

McCurdy, Lauren

From: Vapnek, Paul W. [pwvapnek@townsend.com]
Sent: Wednesday, September 30, 2009 2:18 PM
To: McCurdy, Lauren; Kevin Mohr; Ignazio J. Ruvolo; Anthonie Voogd
Cc: Harry Sondheim; Difuntorum, Randall; Lee, Mimi; Kevin Mohr G
Subject: RE: RRC - 4-200 [1.5] - III.HH. - October 16-17, 2009 Meeting Materials

Attached are the revised materials for this Agenda item. I will shortly send Lauren a clean version of the Rule. There were a couple of minor (?) changes I made after the drafters approved these materials, based on my conversation with Jim Dimitriou. First, he pointed out a problem in trying to read rule 1.5(b), in that there was a comma after "shock the conscience" in the second line that caused reading and comprehension difficulties. I changed the comma to a semi-colon and now it reads well. The second was what we meant by "in-house" in reference to expenses, as they were not defined in the Rule or Comments. I therefore added a sentence to Comment 1, at the end: "In-house expenses are charges by the lawyer or firm as opposed to third-party charges." If not acceptable, I'll take my punishment; otherwise the drafters are done with this rule.

The clean version of the rule follows in a separate email.

Paul

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Sunday, September 27, 2009 7:12 PM
To: Vapnek, Paul W. ; Ignazio J. Ruvolo; Anthonie Voogd
Cc: Harry Sondheim; Randall Difuntorum; Lauren McCurdy; Lee, Mimi; Kevin Mohr G
Subject: RRC - 4-200 [1.5] - III.HH. - October 16-17, 2009 Meeting Materials

Greetings:

I've attached the following:

1. A single scaled PDF that includes the following documents:
 - a. Dashboard, Draft 1 (9/27/09)KEM;
 - b. Introduction, Draft 1 (9/27/09)KEM;
 - c. Rule & Comment Comparison Chart, Draft 1.1 (9/25/09)KEM;
 - d. Public Comment Chart, Draft 1 (9/25/09)RD-KEM.
2. Word versions of each document in item #1.
3. A PDF of new Draft 8 (9/26/09), showing the changes I've recommended to Draft 7.1, the draft that is the basis for the Rule & Comment comparison chart. My recommendations are primarily to update the language per Commission actions in the intervening year since we last revised the rule (e.g., remove references to the current rule numbers). However, see Note 2 under item #3.A.,

below.

KEM Notes: I've added highlights to the attached COMBO PDF with Adobe's highlight tool to focus you on the changes to the rule I've proposed [that's why the file is named "Marked" at the end]. Here are the issues:

1. Dashboard. We'll enter the vote after the October meeting. However, there are several issues:
 - a. Substantially rejected. Do you agree the Model Rule has been substantially rejected? I think we should so state given our rejection of the reasonable standard in MR 1.5, which is the heart of the Rule.
 - b. Stakeholders. Do you agree w/ my characterization of the stakeholders?
 - d. Controversy. I've characterized the rule as "very controversial". Do you agree? Although we might think the revisions we've made to paragraph (e), i.e., subparagraph (e)(2), will likely assuage the criminal defense bar, it's still very possible they will come out in full force for the final public comment.
2. Introduction. Please review to see if you agree with how I have characterized the Rule. I've tried to state a majority position. Do you agree w/ that what I have written fairly represents the majority view? I have also included Nace's minority opinion.
 - a. Paragraph 4. Do you agree that this paragraph is necessary? I think we should include it. Although we discuss the public comment and our response in the Explanation for paragraph (e)(2), I think we need to call it out for BOG and the S.Ct.
3. Rule & Comment Comparison Charts. I've highlighted those parts where I have questions. I have specific suggestions/questions at the following footnotes & related text:
 - A. As to footnotes:
 - a. Note 1. Is there any reason why we can't use the Model Rule language in paragraph (c)(5)?
 - b. Note 2. I recommend deleting the first sentence of Comment [11] because its substance is already covered by Comment [4]. Do you agree?
 - B. As to Explanations I've proposed, please take a look at the Explanations for the following. Do you agree w/ what I have written?
 - Paragraph (a). Do you agree with the third paragraph of the Explanation?
 - Paragraph (a). Do you think we need a definition of "in-house expense"? Any ideas?
 - Paragraph (d). Should we include the highlighted part of the Explanation? There were some

questions why these two kinds of contingent fee cases are called out from other kinds and I've tried to provide the rationale as stated in the Restatement and the literature.

Paragraph (e). Is this explanation adequate for why we have included an express prohibition against non-refundable fees.

4. Public Comment Chart. I've made no changes to Randy's fine public comment chart except to resort the comments alphabetically by commenter.

5. Proposed Draft 8. As to the proposed Draft 8, I've included it so you can quickly see the revisions I've suggested to Draft 7.1, the draft on which the comparison chart is based.

