now in Oregon. I've been practicing in Bend since 1993. A lot of criminal defense attorneys in Oregon charge by the hour and I've heard many complaints from clients regarding that approach. Clients feel they are being "nickel and dimed" to death and appreciate the flat fee approach. I constantly hear that their attorney is "dragging the case out" just to charge additional hourly fees. If an attorney is too expensive, clients won't hire them. Fee arbitration is always an option if a client is really taken advantage of. Clients are usually looking for results. If they get the result they want for a set amount of money, they are happy. Curtailing the flat fee would be a mistake!!



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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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I am opposed to the suggested new rule. In California we have a strong policy of protecting clients, as well we should. However, I think that in the field of criminal law there needs to be some consideration to protecting the attorney. The non-refundable fee tends to do that while also offering the client clear notice of the cost of representation.

I would also note that fees in criminal cases tend to be pretty affordable compared to other areas of practice. If the reader has ever been through a divorce this should be evident.

The rules for being relieved due to non-payment are different in criminal cases and this is another consideration. If non-refundable fees are banned should criminal attorneys charge by the hour? Can they be relieved more easily for non-payment? What impact will this have on court calendars?

I strongly urge that this proposed rule be scrapped. Criminal clients have many other protections. This rule is not needed.



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I have been a member of the State Bar of California since 1/9/62, and have been in private practice for most of this time. I also served as a Judge for 6 years in San Bernardino County. I only handle criminal cases. Eliminating non-refundable and flat fee retainer agreements will only raise fees to clients resulting in heavier caseloads for public defender offices. I know, that if I where to charge for my time on an hourly basis, my fees would far exceed that of my non-refundable retainer fee and flat fee agreements for other services. Most of my client would not be able to hire private counsel. These proposed changes are a step backwards in the Bar's effort to expand the availability of legal services.



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"Wut... we have heeer..... is uh failyuh to 'umunicate".
"Cool Hand Luke", circa 1978

As a criminal lawyer who has served in the public defenders' realm in Louisiana and California for over 20 years and then in a solo or independent contractor capacity, I depend on simplicity and clarity in contracts with clients who need representation, but who do not have a lot of money. I protest this rule. But I will leave to others with more experience and insight the task of adequately explaining to the Commission why the substance of this new rule is abhorrent.

I write separately to protest the abysmal lack of notice to the members of the Bar this paid organization was created to assist and serve. I submit that if I similarly tried to foist upon a client - - without any prior notice - - a contract that allowed me to change my hourly rate under certain circumstances (i.e., DA suddenly amends information to include enhancements and priors, or refuses to cooperate in

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That is how I view this failure to effectively notify the rank and file that this unsupported and unsupportable engraftment is coming down the pike one more time. Why is notice such a problem in these troubling areas?

In 35 years of practice, like the vast majority of others on this list, I have never been cited by any state bar for any malfeasance. Fortunately, I am semi-retired and so this concern has somewhat less impact on me than for my less aged brethren. For now, I just hope I can live out my days without looking over my shoulder for more trebuchet-launched boulders like this one, raining down from the sky. This may speed up my decision to do something else for a living with less downside. I also feel that it may lead others to do the same thing.

Thank you for listening. I hope this new Rule 1.5(e) idea gets a decent burial.

Phil Johnson

CBN 156738



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DISAGREE with this proposed Rule

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The proposed rule ignores the realities of the practice of criminal defense. Currently, the nonrefundable fee allows a client to pay a known amount which will cover the entirety of his criminal representation without additional fees. An attorney and client that enter into a contract for a nonrefundable retainer can feel secure that the retainer fee will cover the representation of the client through trial. Such a retainer allows a client to make decisions about a legal defense without taking into consideration the additional costs that may be incurred.



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Professional Affiliation

Commenting on behalf of an organization

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DISAGREE with this proposed Rule

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This is simply untenable and would have a profound negative effect on the practice of law in the area of criminal defense, as well as other areas of law as well. Flat fee, non-refundable retainers enable attorneys to take cases where it is impossible at the outset to know the amount of work that will be necessary. When we take a case, we agree that we will not ask for additional funds when the work necessary is greater than anticipated - and to be able to make that guarantee it has to work both ways.



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Your Information

Professional Affiliation  An individual

Commenting on behalf of an organization 

Yes

No

* Name Kenneth C. Gregory

* City Palm Springs

* State California 

* Email address (You will receive a copy of your comment submission.) kgregory@socal-law.com

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DISAGREE with this proposed Rule

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Commission/Committee Members:

Your proposed rule is misplaced on so many levels. First, I share a concern that a significant level of deceit is involved in moving this proposed rule forward. The normal and typical process for introducing such a rule has been ignored; in favor of a secretive and deceitful move to push consideration of the rule without encountering known and legitimate opposition - THAT IS NO WAY FOR THE GOVERNMENT TO CONDUCT PROPER BUSINESS.

Second, the premise for the bill is seriously flawed and appears to be someone's personal vendetta rather than a legitimate need looking for an actual solution. I recommend that you take the time to read and consider the attached letter from CACJ.



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My CalBar # is 75342. I have been practicing since 1977 and my practice is devoted probably 85% to criminal defense. If this rule passes my ultimate fees to my clients will need to go way up.

I completely agree with the comments in the letter to you dated May 25, 2010, from:

ANN C. MOORMAN, President
CACJ Board of Governors

Thank you,

James Wm. Webster



THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation	<input type="text" value="criminal defense sole practitioner"/>	Commenting on behalf of an organization
		<input type="radio"/> Yes
		<input checked="" type="radio"/> No
* Name	<input type="text" value="Edward R. Rojas"/>	
* City	<input type="text" value="Redwood City"/>	
* State	<input type="text" value="California"/>	
* Email address <small>(You will receive a copy of your comment submission.)</small>	<input type="text" value="rojazz@pacbell.net"/>	

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For all the reasons Mr. Tarlow stated.



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AGREE ONLY IF MODIFIED

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If we are forced to do away with flat fee retainers, our clients will be billed much higher fees based on hourly work on their case. Most will not be able to afford private representation. Many will be forced to go with public defenders, crippling the private bar and bankrupting the state for the public defender representation. Please leave this alone.



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Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

* Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: [Rules Not Recommended Public Comment Form](#).

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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Your Information

Professional Affiliation	<input type="text" value="attorney, SBN#228119"/>	Commenting on behalf of an organization
		<input type="radio"/> Yes
		<input checked="" type="radio"/> No
* Name	<input type="text" value="Gael G. Mueller"/>	
* City	<input type="text" value="San Luis Obispo"/>	
* State	<input type="text" value="California"/>	
* Email address (You will receive a copy of your comment submission.)	<input type="text" value="gael@muellerandmueller.com"/>	

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- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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The only people who would even raise this issue are those who have never practiced criminal law. People who come to a criminal defense attorney can not afford hourly fees and most would not understand them. They would not pay the bill. More importantly, the work required on a criminal case could not be done as monies received would be in the trust account. For instance, discovery on a criminal matter is charged to a private criminal defense attorney by the District Attorney's Office. This can run into hundreds of dollars depending on the complexity of the case and must be paid "up front". The amount of discovery is unknown to the attorney until it is received. Additionally, the number of appearances, the number of phone calls, the number of hearings are all unknown quantities at the time that a client retains a criminal defense attorney. An hourly estimate is impossible and could run into hundreds of thousands of dollars for a case which now costs around 20-30 thousand. We do not bill on hourlies for a very good reason- people need us to protect their constitutional rights-not just their money.

ENTER COMMENTS HERE.

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We do not bill on hourlies for a very good reason- people need us to protect their constitutional rights-not just their money.

This new "rule" would shut down my business. I will not charge people on an unreasonable basis.

Gael G. Mueller



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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Non-refundable fees, or flat fees, have been used in criminal cases in California for well over a hundred years. The average client is better served by a flat fee in a criminal case, particularly in a misdemeanor case, where to charge hourly would be prohibitive. The average client in a criminal case has no way of having the costs for criminal representation predicted with any real accuracy. It is very difficult for defense lawyers to collect an hourly fee in a criminal case after the work has been performed. The flat fee structure is a better way to deliver this type of legal representation. The client has a predetermined fee that they know they can pay or not pay. It is not open ended. This also encourages counsel to more efficiently deliver the legal service without an eye on the clock. To my knowledge, I have not heard of any reports where clients have been harmed by non-refundable retainers in criminal cases. I know that my clients are very happy to know what it will cost to defend the case and that the fee will not exceed that non-refundable flat fee. I wish I had more room to tell you how stupid an idea this is. Where is the problem that you feel needs a solution?



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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AGREE with this proposed Rule

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AGREE ONLY IF MODIFIED

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I join in the opposition to the Proposed Rule filed by the California Attorneys for criminal Justice (CACJ).



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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AGREE with this proposed Rule

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AGREE ONLY IF MODIFIED

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With respect to privately criminal cases, the hourly rate scheme is impractical and unworkable. If attorneys could only ask for their compensation after the services have been provided, then clients would never pay us. There are rules in place to deal with excessive fees. This proposed rule would actually frustrate a client's effort to hire a lawyer.



**ORANGE COUNTY
BAR ASSOCIATION**

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OC ASIAN AMERICAN BAR

OC DEPUTY PUBLIC DEFENDERS

OC TRIAL LAWYERS ASSOC.

OC WOMEN LAWYERS ASSOC.

June 11, 2010

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

Re: Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

- 1.2 Scope of Representation
- 1.5 Fees for Legal Services
- 1.13 Organization as a Client
- 1.18 Duties to Prospective Client
- 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
- 6.2 Accepting Appointments
- 7.1 Communications Concerning the Availability of Legal Services
- 7.3 Direct Contact with Prospective Clients
- 7.5 Firm Names and Letterheads
- 8.3 Reporting Professional Misconduct

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

Date: May 26, 2010

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.5 – Fees for Legal Services**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

We are aware that a number of other persons have raised the concern that the Board of Governors adopted this proposed rule in the first instance without conforming to public comment procedures established in State Bar Rule 1.10. The OCBA believes that the State Bar should be concerned with the potential implications if the rule is adopted without complying with its own procedural rules.

Substantively, the OCBA is opposed to the present formulation of Rule 1.5, and especially the provisions of paragraph (e)(2) and the comments related to that section.

There already is an existing statutory scheme for written fee agreements in B&P Code sections 6146 through 6148. Several of the terms in proposed paragraph (e)(2) are already contained in these statutory requirements. If there is concern that flat fee arrangements contain peculiar risks for clients, those should be addressed within the existing statutory framework. Lawyers are not subject to discipline for failing to comply with B&P Code sections 6147 and 6148. It would be inappropriate to impose disciplinary consequences only upon those lawyers who charge flat fees, and not those who enter into other fee arrangements.

Paragraph (e)(2) mandates five contract terms that "shall" be set forth in the flat fee agreement. The OCBA believes that requiring inclusion of all of these provisions actually will lead to greater uncertainty and confusion. For instance, it is internally inconsistent to state that the flat fee is the lawyer's property immediately upon receipt, while at the same time mandating that the fee is refundable. Lawyers may believe and claim the fee has been fully earned because the rule declares it is their property. It should not be an ethical requirement that the lawyer state in writing that a fee which is the lawyer's property might have to be given back. This will create ambiguity, resulting in more disputes over whether or not the fee is refundable.

It would be very simple to state expressly in the rule that flat fees for specified legal services contractually agreed to between attorney and client need not be placed in the client trust account,

without also stating that the flat fee is the attorney's property. That solves the issue of whether or not the fees may be placed in the general account.

Whether or not such fees are refundable to a client when the representation ends should depend upon the parties' agreement, as well as whether the lawyer has substantially completed the tasks for which he or she was retained. Substantial completion of the task is difficult to define. There are many factors including the possibility that an early settlement or resolution is one way to complete a task, even if the consequence is to avoid trial or other proceedings that might have been contemplated.

The question of whether or not the client would be entitled to a partial refund should be left to the parties' agreement, subject only to the traditional, well-defined rules that prohibit unconscionable fees (Rule 1.15(a)), and mandate the return of an unearned fee (Rule 1.16). A lawyer should *not be subject to discipline* for retaining a flat fee *unless* that lawyer violates those rules. The question of whether the flat fee lawyer has earned the fee may be resolved just like all other fee disputes. It should not be a separate basis for lawyer discipline unless the overall fee arrangement or the fee charged was unconscionable, or was not appropriately earned by the performance of a proper degree of services. By seeking to resolve the widespread concern over "nonrefundable" fees, the proposed language is simply overbroad.

There is also a risk that the disclosures mandated by paragraph (e)(2) could discourage early resolution of matters by providing incentives for flat fee lawyers to delay resolution of matters so as not to be accused of receiving an excessive fee. This could be an unintended consequence of the rule, contrary to public policy favoring early resolution of disputes. Just because a lawyer has been able to negotiate a favorable early resolution does not mean that the fee is unearned. Better guidance is needed in the comments if the intent is to provide a means of determining when a fee has or has not been earned.

In Comment [9], there is a typographical mistake which erroneously refers to paragraph (f)(2), a provision that does not exist. We believe that is intended to refer to paragraph (e)(2).

With regard to the substance of Comment [9], the lawyer's failure to include the required contract language would essentially convert the payment received from a flat fee to an advance fee deposit – a refundable deposit against which a reasonable fee should be charged. Yet, because the parties were contracting for a flat fee, they did not set a rate or method of calculating a different fee. Thus, this provision will necessitate a *quantum meruit* determination in every instance where the paragraph (e)(2) language is missing, leading to more fee disputes.

In summary, the OCBA is strongly opposed to the provisions of paragraph (e)(2) as presently drafted, and would discourage the Commission from imposing special contractual terms that are appropriately left to the parties or better governed by existing statutory provisions.

PAUL L. GABBERT
LAWYER
MAIN STREET LAW BUILDING
2115 MAIN STREET
SANTA MONICA, CALIFORNIA 90405
(310) 399-3259

June 3, 2010

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

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

Dear Mr. Miller:

I am a criminal defense attorney admitted to the State Bar of California on June 28, 1977. I practice state and federal trial and appellate criminal defense with an emphasis in asset seizure and forfeiture defense. I also represent clients in state and federal jeopardy and termination tax assessment proceedings.

In addition to being admitted to practice in California, I am admitted to the Bars of the United States Supreme Court, the United States Court of Appeals for the Ninth and Federal Circuits, the United States District Courts for the Northern, Southern, Central and Eastern Districts of California, as well as the Districts of Arizona and Hawaii, and the United States Tax Court. I have a national practice and have represented federal forfeiture claimants in California, Hawaii, Oregon, Arizona, Nebraska, New York, Illinois, Pennsylvania, South Carolina, and state forfeiture claimants in California, Hawaii, Michigan, Arizona and Kansas.

In the area of asset seizure and forfeiture defense, my cases have generated nineteen published opinions in the United States District Courts, Ninth Circuit Court of Appeals, and the United States Supreme Court.¹

Perhaps unlike some Members of the Special Commission for the Rules of Professional Conduct ("Commission") who drafted the proposed rule, I have first hand experience in the importance of non-refundable retainers and their significance to the attorney-client relationship in general and in fee forfeitures and Internal Revenue Service ("IRS") and California Franchise Tax Board ("FTB") jeopardy and termination assessment, seizure and levying contexts in particular. On at least three occasions, in which I was representing clients who had their assets seized for federal or state forfeiture, and my compensation was contingent upon obtaining the return of the seized currency, all of the money was seized pursuant to IRS and FTB assessments. This, in turn, required substantial collateral litigation to obtain the return of the funds and payment of my fees.²

I am familiar with the myriad ways federal and state prosecutors use to separate attorneys from their earned fees. Currently I have a motion for an award of attorney's fees under the Civil Asset Forfeiture Reform Act ("CAFRA") (28 U.S.C. §2465, *et seq.*) pending before the Ninth Circuit in United States v. \$186,416.00 in U.S. Currency, 590 F.3d 942, (9th Cir. 2010) in which the government is contending that the statutory fee award belongs to the client, not the attorney who earned the fee, so that the government can then seize the entire fee award under the Treasury Offset Program to repay the government for any debts allegedly owed by the client. In short, while the price of liberty, like safety at sea, is eternal vigilance, it frequently seems to the practitioners in the trenches that the price of getting paid for defending persons accused of crimes is eternal litigation.³ True retainers and other fixed fees are the only way for practitioners to avoid these pitfalls.

¹/Attachment 1.

²/U.S. v. \$127,360.71 U.S. Currency, CV 95-8743-WJR; Guerra v. United States, 645 F.Supp. 775 (C.D.Cal. 1986) (Pfaelzer, J.); and People v. \$74,722 in U.S. Currency, BS 04395958

³/In one FTB seizure in which I represented the client, from the date of the seizure of his funds, through the FTB and State Board of Equalization ("SBE") appeals including the suit for refund and trial in the superior court, approximately ten years were consumed by the litigation.

Initially, it is my understanding that the proposed new rule was adopted by the Board of Governors without appropriate notice and public comment as required by Rule of the State Bar 1.10(A). I certainly had never heard of it until very recently. Nor may the proposed new rule be excused from the requirement of this rule under section 1.10(B)(2) because it is clearly substantive and not a mere modification of the abandoned 2008 proposal, Rule 1.5(f). The present provision for post-hoc public comment neither solves nor resolves the Special Commission's and the Board of Governors' apparent failures to follow their own rules. Indeed, this situation is analogous to a judge issuing a tentative ruling without briefing and then inviting a party to try to change the Court's mind.

Although the purported purpose of the new rule is to protect clients, it appears to work to the detriment of clients and attorneys as well as ignoring the reality of more than a century of practice by California attorneys who have used various varieties of the non-refundable retainer fee. It is also my understanding that the Board of Governors has previously endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" earned upon receipt. Nor am I aware of any course of conduct or pattern of wrongdoing by California attorneys that would warrant modifying the existing rules as well as implicitly questioning the case law upholding them that are not already adequately provided for in the existing body of rules prohibiting the obvious: charging unconscionable fees and stealing money from clients for services not performed.

The primary reason that the non-refundable retainer or other fixed, fee earned upon receipt is essential to criminal defense practitioners and to their clients is to avoid fee forfeiture, seizure by tax assessments, orders to withhold, levies, restraining orders, preliminary injunctions, and years of uncompensated collateral litigation that distracts the lawyer from the purpose for which he was hired. The proposed new rule with its multiple qualifiers and conditions muddies rather than clarifies the existing law. State and federal prosecutors, agents and taxing authorities will have a field day with the proposed rule. It opens the door to seemingly endless "investigations" regarding the nature of the legal work performed by the lawyer and whether or not the fees belong to him or to the client. By definition, any monies deposited into the client's trust account belong to the client and are fair game for seizure, levy, and forfeiture.

In criminal securities litigation involving federal prosecutors and the Securities and Exchange Commission ("SEC") payment of attorney's fees and the relationship of that payment to restraining orders and preliminary injunctions can not only distract the attorney from the case she was hired to defend, it can eclipse the underlying case and result in the attorney having to defend herself in contempt proceedings based on how her

fee was paid. Even when the attorney prevails in the litigation, this can result in the functional equivalent of a fee forfeiture because the cost of successfully defending the civil contempt action can greatly reduce or eradicate the fee paid to defend the client in the underlying criminal action. Thus, non-refundable retainer fees are important in this context to insure that the fees belong to the attorney and that clients will be entitled to retain the counsel of their choice in the underlying case.

As an example of the creativity of federal prosecutors in the securities area, in one case counsel and his expert forensic accountant were paid by credit cards which are debt instruments. They were forced to retain counsel to defend their fees against the government's arguments that fees advanced from credit cards were assets, not debts, and fell within the scope of the order restraining the defendant's assets. After substantial collateral litigation at counsel's and the accountant's expense, the Court ruled that credit cards are debt instruments and were excluded from the order restraining the defendant's assets.

Thus, the proposed new Rule 1.5(e)(2) exposes members of the bar performing a variety of legal services to substantial financial risk and additional, uncompensated, extrinsic litigation by increasing the likelihood of the restraint and/or seizure of fees where the client has criminal, bankruptcy, state or federal tax or SEC investigations as well as being subject to a civil or criminal forfeiture or restraining orders.

Given the existing minefields in these multiple, overlapping areas of practice, Rule 1.5(e)(2) not only substantially increases the risk of attorney fee seizure and forfeiture, it will deprive many criminal defendants of their Sixth Amendment rights to the retained lawyer of their choice and prohibit many civil clients facing state and federal regulatory and civil penalty actions from retaining counsel.

Rule 1.5(e)(2) provides that "[i]f agreed to in advance in writing signed by the client, a flat fee is the lawyer's property upon receipt." Whether or not this is a true statement depends upon the applicable substantive law and a host of factually particular circumstances. Pursuant to its rule making authority, the State Bar cannot promulgate, overrule, alter, amend, or change existing substantive law. The cited portion of the proposed new rule in conjunction with its subsequent, multiple conditions and qualifications, is an unnecessary attempt to meld diverse areas of the law into a single rule that encompasses all potential future circumstances. Given the protean nature of human conduct, this is a factual impossibility, and greatly exceeds the Bar's rule making authority.