6. All the Word documents are clean versions.

DEADLINE. The agenda submission due date is next **Wednesday, September 30, 2009**. I realize you're all under the gun with your own rules. Nevertheless, I've tried to identify the issues so you can review the attached in relatively quick fashion. If I don't hear from you by **Tuesday, September 29, 2009 at noon**, I'll assume you're OK my proposed changes and will implement them. You'll still have an opportunity to object during the e-mail comment period but I have several items to prepare for the agenda and I want to submit them in a timely fashion so I can start working on items for the November agenda. Keep them doggies rollin'

Please let me know if you have any questions. Thanks,

Kevin

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

(Draft #7.1, 9/22/09)

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

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

Primary Factors Considered

Existing California Law

Rules RPC 4-200, 2-200

Statute Bus. & Prof. Code §§ 6147, 6148

Case law *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].

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

Washington Rule 1.5 (2008).

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

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

Very Controversial – Explanation:

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

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.5* Fees for Legal Services

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

1. Proposed Rule 1.5 diverges from Model Rule 1.5 in several important respects: (1) An unconscionability standard is incorporated into the Rule rather than the Model Rule's "reasonable" fee standard as the bench mark for imposing discipline on lawyers; (2) Model Rule 1.5(b), which identifies requirements for fee agreements and Model Rule 1.5(c), which sets forth requirement for contingent fee agreements, have both been deleted because those topics are already covered in Business & Professions Code §§ 6148 and 6147, respectively [see Explanation of Changes for Model Rule 1.5(b) and (c)]; (3) Model Rule 1.5(e), which concerns fee divisions among lawyers, has been deleted because that topic is covered in a separate rule, proposed Rule 1.5.1 [see Explanation of Changes for Model Rule 1.5(e)]; and (4) It adds new paragraph (e), which prohibits lawyers from contracting for, charging, or accepting a non-refundable, except for two exceptions, one for "true" retainers and the other for flat fees that conform to the strict requirements of subparagraph (e)(2). [See Explanation of Changes for paragraph (e)].

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

We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action. As was said by the Washington court in *Re Wiltsie*, 109 Wash. 261, 186 P. 848: "The board also found, as one of the

* Proposed Rule 1.5, [Draft 7.1 \(9/22/09\)](#)

grounds for his disbarment, that the charges made for these services were excessive. We do not feel like depriving a practitioner of his right to continue his profession on a question as debatable as the propriety of the amount of a fee. Such a question is so much a matter of individual opinion that it should not be the basis for disbarment, except in the most aggravated and extreme case. So far as the record discloses, the fees were voluntarily paid, and, were it the only charge here that such fees were excessive, the extreme penalty would not be merited.”

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

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

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

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

3. A minority of the Commission takes the position that proposed Rule 1.5 falls short of the Commission's charge to update the California Rules of Professional Conduct to “[a]ssure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended” and to “[p]romote confidence in the legal profession and the administration of justice.” By retaining “unconscionability” as the standard for imposing discipline under the Rule, the majority sends a regrettable message to the public and profession alike that California tolerates lawyers charging their clients unreasonable fees. This is an area where the Commission and the Board of Governors should reassess the continued viability of the *Herrscher* decision, on which the Commission majority has placed great reliance. The concerns the Supreme Court expressed 75 years ago about the efficacy of inquiring into the reasonableness of fees should not control the debate for a self-regulating profession in this sensitive area of lawyer-client relations. Moreover, the proposed Rule is out of step with virtually all other states on the subject

of lawyer's fees. Only California and Texas adhere to an "unconscionable fee" standard. A clear majority of the remaining jurisdictions states have adopted the more public protective Model Rule standard which prohibits lawyers from charging "unreasonable fees," while a handful have retained the "clearly excessive" standard from the 1969 ABA Code of Professional Responsibility.

4. *Non refundable fees.* During the public comment period, members of the California criminal defense bar and some of their representative organizations disagreed with the Commission's proposed paragraph (f), which provided that a lawyer shall not charge, contract for or collect a non-refundable fee, except for a true retainer. See Public Comment Chart, below, for a complete list of those who commented on the public comment draft of the Rule. After public comment, the Commission revised paragraph (f) [now lettered "(e)"] to also permit non-refundable *flat* fees, so long as the requirements set forth in paragraph (e)(2) are satisfied. See Explanation of Changes for paragraph (e)(2), below. The Commission believes the changes made should assuage the concerns raised by the criminal defense bar.