Cash flow is the economic life blood of all law firms. Under the proposed new Rule, and its multiple exceptions, when a skilled lawyer through knowledge, experience, reputation and carefully cultivated relationships obtains a significant benefit for the client within a short time, that does not resolve the entire case, the new Rule encourages clients to terminate representation without cause and obtain a refund of a substantial portion of the "flat fee" that would, under this proposal, no longer apparently belong to the attorney. As an example, in some federal drug cases, the principal concern of some clients is to get out of custody on bail. In a significant case, bail hearings can take many days and involve the presentation of multiple witnesses and the admission of numerous items of documentary evidence. Once the client is admitted to bail, and, in the case of a large multi-defendant federal drug conspiracy, the case can be set for trial six months to a year later. The proposed new rule provides an incentive for the client to fire the lawyer who successfully litigated the bail motion without cause, demand a significant refund of the "flat fee" fee paid, and to go shopping for less expensive counsel. Although it may seem counter intuitive, or even counter-empirical, to those who have not practiced in this area, there can be a surprising lack of gratitude and loyalty from clients even when counsel obtains significant results during the course of the litigation such as pre-trial release on bail, partial suppression of evidence, a severance of the defendant, the release of some assets, and the severance or dismissal of counts.

In short, there is no apparent historical, factual, legal or logical basis for the proposed new rule. It appears to unnecessarily and unreasonably create fertile new ground for fee disputes, including arbitration claims, bar complaints and lawsuits, as well as fee seizures, fee levies, fee forfeitures, and civil and criminal contempt proceedings against attorneys. Accordingly, the proposed new rule should be withdrawn.

Very truly yours,



PAUL L. GABBERT

PLG:ht

Encls.

cc: Rex Heinke
Michael Marcus
Richard A. Rubin
James H. Aguirre
Angela Joy Davis

Jeannine English
Patrick M. Kelly
Gwen Moore
William Gailey
George Davis
Laura N. Chick
Audrey Hollins
Jon Streeter

ATTACHMENT 1

1. United States v. \$8,850, 461 U.S. 555 (1983) (on the brief)
2. United States v. \$186,416.00 in U.S. Currency, 590 F.3d 942, (9th Cir. 2010).
Reversing the District Court (United States v. \$186,416.00 in U.S. Currency, 527 F.Supp.2d 1103 (C.D.Cal. 2007) (Wilson, J.)
3. Carvajal v. United States, 521 F.3d 1242 (9th Cir. 2008)
4. United States v. \$4,224,958.57, 392 F.3d 1002 (9th Cir. 2004) (on the brief)
5. United States v. Real Property Known as 22249 Dolorosa St., Etc., 190 F.3d 977 (9th Cir. 1999) (Dolorosa 2)
6. United States v. One 1997 Mercedes E420; One 1992 Mercedes Benz 500SL; One 1997 Chevrolet Tahoe, 175 F.3d 1129 (9th Cir. 1999) (on the brief)
7. United States v. Real Property Known as 22249 Dolorosa St., Etc., 167 F.3d 509 (9th Cir. 1999) (Dolorosa 1)
8. United States v. Real Property Located at 874 Gartel Drive, 79 F.3d 918 (9th Cir. 1996)
9. United States v. \$124,570 U.S. Currency, 873 F.2d 1240 (9th Cir. 1989)
10. Martinez v. United States, 669 F.2d 568 (9th Cir. 1981) (Martinez 2)
11. Martinez v. United States, 595 F.2d 1147 (9th Cir. 1979) (Martinez 1)
12. United States v. \$186,416.00 in U.S. Currency, 527 F.Supp.2d 1103 (C.D.Cal. 2007) (Wilson, J.)
13. In re Application of Gerard Mgnidichian for Return of Property, 312 F.Supp.2d 1250 (C.D.Cal. 2003) (Morrow, J.)
14. United States v. One 1992 Ford Mustang GT, 73 F.Supp.2d 1131, 1138 (C.D.Cal. 1999). (Baird, J.)
15. United States v. Funds Representing Proceeds of Drug Trafficking in the Amount of \$75,868.62, Etc., 52 F.Supp.2d 1160 (C.D.Cal. 1999)
16. United States v. One 1996 Toyota Camry Sedan, 963 F.Supp. 903 (C.D. Cal. 1997) (Pregerson, J.)
17. United States v. Real Property Located at 6625 Zumirez Drive, Malibu, California, 845 F.Supp. 725 (C.D.Cal. 1994) (Pfaelzer, J.)
18. United States v. Real Property Located at 25231 Mammoth Circle, 659 F.Supp. 925 (C.D.Cal. 1987) (Hatter, J.)
19. Guerra v. United States, 645 F.Supp. 775 (C.D.Cal. 1986) (Pfaelzer, J.)



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on one Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010

Your Information

Professional Affiliation 

Commenting on behalf of an organization 

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

* Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: [Rules Not Recommended Public Comment Form](#).

Rule 1.5 Fees for Legal Services [4-200] 

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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Flat fee retainers in our rural county allows access to defense attorneys. Simply put, most, if not all, of my clients could not afford my hourly rate. Defendants would be left without representation as they would be too wealthy for the public defender and not wealthy enough for a private attorney.



THE STATE BAR OF CALIFORNIA

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- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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Carol Langford Comments on Proposed Rules of Professional Conduct 1.5(f) Fees for Legal Services

The following is a comment on Proposed Rule 1.5(f), specifically regarding when it is appropriate for a lawyer to make a modification to an agreement. You should know that I have served as the Chair and Special Advisor to the State Bar Committee on Professional Responsibility and Conduct, in addition to being a member for several years. I have also chaired the Law Practice Management & Technology Section of the Bar and the Council of Section Chairs. I am currently an adjunct professor at the University of San Francisco School of Law and Hastings College of the Law teaching courses in legal ethics, and I have a full-time practice specializing in legal ethics and attorney conduct.

A lawyer has a fiduciary relationship, a relationship of confidence and trust, to always put the needs of the client above his or her own. When trust is breached,

ENTER COMMENTS HERE.

Carol Langford Comments on Proposed Rules of Professional Conduct 1.5(f) Fees for Legal Services

The following is a comment on Proposed Rule 1.5(f), specifically regarding when it is appropriate for a lawyer to make a modification to an agreement. You should know that I have served as the Chair and Special Advisor to the State Bar Committee on Professional Responsibility and Conduct, in addition to being a member for several years. I have also chaired the Law Practice Management & Technology Section of the Bar and the Council of Section Chairs. I am currently an adjunct professor at the University of San Francisco School of Law and Hastings College of the Law teaching courses in legal ethics, and I have a full-time practice specializing in legal ethics and attorney conduct.

A lawyer has a fiduciary relationship, a relationship of confidence and trust, to always put the needs of the client above his or her own. When trust is breached, the integrity of the legal system and the public's respect for the legal profession is jeopardized. The Proposed Rules are designed to regulate lawyer's conduct and bolster the public's confidence in the legal profession. I am concerned that the language of Rule 1.5(f) does not set a high enough standard to protect a client's interest in cases of modification.

Rule 1.5(f) language states that a lawyer shall not make a modification that is "adverse." Adverse is defined as a modification that "benefits the lawyer in a manner that is contrary to the client's interests." I am concerned this language is unclear. Whether a particular modification is adverse to the interest of the client always depends on the circumstances. I believe that a modification that increases a client's fee for a project should be adverse. In addition, adverse modification occurs when the client is coerced or agrees to it under duress or threat of non-performance. However, not all modifications are adverse. A modification that extends the time within which a client is obligated to pay a fee ordinarily is not adverse. The current language does make clear these distinctions. It doesn't set forth a requirement that the client who consents to the modification in writing can do so only if it is knowing and intelligent and the deal is fair and reasonable. The proposed rule will not deter adverse modifications and promote ethical transactions between lawyers and their clients.

I support the adoption of a higher standard in evaluating interests adverse to clients as in current Rule 3-300. It states that a lawyer must avoid interests adverse to a client unless all three requirements are satisfied. These requirements are: 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 either is represented in the transaction or acquisition by an independent lawyer of the client's choice 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; and (c) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.

It is detailed in scope and stipulates that modification is not allowed unless the client has full and intelligent consent and in writing. My other comments to this and other Rules are set forth in the Hazard/Zittrich professors' commentary.



THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation **Commenting on behalf of an organization**

Yes
 No

* Name

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- AGREE with this proposed Rule
 DISAGREE with this proposed Rule
 AGREE ONLY IF MODIFIED

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Proposed Rule 1.5 would prevent thousands of Californians from obtaining meaningful access to the criminal courts. The scarcity of public defender resources, particularly in misdemeanor matters is becoming worse and worse from coast to coast. Those private practitioners who provide a realistic alternative to going to court and pleading guilty (usually at arraignment) with the public defender must rely on non-refundable retainers in order to remain viable economic enterprises. The non-refundable retainer benefits both the public and the legal profession because fewer and fewer Californians can afford the cost of a jury trial and because most cases that would plead guilty at arraignment (with the public defender) are likely to be settled far more beneficially for the client or dismissed before trial due to the work of a flat fee compensated private counsel. Proposed Paragraph (e)(1) would have disastrous consequences on the adversary system, because most persons who could afford the relatively modest fees for legal assistance from one stage of the proceedings to the next, could in no way afford a retainer based upon availability for a trial that would, in all likelihood, never occur. Clients need certainty about

ENTER COMMENTS HERE.

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June 14, 2010

Via Facsimile
(415) 538-2171

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

Re: **Public Comment on Proposed Rule of Professional Conduct 1.5(e)**
(Fees For Legal Services)

Dear Ms. Hollins and members of the Rules Revision Commission:

Mr. Balin and I respectfully submit the following comments on Proposed Rule of Professional Conduct 1.5(e) (Fees for Legal Services). We are members of the Bar Association of San Francisco's Legal Ethics Committee. Mr. Balin is the Chair and I am the Vice-Chair. These comments are submitted in our individual capacity as time constraints prevented consideration and potential adoption by the Committee as a whole. We oppose subdivision (e) of rule 1.5 as presently drafted.

Subdivision (e) begins with the predicate that "[a] lawyer shall not make an agreement for, charge, or collect a non-refundable fee, *except*:" We respectfully submit that there is no such thing as a "non-refundable" fee and therefore the premise upon which the subdivision is based is misguided and is likely to create unnecessary confusion for both lawyers and clients.

The predicate language carries two implications. First, it implies that a fee can actually be non-refundable. Second, it implies that a non-refundable fee is ethically permissible in certain circumstances. According to proposed rule 1.5(e)(1) & (2), those circumstances include: (1) a true retainer, and (2) a flat fee for specified services.

Ms. Audrey Hollins and RRC

June 14, 2010

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Even a true retainer, however, is subject to possible refund under the particular facts and circumstances of a case. If a lawyer whose availability is to be secured by a true retainer is not available, then there is no legitimate basis for the lawyer to keep the retainer. Consider, for example, a situation in which the retainer is paid to secure the availability of a prominent criminal defense attorney. The client's willingness to pay the retainer is based on the attorney's high profile in this area of practice, and her busy trial schedule. Were the attorney to subsequently advise the client that she had another case that demanded her attention but someone else within the firm would be available to represent the client, would the client not be entitled to a refund of the true retainer?

A true retainer must also be earned in order for the lawyer to have a legitimate claim to it. *If* the lawyer makes him or herself available for the agreed period of time then she earns the retainer. It may be earned earlier than subsequent fees incurred in connection with the provision of actual legal services, but it is not earned simply by the lawyer's physical receipt of the funds. The same is equally true, if not more so, with regard to a flat fee for specified services. Such fees typically contemplate not only availability of the lawyer or law firm, but the provision of specified legal services in connection with the case. In many cases this includes the totality of legal services that will be required from beginning to conclusion of the representation. A flat fee is not earned on receipt of the funds, but rather upon provision of the specified legal services.

From the misguided premise that a fee can be non-refundable, subdivision (e) compounds the problem by stating "[i]f agreed to in advance, in a writing signed by the client, a flat fee is the lawyer's property on receipt." In our view, it should not be within the purview of the fee rule to try and create, modify or dictate property rights between lawyers, clients and third parties; and, the inclusion of this language does not effectively establish such rights. Moreover, attempting to define such rights and interests under a general rule ultimately fails because the issues of "when" a fee is earned and "whether it is to be refunded" are fact-specific.

Subdivision (e) seems to acknowledge these points when it states that a lawyer who is attempting to earn his or her flat fee "upon receipt" must nonetheless advise the client in writing that the non-refundable fee may in fact be refundable if the agreed-upon legal services have not been completed. Subdivision (e) therefore sets up an oxymoron. It purports to recognize the existence and permissibility of a "non-refundable" fee earned on receipt, while simultaneously acknowledging that such a fee is still "refundable."

The general public and lawyers, who seek guidance from the rules of professional conduct, are not well-served by a facially inconsistent rule - particularly in an area as important as the provision and handling of client funds. It is common knowledge that the

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majority of complaints by clients against lawyers, and the majority of cases brought by the State Bar, involve disputes over client funds. This is an area that is critical to clients, to the issue of public protection, and to maintaining public confidence in the legal system. Lawyers (who face potential discipline), as well as clients (who provide funds to lawyers), are entitled to clear guidance regarding these issues.

The confusion created by subdivision (e) is exacerbated by the fact that the requirements of 1.5(e)(2)(iii)-(v)¹ which deal with flat fees are not present in 1.5(e)(1) which deals with true retainers. Proposed rule 1.5(e)(2)(iii)-(v) requires a lawyer to advise a client in writing:

"... (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."

Why is a client who pays a flat fee, but whose lawyer does not perform any or all of the contemplated services, entitled on the face of the rule to a potential refund while a client who pays a true retainer, whose lawyer is not in fact available, is not? Why, for that matter, is the flat fee earned on receipt when the true retainer is not? The materials provided by the Commission do not provide a rationale for differentiating between these two types of allegedly non-refundable fees, yet the requirements set forth in 1.5(e)(2) are not set forth in 1.5(e)(1). We respectfully suggest that the answer to these questions is that *neither* fee is truly "non-refundable," and neither is "earned" simply by receipt.

The notion that a true retainer or flat fee can truly be non-refundable is also at odds with the language in proposed rule 1.5, as well as other rules of professional conduct, which recognize that a fee (regardless of type) may not be illegal or unconscionable, and that any unearned portion of a fee must be refunded. See, e.g., proposed rules 1.5(a) and 1.16(e). The provisions of subdivision (e) as drafted make

¹ Proposed rule 1.5(e)(iii)-(v) provides: "... (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."

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these other provisions and rules, and the relationship between them, all the more confusing for practitioners and clients.

The effort to dictate through a rule of discipline when a fee is earned and whether it is refundable is also inconsistent with the approach taken by the Commission in other rules. For example, proposed rule 1.15(g) recognizes that when there is a dispute between a client and lawyer over funds, the lawyer must place the disputed funds in a trust account until the dispute is resolved. The rule does not seek to determine whether the fees were in fact earned, who they belong to, etc. What principled basis is there for taking a different approach when addressing the important and fact-specific issue of whether a client's fee will be non-refundable?

Given that the provisions of subdivision (e) undermine its central premise (i.e., that a fee can be non-refundable), the question becomes "what is the real purpose and function of subdivision(e)?" The answer apparently is that it is directed at assisting a subset of lawyers (principally, criminal defense lawyers) in trying to fend-off third party efforts to seize client funds. We would respectfully submit that regardless of whether one agrees with the proposition that a fee rule should be drafted for the purpose of delineating property rights between a client and a third party, the effectiveness of the provision is dubious. It is not clear that a rule of discipline would have *any* effect on resolution of the legal issue of who actually owns or is entitled to the property (whether through seizure proceedings or otherwise).

Whatever minimal benefit lawyers might receive from being able to point to such language is significantly outweighed by the confusion and risks that such a rule would create for clients. The esoteric issues, and special interests, that underlie the rationale for subdivision (e) will be lost on clients. At the end of the day, a client who reads subdivision (e) is left with the following: (1) a true retainer to secure availability is non-refundable, and the default is that it is earned upon receipt, even if the lawyer ends up being unavailable, and (2) a flat fee for specified services can be non-refundable but even if the parties agree it is non-refundable it may still be "refundable." Will a client who reads the proposed rule have an accurate sense of the non-refundable nature of the fee?

As the Commission is undoubtedly aware, there have historically been significant differences of viewpoint with regard to true retainers, flat fees and non-refundable fees. This longstanding disagreement, even among lawyers who devote their practices to matters of professional responsibility, demonstrates why subdivision (e), as drafted, is not helpful to lawyers or to clients. Simply put, the subdivision does not provide greater clarity, it only muddies already murky waters.

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Page 5

The language of subdivision (e) comes in large part from Washington State Rule of Professional Conduct 1.5.² The use of Washington's language, while undoubtedly well-intentioned, is eventually unproductive because the Washington rule and the proposed rule address different issues. The Washington rule is tied in large part to the placement of funds received from the client. It creates an exception to the general requirement that the funds be placed in a trust account by providing that flat fees do not need to be placed in a trust account. Unlike most other states in the country, California is generally considered not to require an advance fee to be placed in a trust account. See, e.g., *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164; see also Cal. State Bar Form. Opn. 2007-172 ("Under rule 4-100, as it has been construed by the courts, an attorney is ethically permitted, but not required, to deposit fees not yet earned into a client trust account."). The purpose behind the Washington rule therefore doesn't exist in California where the exception has already been embodied by California law.

Which brings us back to the question what is the real purpose and function of subdivision (e)? Subdivision (e) does not benefit clients. A client has no interest in a fee truly being non-refundable, only the lawyer stands to gain. So, at the end of the day, subdivision (e) will exist for the purpose of assisting a subset of lawyers in fending-off third party claims to client funds through provisions that are unlikely to have any substantive impact on the legal issue of who is actually entitled to the funds.

We respectfully urge the Commission to amend proposed rule 1.5(e) to prohibit non-refundable fees in their entirety, as no fee is truly non-refundable. We understand that such a rule was originally proposed by the Commission. We further urge the

² Washington State Rule of Professional Conduct 1.5(f)(2) provides: "[a] lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing he services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. 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 and will not be placed into a trust account; (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."

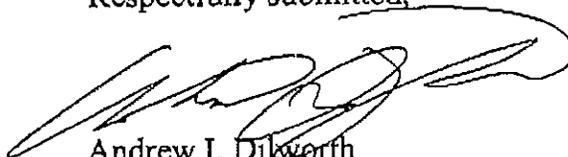
Ms. Audrey Hollins and RRC
June 14, 2010
Page 6

Commission not to try and use the fee rule to address when a fee is earned, or who owns it. A straightforward rule prohibiting non-refundable fees would provide clear guidance to both clients and to lawyers. It would also be consistent with established case law and other rules of professional conduct that recognize that a fee must be earned, and that a fee is always subject to "potential refund" depending on the facts and circumstances.

If the Commission does not wish to prohibit non-refundable fees through a rule of discipline, then we urge the Commission to get rid of subdivision (e) altogether. Its inclusion is unnecessary. Clients will not be prejudiced by its omission. Nor will its omission place lawyers (criminal defense or otherwise) in a position any different than that which currently exists, and thus will not prejudice their ability to make the substantive arguments on which they seek to rely in responding to third party claims.

We appreciate the opportunity to have presented our views to the Commission, and the Commission's consideration of our comments.

Respectfully submitted,



Andrew I. Dikwerth
William Balin

Hollins, Audrey

From: Louis J. Goodman [ljgoodman@yahoo.com]
Sent: Friday, June 11, 2010 4:06 PM
To: Hollins, Audrey
Subject: Opposition to proposed Flat-Fee/Non-Refundable restrictions

1.5

Ms. Hollins:

Below, please find a copy of the comments of Ann Moorman. I incorporate her comments herein by reference. Please count me as opposed to the non-refundable/flat-fee restrictions. As a criminal practitioner, I can assure you that there is really no other way to effectively bill clients reasonable fees for service. Thank you.

Louis J. Goodman

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Linda Starr, Santa Clara
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Kelly Tanalepy, Sacramento
Vincent Tucci, Irvine
L. Stephen Turer, Santa Rosa
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Thomas S. Worthington, Salinas
May 25, 2010
Howard B. Miller
State Bar President
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1126 Wilshire Boulevard
Los Angeles, California 90017
Special Commission for the Rules of Professional Conduct
c/o: Ms. Audrey Hollins
The State Bar of California

Office of Professional Competence, Planning & Development

180 Howard Street

San Francisco, California 94105

Re: Opposition to Proposed New Rule of Professional Conduct,

Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers

Dear Mr. Miller,

As the current President of California Attorneys for Criminal Justice (hereafter "CACJ"), I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors. There are many features about the proposal that raise strong concerns for our membership, some of which I highlight herein.

California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. It is administered by a Board of Directors and its bylaws state a series of specific purposes, including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 2,000 criminal defense lawyers working in both the private and public sector from around the State of California and elsewhere, as well as members of affiliated professions. For over 36 years, CACJ has appeared before numerous courts including the United States Supreme Court as amicus curiae on matters of importance to the administration of justice, to our members and to our clients. We write in this capacity to urge the proposed amendment be rejected as unnecessary; essentially interfering with the ability of lawyer and client to contract in a way that benefits the client.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

CACJ California Attorneys for Criminal Justice

Re: Opposition to Proposed New Rule of Professional Conduct,

Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers

Page 2

We are unclear why the Board is now considering a ban on non-refundable fee agreements. As I understand it, there have not been a substantial number of complaints from consumers/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.

As with all fees and fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the 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). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.

As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether 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 by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.

Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and is not practical. Since the proposal would require the "flat fee" to cover contingencies (e.g., trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially 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 and represent the "gold standard" for California lawyers.¹

We also think the proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged. In her article in the California Bar Journal, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee forms:

"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 Agreement", 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>.

CACJ California Attorneys for Criminal Justice
Re: Opposition to Proposed New Rule of Professional Conduct,
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at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, s/he will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or cuts short the life of the case, the Proposal encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee", which, under this Proposal would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.

For these and other reasons, CACJ urges the State Bar Board of Governors to reject the proposed amendment (Rule 1.5(e)(4-200). Thank you for your consideration of this letter.