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

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

* Proposed Rule 1.5, Draft 7.1 (9/22/09). Redline/strikeout showing changes to the ABA Model Rule

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	<p>fee will be affected by later events.</p>	
	<p>(c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:</p>	<p>Paragraph (c) is based on the second sentence and subparagraphs of Model Rule 1.5(a), revised by substituting the recommend "unconscionable" standard.</p>
	<p>(1) the amount of the fee or in-house expense in proportion to the value of the services performed;</p>	<p>Subparagraph (1) has no counterpart in the Model Rule. Carried forward from current rule 4-200(B)(1), subparagraph (1) recognizes that a lawyer should assess the costs and benefits of the lawyer's services in determining what tasks to perform.</p>
	<p>(2) the relative sophistication of the lawyer and the client;</p>	<p>Subparagraph (2) has no counterpart in the Model Rule. Carried forward from current rule 4-200(B)(2), subparagraph (1) recognizes that the experience of a client in using legal services can be relevant in determining the conscionability of a fee.</p>
<p>(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;</p>	<p>(13) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;</p>	<p>Subparagraph (3) is identical to Model Rule 1.5(a)(1), except that the phrase "the time and labor required" has been given status as a separate factor for consideration. See subparagraph (10).</p>

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<p>(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;</p>	<p>(24) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;</p>	<p>Subparagraph (4) is identical to Model Rule 1.5(a)(2).</p>
<p>(3) the fee customarily charged in the locality for similar legal services;</p>	<p>(3) the fee customarily charged in the locality for similar legal services;</p>	<p>The Commission recommends that Model Rule 1.5(a)(3) be rejected because the identified factor, while relevant to determining the reasonableness of a fee, is not relevant to determining the conscionability of a fee.</p>
<p>(4) the amount involved and the results obtained;</p>	<p>(45) the amount involved at stake¹ and the results obtained;</p>	<p>Subparagraph (5) is identical to Model Rule 1.5(a)(4), except that the term "at stake" has been substituted for "involved". No change in meaning is intended.</p>
<p>(5) the time limitations imposed by the client or by the circumstances;</p>	<p>(56) the time limitations imposed by the client or by the circumstances;</p>	<p>Subparagraph (6) is identical to Model Rule 1.5(a)(5).</p>
<p>(6) the nature and length of the professional relationship with the client;</p>	<p>(67) the nature and length of the professional relationship with the client;</p>	<p>Subparagraph (7) is identical to Model Rule 1.5(a)(6).</p>

¹ **Consultant's Note:** is there any reason not to used the Model Rule term, "involved"? I would restore it.

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<p>(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and</p>	<p>(7)⁸the experience, reputation, and ability of the lawyer or lawyers performing the services; and</p>	<p>Subparagraph (8) is identical to Model Rule 1.5(a)(7).</p>
<p>(8) whether the fee is fixed or contingent.</p>	<p>(8)⁹whether the fee is fixed or contingent.</p>	<p>Subparagraph (9) is identical to Model Rule 1.5(a)(8).</p>
	<p><u>(10) the time and labor required;</u></p>	<p>Subparagraph (10) consists of language that has been moved from Model Rule 1.5(a)(1) and given its own subparagraph.</p>
	<p><u>(11) whether the client gave informed consent to the fee or in-house expense.</u></p>	<p>Subparagraph (11) has no counterpart in the Model Rule. It is carried forward from current rule 4-200(B)(11), which provides: "(11) The informed consent of the client to the fee."</p>
<p>(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.</p>	<p>(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.</p>	<p>The Commission recommends deletion of Model Rule 1.5(b), which prescribes what a lawyer is obligated to communicate to a client about the scope of representation and basis or rate of the fee. Those requirements are already addressed in Business & Professions Code § 6148. Under that statute, the client already has a remedy for a lawyer's violation of the statute: having the contract voided. Section 6148(c). The Commission does not recommend a violation of section 6147 subject a lawyer to discipline under this Rule in addition to the remedy provided in the statute.</p>