Very truly yours,
ANN C. MOORMAN, President

CACJ Board of Governors

cc:

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on one Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010

Your Information

Professional Affiliation	<input type="text"/>	Commenting on behalf of an organization
		<input type="radio"/> Yes
		<input checked="" type="radio"/> No
* Name	<input type="text" value="Alison Bermant, Attorney at Law"/>	
* City	<input type="text" value="Truckee"/>	
* State	<input type="text" value="California"/>	
* Email address <small>(You will receive a copy of your comment submission.)</small>	<input type="text" value="truckeelawyer@gmail.com"/>	

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

* Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: [Rules Not Recommended Public Comment Form](#).

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I have been practicing criminal defense law for 11 years now; eight years in private practice after working as a public defender. To have the State Bar suddenly involved in my fee contracts with my clients is very disturbing. 100% of the time that I have allowed clients to make payments to me for work performed, I have not been paid. There are no exceptions to this. My experience is such that if I am not paid in full prior to the making of the first court appearance, I will not be paid. Once a case is resolved, the client no longer has any interest in keeping his or her obligations to me because they are either incarcerated or so focused on paying court fines and reporting to their probation or parole officer that it is not on their agenda to see that the lawyer who helped them gets paid.

Every criminal lawyer I have ever come in contact with works on a flat fee basis for this very reason. In some cases, when a client insists on me working for an hourly rate, I will do so. Generally I end up charging them significantly more because of the amount of time I spend on the phone dealing with my client's emotional issues

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Every criminal lawyer I have ever come in contact with works on a flat fee basis for this very reason. In some cases, when a client insists on me working for an hourly rate, I will do so. Generally I end up charging them significantly more because of the amount of time I spend on the phone dealing with my client's emotional issues over being prosecuted for their crimes. Flat rate fees in criminal cases are the only way to assure an attorney gets paid.

While many people believe that criminal lawyers are getting rich and some sort of windfall by this agreement, I am here to tell you that there are so few Johnny Cochrans in this world. I still love month to month most times. I have been out of law school for 11 years and every single month have made significant law student loan payments (still am). Not being paid for my work eventually means I go out of business. That is my reality.

I vehemently oppose any modifications to the way I conduct my business. I'm happy to come down and discuss this in person as well so you understand what real life is really about.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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Your Information

Professional Affiliation	<input type="text"/>	Commenting on behalf of an organization
		<input type="radio"/> Yes
		<input type="radio"/> No
* Name	<input type="text" value="Melyssa A Avola"/>	
* City	<input type="text" value="Pasadena"/>	
* State	<input type="text" value="California"/>	
* Email address (You will receive a copy of your comment submission.)	<input type="text" value="melyssa@avolaw.com"/>	

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

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Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers would radically alter the way the majority of the Criminal Defense Bar does business. "Flat Fees" or "Fixed Retainers" are a common, and accepted way to retain clients in need of a criminal defense attorney. Such a practice keeps fees low to accommodate clients that may not be financially able to pay for accrued hourly fees and costs. Please refer to the attached letter from the President of CACJ Board of Governors, Ann C. Moorman for more information.

CACJ California Attorneys for Criminal Justice

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May 25, 2010

Howard B. Miller
State Bar President
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, California 90017

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

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

Dear Mr. Miller,

As the current President of California Attorneys for Criminal Justice (hereafter "CACJ"), I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors. There are many features about the proposal that raise strong concerns for our membership, some of which I highlight herein.

California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. It is administered by a Board of Directors and its bylaws state a series of specific purposes, including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 2,000 criminal defense lawyers working in both the private and public sector from around the State of California and elsewhere, as well as members of affiliated professions. For over 36 years, CACJ has appeared before numerous courts including the United States Supreme Court as *amicus curiae* on matters of importance to the administration of justice, to our members and to our clients. We write in this capacity to urge the proposed amendment be rejected as unnecessary; essentially interfering with the ability of lawyer and client to contract in a way that benefits the client.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

CACJ California Attorneys for Criminal Justice

Re: Opposition to Proposed New Rule of Professional Conduct,
Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers
Page 2

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As with all fees and fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the 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). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.

As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether 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 by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.

Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and is not practical. Since the proposal would require the "flat fee" to cover contingencies (e.g., trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially 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 and represent the "gold standard" for California lawyers.¹

We also think the proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged

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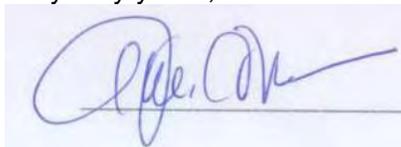
CACJ California Attorneys for Criminal Justice

Re: Opposition to Proposed New Rule of Professional Conduct,
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Page 3

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For these and other reasons, CACJ urges the State Bar Board of Governors to reject the proposed amendment (Rule 1.5(e)(4-200)). Thank you for your consideration of this letter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ann C. Moorman", is written over a light blue horizontal line.

ANN C. MOORMAN, President
CACJ Board of Governors

cc:

Richard A. Rubin
State Bar Vice President
Richard A. Rubin Associates
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†ALSO ADMITTED IN NEW JERSEY

June 14, 2010

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

VIA OVERNITE EXPRESS

Howard B. Miller
President
The State Bar of California
Girardi & Keefe
1126 Wilshire Boulevard
Los Angeles, CA 90017

VIA OVERNITE EXPRESS

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 and Mr. Miller:

As a long time Family Law practitioner I write this letter to express my opposition to the proposed new Rule of Conduct that would abolish the right of lawyers to charge flat or non-refundable fees. For many different reasons, in my area of practice, such a Rule would be grossly unfair to the lawyers and allow many clients to receive services at a cost far below the reasonable compensation for the work, effort and experience that goes into the representation of that client. For example:

In Family Law it is not uncommon for potential clients to go around and conflict out lawyers they do not want to have as opposing counsel. Sadly, this is a practice that is promulgated by some lawyers in our community but also has clearly taken hold in the general community because of the proliferation of this kind of advice on various special

Audrey Hollins

Howard B. Miller

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interest web sites. One of the ways a high profile law firm can protect itself from this kind of practice is to have non-refundable retainer agreements so that the client does not hire you, conflict you out and then fire you, paying only for an hour or so of your time. There is truly a premium value to the retention of certain lawyers in all fields, unfortunately in the Family Law field the concept of "conflicting out" has become a tactic used by some litigants and some lawyers.

In Family Law it is not uncommon for some of us to substantially limit the intake of cases so that we can provide full and complete services to the clients we commit to represent. Only by knowing that there will a specific fee [minimum fee] can we afford to do that. If a client is accepted and then we turn away another potential client [as we do at Kolodny & Anteau] because of work load commitments, we should not be prejudiced because the client we accepted then chooses to leave before much work is done.

In Family Law we are often asked to prepare Pre or Post Nuptial Agreements, which are documents that have very substantial potential liability associated with them. The fees charged are document specific fees, not related to time expended. Prohibition of flat fees [which are a form of non-refundable retainers or will ultimately be categorized as such] would severely inhibit the willingness of lawyers to provide services in this difficult area.

To my knowledge, members of the Bar practicing in many fields including bankruptcy, immigration, family law, criminal law, tax law, and SEC law, as well as entertainment and real estate law understand that there is nothing about a non-refundable retainer that permits a lawyer to charge an unconscionable or clearly excessive fee. That is, the non-refundable retainer, as with any other traditional fee arrangement, has always been subject to well-established professional rules that apply to the unscrupulous lawyer who extracts an unconscionable fee as a "non-refundable retainer" from a naive client, has no established basis for doing so or to justify the amount charged, does little or no work, and keeps the clients' 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 non-refundable retainer arrangement, except as allowed by historical rules and precedent, if a lawyer does very little or no work, the client is entitled to a full refund.

Audrey Hollins

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Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e) (4-200)
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Similarly, members of the Bar have almost universally recognized that when a client signs an agreement and pays a non-refundable retainer, there are unanticipated events that can result in a refund of a non-refundable retainer. For instance, a client would be entitled to a full refund if his/her lawyer gets sick and does no work. Likewise, an honest lawyer would refund a \$10,000 non-refundable 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 non-refundable retainer would be "unconscionable" under Rule 1.5(a) and an honest lawyer would refund the unearned portion of the fee.

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 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 California lawyers have used

Audrey Hollins

Howard B. Miller

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- some form of the non-refundable retainer (that falls outside of the limited exceptions in 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 Governors endorsed the continued use of "fixed fees," and "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 (c)(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.

Audrey Hollins

Howard B. Miller

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

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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 restraining 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 family lawyer litigants 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.

Audrey Hollins

Howard B. Miller

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

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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.¹
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-determined in an ongoing case, the Rule encourages clients to terminate the

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

"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...." Diana Karpman, "Time for turning 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>.

KOLODNY & ANTEAU

Audrey Hollins

Howard B. Miller

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

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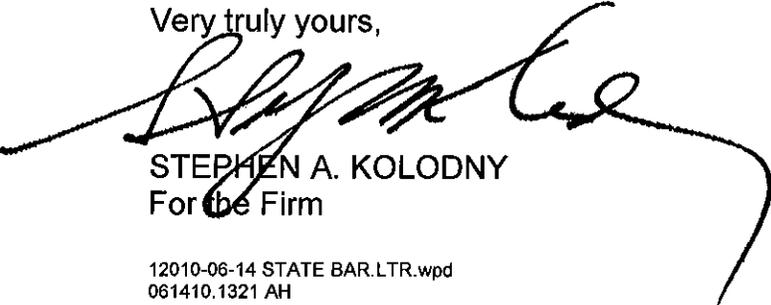
representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled. This Proposal effectively penalizes an effective and/or efficient lawyer or the promotion of early resolution of disputes, all of which is contrary to the legislature's stated intent in the Family Code and which should be the principal to which all lawyers should subscribe.

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."

I attach hereto a "Summary Analysis" done by others, which appears to me to completely address many of the problems in this Proposed Rule.

It is respectfully requested that the Proposed Rule be rejected or, if not, at least delayed until clear, specific comments are sought from the entire Bar.

Very truly yours,



STEPHEN A. KOLODNY
For the Firm

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Enclosure

**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 presumably “non-refundable” flat fee cover fees for services spanning the entire length of the case, including trial.⁵ Particularly in complex

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

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)⁶ because they are not earned.⁷

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, 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

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 a 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)

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.

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).

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 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

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.*

Indeed, in many jurisdictions, the use of non-refundable retainers is recognized as appropriate, if not essential in both civil and criminal cases.¹¹ 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)).¹² 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.

¹¹ 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 Lawyer* (2d. ed. 1996) at p. 163. *See also, e.g., Bunker v. Meshbesh*, 147 F.3d 691 (8th Cir. 1998) (Minnesota); 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).

¹² 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?

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 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,¹³ bankruptcy, criminal law¹⁴ and jeopardy tax assessments¹⁵ 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 "non-refundable" 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)

¹³ *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).

¹⁴ *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).

¹⁵ *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).

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 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 protections against unreasonable and unconscionable fees currently protects 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 website¹⁶). The current standards, custom, and

¹⁶ 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>).

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), 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.

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.¹⁷ 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

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 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)

¹⁷ 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) other than 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.

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 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 meaningfully respond or object before the Board of Governors' tentative approval of revised proposed Rule 1.5(e).

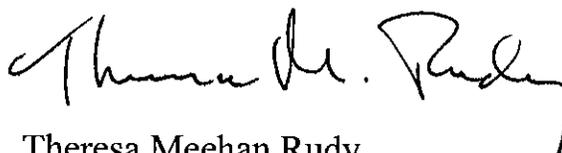
June 14, 2010

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

Dear Ms. Hollins:

Please find enclosed our comments on Proposed California Rules of Professional Conduct. We would be happy to address any follow-up questions the Commission may have regarding our comments.

Sincerely,



Theresa Meehan Rudy
Executive Director



Simple • Affordable • Accountable • Justice for All

June 15, 2010

Comments by
HALT—*an Organization of Americans for Legal Reform*
on
Proposed California Rules of Professional Conduct

In response to the request for public comment by the Commission on the Revision of the Rules of Professional Conduct of the State Bar of California, HALT – *An Organization of Americans for Legal Reform* hereby submits the following comments on the Proposed Rules of Professional Conduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, HALT has been on the forefront of fights to improve the systems in place to weed out unethical lawyers and to provide meaningful recourse to victimized legal consumers.

Although we suggest some possible improvements, four of the Proposed Rules that we discuss reflect progress in key areas of client empowerment and lawyer responsibility. On the critical issue of protecting consumers from exorbitant legal fees, however, the Commission and the California Bar continue to fail the public. Unreasonable attorney's fees are the leading cause for consumer complaints against lawyers. HALT respectfully urges the Commission to revisit this issue.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer. HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. We applaud the Commission's recognition of a lawyer's ethical obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, HALT has long advocated limited representation as a cost-saving innovation that enhances

consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).

Rule 1.4 Communication. HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.4. It is a substantial improvement over current California Rule of Professional Responsibility 3-500. Without full and regular communication, the attorney-client relationship cannot function properly, and a client is not in a position to make the critical decisions during the course of a representation. Unfortunately, the proposed rule only requires a lawyer to communicate the "amounts, terms, and conditions of any *written* offer of settlement made to the client" in civil matters (Proposed Rule 1.4(c)(2), emphasis added). Whether a settlement offer is oral or written is immaterial; the client has the right to decide whether to accept it under Proposed Rule 1.2, and should be informed of all such offers. Indeed, the Commission's commentary on the proposed Rule states "[a]ny oral offers of settlement made to the client in a civil matter must also be communicated if they are significant" (Proposed Rule 1.4, Comment [7]). But a Comment is not a Rule. As currently drafted, the Proposed Rule and the Commission's commentary create unnecessary ambiguity. HALT urges the Commission to strike the word "written" from Proposed Rule 1.4(c)(2), so it is clear that a lawyer has an obligation to communicate all settlement offers to a client.

Rule 1.4.1 Disclosure of Professional Liability Insurance. HALT believes that all lawyers who offer their services to the general public should be required to carry adequate malpractice insurance. Proposed Rule 1.4.1 is an important step toward that objective, and HALT thanks the Commission for beginning to address the problem of uninsured and inadequately covered attorneys. While similar mandatory disclosure requirements have significantly reduced this problem in other States, we believe that there is a better approach. Since 1978, Oregon has required all lawyers in private practice to obtain malpractice insurance coverage through the Oregon State Bar Professional Liability Fund. The Oregon system of universal coverage has worked well. HALT urges the Commission and the Board of Governors to monitor the effectiveness of the new disclosure requirements, and to consider a universal coverage system, similar to that which has proven effective in Oregon, to address any continuing problems of uninsured attorneys.

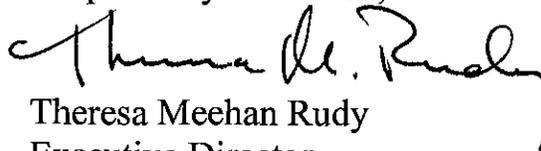
Rule 1.5 Fees For Legal Services. HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, Proposed Rule 1.5 would only prohibit fees that are "unconscionable or illegal." An ethical rule that prohibits

only the unenforceable and the unlawful adds nothing. For many years, HALT has raised questions about the elasticity of the ABA's requirement that attorneys only charge "reasonable" fees. But even that flawed approach offers some protection to consumers. The California approach protects only lawyers who charge unreasonable fees. HALT urges the Commission to revisit the issue of reasonable attorneys fees and, at a minimum, adopt the ABA Model Rule.

Rule 1.8.10 Sexual Relations With Client. There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients. HALT strongly supports the clear prohibition of such lawyer misconduct by both the Commission and the ABA. Proposed Rule 1.8.10 is a substantial improvement over current California Rule of Professional Responsibility 3-120.

HALT thanks the Commission for the opportunity to offer these Comments.

Respectfully submitted,



Theresa Meehan Rudy

Executive Director

HALT, Inc.—

an Organization of Americans for Legal Reform

1612 K Street NW

Suite 510

Washington, DC 20006



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on one Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010

Your Information

Professional Affiliation Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

* Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: [Rules Not Recommended Public Comment Form](#).

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The prohibition of a non-refundable fee option would have serious negative consequences on the rights and benefits of a client/defendant in a criminal case.

As an attorney who left school over three decades ago and applied to every single public defender and legal aid office in the country, and as someone who spent his first year in practice as a Peace Corp volunteer (VISTA Volunteer) working for \$185 per month (plus food stamps) at the San Diego Legal Aid office, and as someone who has for over thirty three years maintained his commitment and dedicated a considerable portion of his practice to representing the indigent defendant, I am NOT someone who has ever placed money ahead of the rights of my clients.

It is with that background that I can unequivocally state that the benefits and rights of an defendant/client in a criminal case would be considerably benefitted by having the option of being able to accept an attorney fee agreement on a non-refundable fee basis.

ENTER COMMENTS HERE.

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It is with that background that I can unequivocally state that the benefits and rights of an defendant/client in a criminal case would be considerably benefitted by having the option of being able to accept an attorney fee agreement on a non-refundable fee basis.

The foundation for my beliefs are as follows:

1. A non-refundable and fixed fee agreement provides certainty to the client. They know what they are going to pay at the beginning of the case and they never have to worry that their fee will increase. In my cases, it usually means that I have greatly undercharged the client, because I end up spending more time on the case than I originally estimated, yet never charge a client more.
2. It provides better and full service to the client. The client never has to practice "check-book defense", deciding whether a particular meritorious motion or legal task should be taken as compared to what it would cost. There never is a "short changing" of services, but rather is an expansion of services available.
3. It increases access to the attorney. A client doesn't ever have to worry that he is going to suffer financially by being billed by communicating with his attorney a multitude of times. In this regard, I am reminded of a true story involving the client who met his lawyer at the Padre game, talked about Tony Gwynn and the Padre pitching and asked about the status of his case, only to receive a bill the following week for legal consultation.
4. It eliminates the chances of conflict between the client and his attorney. Because the attorney also gains certainty in the receipt of a non-refundable fee at the beginning of the case, there never is a situation where the attorney is not paid for his services, either intentionally or because of a change of financial circumstances of the client, meaning that the attorney does work for the client - maybe is forced to go to trial for the client cuz the judge will NOT relieve an attorney just for the client's failure to pay - all of which builds in a sometimes subtle and sometimes not so subtle conflict between client and attorney.

One of the most repugnant examples of this circumstance relates to a story that I saw on the CBS News Program "60 Minutes", where Morley Safer was interviewing a defense attorney on the day before his trial. The attorney told Mr. Safer that he hadn't been paid by his client on the day before the trial despite his multiple efforts to have the client pay. The attorney told Safer, that he wasn't worried because he "had a way to convince the client". What was the way? The trial started; the judge asked if the defense had an opening statement: The attorney responded, "We will waive your honor." The first DA witness finished direct; the court said, "defense counsel, you may cross examine". The defense attorney responded: "We will waive, your honor."

At the end of the day, the defense attorney smiled toward the camera and showed Safer a bag full of money and said "See Morley, I told you I had a way to make him pay."

It was as repugnant an exhibition of defense representation as I've ever heard. In the worst tradition of this profession.

Yet this behavior is ripe where the a non-refundable fee agreement is not allowed.

It also must be remembered, that just because an attorney requests a non-refundable fee agreement does not mean that it is something which the client MUST accept. Of course, the client can say, "I will not accept this term" or can seek other counsel. This is NOT a situation where the attorney has a "monopoly" on representation. Simply put, the client can simply say: "I will hire someone else."

It should also be noted, that a non-refundable fee agreement is really a much fairer system, if there is ever a dispute as to the fee. This works to the benefit of the client. Let's look at the two circumstances: non-refundable and refundable.

If there is a NON-refundable fee agreement, and at the end of the case or anywhere in the middle, the client disputes the fee, the client has the right to (a) attempt an informal resolution, but if such a resolution is not successful, has the right to (b) DEMAND arbitration and the atty MUST, as a matter of state law, accept the arbitration requirement. Of course, the client has the option of (c) filing a law suit. In all matters the attorney is obligated to try to resolve the matter.

On the other hand if there is a REFUNDABLE fee agreement, and the client disputes the fee, the client has the right to (a) seek an informal resolution, but if such a resolution is not successful, but here the situation changes. The disputed funds now have to be placed in a special trust account and though the client has the right to demand arbitration, the attorney does NOT have the right to do so. In short, the client can refuse to try to settle the issue, and ignore all the efforts of the attorney to resolve the situation. The money remains in the trust account and the client, if she wishes, can do absolutely nothing and if she acts in this way, the ONLY resolution that the atty has is to SUE HIS CLIENT. It destroys atty-client trust; it works greatly to the detriment of the client; it potentially opens the door to privileged communications - it's just bad.

Finally, it should be remembered that, of course, it is possible that there could be abuses by the unscrupulous atty taking advantage of a non-refundable fee agreement. There is a remedy in place to deal with such a circumstance. If a case is dismissed two days after filing, then, of course, the prohibition against unconscionable fees and my own ethics, demand that I return a large, if not all, the fee. If I, not my client, were to walk away from representation, then the full fee should be returned.

But problems with unscrupulous attorneys can occur with equal frequency with any other billing system: hourly (where the hours can be gouged and multiplied for unnecessary work); task (where poor work can be done for services). simply put, there is no billing system which is immune for an unscrupulous attorney, or for that matter, an unscrupulous client. The best way to have fair fees and good services for clients, is to have good attorneys and fair clients, and no system of billing guarantees that, however, we should look to create a system which enhances the chances of good representation, and I have found, after 35 years of practice, that the best method is through a non-refundable fee system.

LAW OFFICE OF RICHARD P. BERMAN

Richard P. "Rick" Berman, Attorney

2333 Merced Street
Fresno, California 93721
(559) 438-7425
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June 15, 2010

Mr. Howard B. Miller
State Bar President
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, CA 90017

Special Commission for the Rules of Professional Conduct
c/o Ms. Audrey Hollins
Office of Professional Competence,
Planning and Development
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) Abolishing Non-Refundable
Retainers

Dear Mr. Miller:

The new proposed State Bar Rule 1.5(e) (4-200) to prohibit non-refundable retainers is an anti-consumer measure. I have been practicing criminal law, both as a prosecutor and a defense attorney, for almost 40 years. During that time I have won numerous awards and received the highest possible peer ratings and reviews. It is unfair to the public to prohibit them from negotiating a reasonable and fair price for my services. In America, competition and the free market are hallmarks of our success. If a consumer wants to pay for my years of experience, track record of success, thousands of hours of post-law school education, reputation and expertise, they should be free to do so.

If I could not charge a significant non-refundable retainer, I would be likely forced to charge an hourly fee which could not be reflective of my past accomplishments and experience in relationship to a relatively new and unproven attorney. If the new attorney is charging the "going rate" of \$250.00 to \$350.00 per hour, I would have to charge many times that amount per hour to reasonably value my services. Simply put, a large non-refundable retainer paid to me may provide the results and the piece of mind that a new attorney may never be able to provide, and do so with a fair and reasonable cost to the client.

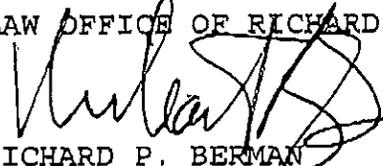
Mr. Howard B. Miller

June 15, 2010
Page Two

Anyone who has dealt with a person charged with a serious crime, or their family, knows the stress that a criminal prosecution visits upon a defendant and his/her family. If I can save a person's liberty, reputation, life savings, and professional license, and do so in an expeditious manner that does not force him/her and the family to go through protracted proceedings, then the consumer has enjoyed the freedom to hire the lawyer they desire at the price that they are free to negotiate and to enjoy the results. Of the many thousands of clients I have represented the complaints about the fees can be counted on the fingers of one hand. That is in almost 40 years of handling both serious and mundane criminal matters and charging what I and the client feel is fair and reasonable. I simply cannot provide such services under the new proposed State Bar Rule. Both the public and I will lose a great deal if this measure is passed.

Sincerely yours,

LAW OFFICE OF RICHARD P. BERMAN



RICHARD P. BERMAN
(State Bar #55462)

RPB:as
Enclosure

Richard P. Berman (AV)
Law Office of
Richard Berman & Eric Schweitzer
Fresno, CA

Partner
2333 Merced Street
Fresno, CA 93721
Tel: 559-233-2333; 559-438-7425
Fax: 559-233-6947
Fresno Co.

Practice Areas: Criminal Law, White Collar Criminal Defense, Sexual Offenses and Internet Pornography, Drug Crimes, Traffic Violations, Homicides, Driving While Intoxicated, Personal Injury

Admitted: 1973, California

Biography: Phi Alpha Delta. Recipient, Northern California Super Lawyer, 2009. Instructor, "Criminal Law," Fresno City College and State Center Peace Officers Academy, 1974-1979. Deputy District Attorney, 1972-1977 and Chief Deputy, 1977, Fresno County. Dean's Advisory Council, California State University, Fresno, School of Social Sciences, 1986-1998. Listed in Best Lawyers in America, Criminal Defense, 1987. Listed as one of top 100 trial lawyers in California 2007 by Association of Trial Lawyers of America. Northern California Super Lawyer, 2009.

Member: Fresno County Bar Association (Director, 1992-1994; President, 1994-1995; Chair: Criminal Law Section, 1982 and 1984; Bench, Bar and Media Committee, 1990. Member, Blue Ribbon Committee on Court Coordination); Federal Bar Association; State Bar of California (Member, State Bar Public Affairs Committee, 1986-1989); Consumer Attorneys of California (Recognized Experience as a Trial Lawyer and in the Field of Criminal Defense, 1981); Fresno Trial Lawyers Association (Director, 1979-1985); California Attorneys for Criminal Justice (Life Member and Patron, Board of Governors, 1983-1989, 1992-2001); National Association of Criminal Defense Lawyers (Life Member); Consumer Attorneys of Los Angeles; American Inns of Court (Master).

Military: Captain, U.S. Army Reserve, Medical Service Corps, 1975-1979

Educated: University of California at Los Angeles (B.A., 1968); University of California, Hastings College of Law (J.D., 1972)

Born: Los Angeles, California, October 26, 1946

Associations: ABA

Martindale Hubbell US Lawyers Winter 2009



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on one Rule per form submission and that you choose the proposed Rule from the drop-down box below.

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Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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* Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: [Rules Not Recommended Public Comment Form](#).

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please see attached 3 page .pdf.



LAW PRACTICE MANAGEMENT AND TECHNOLOGY SECTION

THE STATE BAR OF CALIFORNIA

PROPOSED RULE 1.5 [4-200]: "FEES FOR LEGAL SERVICES" (DRAFT #11, 12/14/09)

INTRODUCTION

The State Bar of California Law Practice Management & Technology Section (LPMT) comment on Proposed Rule 1.5 concerns 1.5 in general and Comment [1B] in particular:

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.

ANALYSIS

The State Bar Should Acknowledge and Encourage Alternative Fee Arrangements

LPMT believes that Proposed Rule 1.5, as drafted, would hamper the development of alternative fee arrangements, arrangements that would benefit clients and attorneys alike. This consequence is particularly likely given the

historical emphasis on hours as the billing touchstone – a touchstone that will likely be less relevant in evaluating alternative arrangements. The Proposed Rule should more directly acknowledge and encourage such alternative fee arrangements, in addition to contingency fees and strictly flat fees.

The failure to remove hours expended as the litmus test of conscionability interferes with the development of alternative fee arrangements, which can be of great worth to clients as they plan and budget. Hours expended are often irrelevant and should not be the standard by which such alternative fee arrangements should be judged. Many lawyers on fixed fees do not keep track of time – that is one of the benefits to both lawyer and client. Rather, alternative fee arrangements can provide the client with much-valued specificity and certainty of cost and time.

On the lawyer's side, such arrangements encourage the lawyer to invest in technology, which will yield a better and more efficient result for the lawyer's clients. Without the ability to thus amortize the capital expense of new technology and innovate, lawyers will see no incentive to change to more dynamic fee arrangements that would benefit both client and lawyer

While it might not be advisable to address specific alternative arrangements in the Proposed Rule itself, LPMT does urge the Commission to revise its Comments to Proposed Rule 1.5. In particular, we highly recommend that the Commission:

- note that such alternative fee arrangements are subject to the proscription against unconscionable fees; and
- acknowledge that the factors used to evaluate the conscionability of fees can and should be weighted differently in certain alternative fee arrangements.

By doing so, the Commission would clarify that Proposed Rule 1.5 is not meant to chill the development of such alternative fee arrangements, while at the same time ensuring that such arrangements are nevertheless subject to a fundamental ethical standard.

(c't'd)

CONCLUSION – AND SUGGESTED EDITS TO THE PROPOSED RULE

For the foregoing reasons, we recommend that Comment [1B] be amended as follows:

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. Indeed, it is anticipated that the weighting of factors and the relevance of each factor would be dependent upon the facts of a given fee arrangement. Contingent fees and other alternative fee arrangements, 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.

Clean version of Comment [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. Indeed, it is anticipated that the weighting of factors and the relevance of each factor would be dependent upon the facts of a given fee arrangement. Contingent fees and other alternative fee arrangements, 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.



**THE STATE BAR OF
CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning &
Development
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,¹ we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.² We hope you find our thoughts helpful.

SUMMARY

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

¹ OCTC refers the Commission to its previous comments and recommendations.

² We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).³

GENERAL COMMENTS

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.⁴

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.⁵ The 1974 rules were 13 pages; contained 25 rules; and 6 comments.⁶ The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

³ Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

⁴ See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

⁵ The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

⁶ The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.⁷

⁷ There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Rule 1.5. Fees for Legal Services.

1. **Unconscionable Fees.** OCTC still prefers the ABA's language for this rule. Further, OCTC remains opposed to any attempt to specifically define the term "unconscionability" in subsection (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. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by a list of facts set forth in subsection (c) of proposed rule 1.5.
2. However, we urge the Commission to consider adding additional factors to the list set forth in subsection (c). Those additional factors are (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher v. State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher v. State Bar, supra*, 4 Cal.2d at 403); (3) whether the client consented or authorized the legal service (see *In the Matter of Connor* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 93, 104); (4) whether the attorney fully explained the fee agreement to the client and/or the client understood the terms of fee agreement (see *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980); and (5) whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging the same fee for these non-legal services at the legal services rate. (See e.g. *In re Green* (Co. 2000) 11 P.3d 1078 [charging lawyer's rate for faxing documents, etc]; *Prof'l Ethics & Conduct of Iowa State Bar v. Zimmerman* (Iowa 1991) 465 N.W.2d 288 [lawyer charged full hourly rate for attending ward's birthday party and discussing toiletry needs]; *Cincinnati Bar Ass'n v. Alsfelder* (Ohio 2004) 816 N.E.2d 218 [charging for discussions and advice about boyfriends, vehicles, and restaurants].)
3. The Commission may want to state in the rule that the factors set forth in subsection (c) are not exclusive. At least one appellate court has expressed some uncertainty on this issue. (See *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1003.) Although this is stated in Comment 1B, OCTC believes it is more appropriately stated in the rule itself.
4. We believe that the proposed definition of an "unconscionable fee" as currently drafted is inconsistent with case law. The proposed definition in subparagraph (b) states in pertinent part, that a fee is unconscionable if the lawyer "has engaged in fraudulent conduct or overreaching." Proposed rule 1.0.1(d) states "fraud or fraudulent means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive." This suggests that all the elements of civil fraud must be present to constitute unconscionability. However, under the 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 of civil fraud. (See *Herrscher v. State Bar, supra*, 4 Cal.2d at 403; *In the Matter of Van Sickle, supra*, 4 Cal. State Bar Ct. Rptr. at 989.)
5. OCTC supports the concept proposed in subparagraph (e) regarding true retainers, non-refundable fees, and flat fees. Proposed paragraph (e) is nothing more than a reiteration of

Letter from OCTC
To Randall Difuntorum
June 15, 2010

current law regarding true retainers, non-refundable fees, and flat fees. Several of the commentators opposed to subparagraph (e) appear to be under a misunderstanding of current law. It is well established that only a true retainer to secure an attorney's availability over time is non-refundable. This is because it is considered earned when paid. Advanced fees, however, no matter how the attorney characterizes them, must be refunded if not earned. A failure to do so is disciplinable. (See *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907; *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752; *Matthew v. State Bar* (1989) 49 Cal.3d 984.) Flat fees also must be earned by performance of services. Any attempt to deal with the issue of creditor rights and government forfeiture rules as proposed by some of the other commentators is beyond the scope of the Rules of Professional Conduct.

6. The one change subparagraph (e) does add to the rule is the requirement for written fee agreements. Given the unusual nature of these agreements and the need to make sure the clients are aware of and understand them, it is good public policy to require that they be in writing and places California closer to what is required in other jurisdictions.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on one Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

* Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: [Rules Not Recommended Public Comment Form](#).

Rule 1.5 Fees for Legal Services [4-200]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I am a sole practitioner in the area of criminal defense. The proposed rule is unnecessary, interferes with my ability to contract with potential clients, and in many cases would result in my charging fees that would be much greater than those charged as a flat fee.

In many cases, I make court appearances over and above the necessary minimum number strictly for the purpose of benefitting an interest of the client. If my fee arraignments were now all going to be done on an hourly basis, the cost to the client would increase dramatically. Most of my clients could not afford this increase, and be forced to make difficult decisions, based upon limited resources, that would not be in their best interest.

I would respectfully urge the rejection of the Proposed New Rule 1.5(e)(4-200)

From: John Breeze [mailto:plourd-breeze@sbcglobal.net]

Sent: Tuesday, June 15, 2010 11:56 AM

To: Feedback; The State Bar of California

Subject: Proposed Amendment to 2008 Rule 1.5(f), abolishing nonrefundable retainers

Dear State Bar:

As an attorney that has been in private practice for the last 33years, I highly disagree and oppose the proposed change to Rule 1.5(f), providing that "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 purposes of insuring the availability of the lawyer for the matter."

This language clearly demonstrates the Commission's clear intent to abolish nonrefundable retainers subject to the limited exceptions in subparagraph (e). It prohibits the long-established practice of charging a minimum fee to insure availability where the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer.

The obvious problem with subparagraph (e)(2) is that if any portion of a "nonrefundable" fee "may be" refundable, then the entire fee cannot be the lawyer's property.

As a lawyer who has been in private practice since 1976, I highly oppose this amendment to the rules that would basically outlaw nonrefundable retainers. Isn't there anyone that has actually practiced in the private sector who understands what a nonrefundable retainer is? These types of fees are necessary in order to secure the attendance of attorneys at upcoming court proceedings and to guarantee that the client will be represented at those proceedings. If I am going to be required to refund, non refundable retainer fees, then I might as well get out of private practice.

The amendment also fails to take into consideration that lawyers pay income taxes on nonrefundable retainer fees and if these fees are going to be refundable, it will have an impact on the lawyer's ability to report his true income to the Franchise Tax Board and the IRS.

I ask you whether the State Bar has received any complaints from any of my clients dealing with the issue of nonrefundable retainer fees. I have no knowledge that any of my clients have ever objected to being charged a nonrefundable retainer fee. Therefore, there is no need to amend the Rules of Court if there are no complaints regarding the way I deal with nonrefundable retainers. This is just another example of how the State Bar is trying to legislate in an area that properly needs to be addressed either by the state legislature or by lawyer professional groups as opposed to the State Bar.

I strongly recommend that this amendment be rejected.

John W. Breeze



UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FACULTY

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
BY EMAIL ONLY

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, each issue raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyola's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitron / by son

Richard Zitron

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum



UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FACULTY

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to protect clients and the public.¹ Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as guidance for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's omission of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

¹ The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter’s already considerable length – have not always cited to the Commission’s written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

I. ~~**Rules relating to conflicts of interest**~~

~~1. **Rule 1.7 – Basic conflict of interest rule**~~

~~We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct (“CRPC”) 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 (“June 2008 Ethics Profs. Letter”). The position in this letter is consistent with the June 2008 letter, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.~~

~~A. **Comment 22 on advanced waivers – no position taken in this letter**~~

~~This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The June 2008 Ethics Profs. Letter did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.² To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.~~

~~B. **Other comments to Rule 1.7 – in need of careful consideration**~~

~~This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission’s history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised~~

² One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

2. Rule 1.13 – Organization as client

~~Similarly, it is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.~~

V. Rules related to lawyers' financial interests

1. Rule 1.5 – Use of the term “unconscionable”

The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word “unconscionable” to define the propriety of fees and – even more puzzlingly – some expenses. The ABA uses the far more intelligible word “unreasonable.” Moreover, California’s own Business & Professions Code, in evaluating fee recoveries without written contracts, also uses the “reasonable” standard. Finally, the term “unconscionable” appears to create a higher threshold than “unreasonable,” thus being lawyer- rather than client-protective.

Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation and at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act.

This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with “unreasonable.”

2. Rule 1.15 – Trust accounts

~~The Commission has developed an extraordinarily detailed and complicated trust account rule. We commend the Commission for the time and energy involved in fashioning such a detailed series of requirements.~~

~~However, we remain quite concerned that details of this extraordinary nature read more like a handbook than a disciplinary rule. While we have stated that we believe the CRPC must provide guidance as well as simple rules of discipline, we are concerned as to whether the trust account rule may be so complicated as to pose traps for both unwary and wary practitioners.~~

~~We note that the proposed CRPC rule runs 30 paragraphs, while the ABA rule is five paragraphs long. We believe more work needs to be done on this rule in order to provide practitioners with clear guidance and sufficient simplicity to enable California lawyers to comply with reasonable requirements without getting lost in the interstices of complex linguistics.~~

~~The Board should return this rule to the Commission with appropriate instructions.~~

3. Rule 1.17 – Sale of a law practice

A. Geographical area

~~The Commission has conflated the reference to “geographic area of practice” in the ABA rule – allowing a selling lawyer to cease practice in a state or particular “geographic area” – into selling off different geographic areas themselves. This is clearly a misinterpretation of the current ABA rule, intended or otherwise.~~

~~Importantly, this also damages clients. Sale of an “area” would allow a large law firm to sell all its San Diego clients, or San Joaquin clients, to another firm even while it continues to practice in the same field. Clients will then be shunted to another law firm not of their choosing~~

ROBERT SHEAHEN
ATTORNEY AT LAW
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SUITE 500
BEVERLY HILLS, CALIFORNIA 90211

TELEPHONE: (310) 550-1275

June 14, 2010

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

Facsimile: (415) 538-2171

re: Abolition of Nonrefundable Retainer Fees in Proposed Rule 1.5(e)

Dear Ms. Hollins:

I am an attorney in Los Angeles and I have been a member in good standing of the Bar since 1973. I have been made aware of Proposed Rule 1.5(e) and its abolition of nonrefundable retainer fees.

With all respect to the drafters of this proposal, I am afraid they do not toil in the humble vineyards of modern-day criminal defense practice. I am reminded of Mr. Bumble's analysis from Oliver Twist:

"If that's the eye of the law, the law is a bachelor; and the worst I wish the law is his eye may be opened by experience -- by experience."

Those of us who have the experience of day-to-day work as criminal defense lawyers know that nonrefundable retainer fees benefit both attorney and client.

We are not talking about gigantic or unconscionable fees. But a reasonable nonrefundable retainer fee is of the essence in the practice of criminal law.

ROBERT SHEAHEN

Suppose, for example, Attorney A charges a refundable \$10,000 fee against \$350 an hour. Attorney A then proceeds to spend 30 hours on the case -- doing, say, "research." The fee is exhausted and the client has received nothing -- except a request for an additional fee.

Attorney B, however, knows his way around. He charges a nonrefundable fee of \$10,000 -- or a minimum fee of \$10,000 -- and puts in only ten hours on the case -- and gets a dismissal for the client. Should this attorney -- having achieved a great result for the client -- be forced to return most of the fee?

In the situation of Attorney B, the new Rule would encourage attorneys simply to waste their time to build up "hours" to justify the larger fee.

We are not civil lawyers. We are criminal defense lawyers. We live in a different world.

The proposed new Rule is not workable. I urge the Bar to reject it and to create a new Rule guided by "the eye of experience."

Very truly yours,



Robert Sheahen



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June 14, 2009

To: The State Bar Representatives and
State Bar Board of Governors Representatives

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear State Bar Personnel:

I am writing to express my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). I have been an attorney since 1971, and currently practice Administrative Law and Criminal Law.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) 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:

(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/ProposedRulesB1B6.pdf> (at p. 10)

My concerns about this proposed new rule include the following:

1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);

3. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace;
4. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed";
5. It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged;
6. It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule; and
7. It was submitted to the State Bar Board of Governors for preliminary approval without the *prior* public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.

Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.

Thank you for considering my views.

Sincerely,

SPITAL AND ASSOCIATES



SAMUEL SPITAL, LAWYER

State Bar Representatives

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Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, CA 90017-0211

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

District 7 (Los Angeles) - State Bar Board of Governors Representatives

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MICHAEL P. JUDGE
PUBLIC DEFENDER

LAW OFFICES
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EXECUTIVE OFFICE

June 14, 2010

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

Dear Ms. Hollins:

This letter address the public comment provided for the 69 proposed new or amended Rules of Professional Conduct developed by the Commission for the Revision of the Rules of Professional Conduct.

There is a rule and comment that seem to be internally inconsistent. Rule 3.8(e), concerning the special rules for prosecutors, states that a prosecutor shall not subpoena a lawyer to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege or the work product doctrine. Comment [4] however adds an exception that is not covered in the rule, saying it is intended to limit the issuance of lawyer subpoenas to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

There is no "genuine need" exception written into the Rule and it should not swallow up the Rule's protections.

There are a few proofreading errors. Rule 1.5 Comment [9] refers to paragraph (f)(2) which does not exist. Probably it means (e)(2), because (f) is not subdivided. Comment (10) refers to Rule 1.01(n) for a definition of "signed," but "signed" is not defined there or Evidence Code section 250.

Comments [7] and [8] to Rule 3.6 seem duplicative.

Sincerely,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

JAMES S. THOMSON
Attorney and Counselor at Law

June 18, 2010

Howard B. Miller
State Bar President
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, California 90017

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

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

Dear Mr. Miller,

As a lawyer in private practice for the last thirty plus years in California, I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

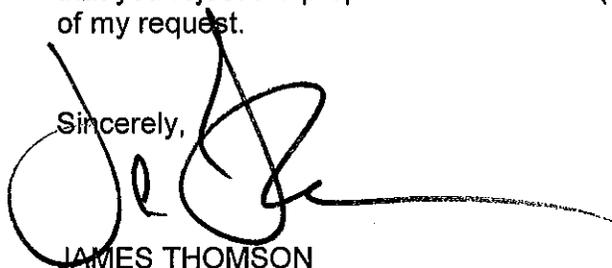
As with all fees and fee agreements, non-refundable fee arrangements are subject to well established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the rule against charging excessive fees (Rule 1.5(a)) and 2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules control unscrupulous lawyers as it stands.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially 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 and represent the "gold standard" for California lawyers.

The proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged at an hourly rate.

For these and the many other reasons, offered by individuals and organizations, I ask that you reject the proposed amendment (Rule 1.5(e)(4-200). Thank you for your consideration of my request.

Sincerely,

A handwritten signature in black ink, appearing to read 'James Thomson', with a long horizontal flourish extending to the right.

JAMES THOMSON

cc.

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