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<p>(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.</p>	<p>(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.</p>	<p>The Commission recommends deletion of Model Rule 1.5(c), which prescribes a lawyer's duties when the lawyer is retained on a contingent fee basis. Those requirements are already addressed in Business & Professions Code § 6147. Under that statute, the client already has a remedy for a lawyer's violation of the statute: having the contract voided. Section 6147(b). The Commission does not recommend that a violation of section 6147 subject a lawyer to discipline under this Rule in addition to the remedy provided in the statute.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(d) A lawyer shall not enter into an arrangement for, charge, or collect:</p> <p>(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or</p> <p>(2) a contingent fee for representing a defendant in a criminal case.</p>	<p>(d) A lawyer shall not enter into an arrangement for, charge, or collect:</p> <p>(1) any fee in a domestic relationsfamily law matter, the payment or amount of which is contingent upon the securing of a divorcedissolution or declaration of nullity of a marriage or upon the amount of alimonyspousal or child support, or property settlement in lieu thereof; or</p> <p>(2) a contingent fee for representing a defendant in a criminal case.</p>	<p>Paragraph (d) is based on Model Rule 1.5(d), except that the language in subparagraph (1) has been revised to conform to the language used in that area of law in California, e.g., “family law” in place of “domestic relations”.</p> <p>The Commission recommends adoption of Model Rule 1.5(d) as revised. The Commission recognizes that there are other kinds of contingent fee cases that might be prohibited, for example, the representation of a governmental entity by a private lawyer or firm on a contingent basis, (see, e.g. County of Santa Clara v. Superior Court (2008) 74 Cal.Rptr.3d 842, review granted, 80 Cal.Rptr.3d 629 (7/23/2008)). However, the two kinds of cases regulated under Model Rule 1.5(d) have traditionally been viewed as implicating important Constitutional rights or public policy. See, e.g., Restatement (3d) Law of Lawyers § 35, comments f.(i), f.(ii) and g.</p> <p>In the family law matters, California has a strong public policy of promoting reconciliation and maintaining the family unit. Because a lawyer who is being paid on a contingent basis would recover a fee only if the marriage is dissolved and property apportioned, permitting contingent fees in these cases would undermine the California policy.</p> <p>In criminal cases, a lawyer who is being paid on a contingent basis would recover a fee only if the client is innocent. That would create a conflict for a lawyer if the best interests of the client, in light of the evidence, warrant the client entering a plea.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(e) A division of a fee between lawyers who are not in the same firm may be made only if:</p> <p>(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;</p> <p>(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and</p> <p>(3) the total fee is reasonable.</p>	<p>(e) A division of a fee between lawyers who are not in the same firm may be made only if:</p> <p>(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;</p> <p>(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and</p> <p>(3) the total fee is reasonable.</p>	<p>The Commission recommends deletion of Model Rule 1.5(e) because the subject of fee divisions between lawyers is addressed in a separate rule. See proposed Rule 1.5.1. The Commission determined that fee divisions should be addressed in a free-standing rule because: (i) proposed Rule 1.5.1 is a substantial departure from the Model Rule (ii) the Commission is recommending several revisions to current rule 2-200 to impose more obligations on lawyers and enhance client protection, and (iii) of the large amount of litigation this Rule has traditionally engendered. See proposed Rule 1.5.1, Introduction, ¶. 8.</p>
	<p><u>(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:</u></p>	<p>Paragraph (e) has no counterpart in the Model Rule. The Commission recommends its adoption because charging a non-refundable fee is inimical to California's strong policy of client protection. The prohibition stated in the introductory clause of paragraph (e) is subject to two traditional exceptions, as discussed below. Much of the language used in this paragraph is taken from Washington Rule 1.5(f).</p>
	<p><u>(1) a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A true retainer</u></p>	<p>Subparagraph (1) provides one exception to the non-refundable fee prohibition in paragraph (e): a true retainer, which carries forward an exception traditionally recognized in the profession and already found in current rule 3-700(D)(2). Much of the language used in this subparagraph is taken from Washington Rule 1.5(f).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.5 Fees for Legal Services</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>must be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt.</p>	
	<p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>	<p>Subparagraph (2) provides the second exception to the non-refundable fee prohibition in paragraph (e): a flat fee that satisfies the requirements set forth in the subparagraph. Subparagraph (1) was added following public comment to address concerns raised by members of the California criminal defense bar that prohibiting such earned-on-receipt flat fees and requiring all such fees paid to criminal defense lawyers to be advance fees, could result in the government impounding the fee advance, thereby preventing a criminal defendant from retaining the defendant's counsel of choice. The Commission believes the conditions marked by romanettes in the subparagraph will operate to prevent abuses of the flat fee exception and avoid the problems envisioned by the defense bar. As with subparagraph (1), much of the language used in subparagraph (2) is derived from Washington Rule 1.5(f). See the Public Comment chart for a complete list of the members of the California criminal defense bar who submitted public comment on proposed Rule 1.5.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><i>Reasonableness of Fee and Expenses</i></p> <p>[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.</p>	<p><i>Reasonableness <u>Unconscionability</u> of Fee and Expenses</i></p> <p>[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer. <u>Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., <i>Kallen v. Delug</i> (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., <i>In re Shalant</i> (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; <i>In re Harney</i> (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed</u></p>	<p>The title for this section of the Rule has been revised to reflect the standard being recommended.</p> <p>The Commission recommends that Model Rule 1.5, cmt. [1] be rejected because it addresses the reasonable fee standard, which the Commission has recommended be rejected. See Introduction.</p> <p>In its place, the Commission has proposed Comment [1], which clarifies paragraphs (a) and (b) and provides additional guidance for their application by citing to California decisional law concerning illegal or unconscionable fees.</p> <p>The second and third sentences from the end of the Comment emphasize that the eleven factors in paragraph (c) are not exclusive or will necessarily be relevant in every instance. The last sentence observes that contingent fees are subject to the same unconscionability standard as other fee arrangements.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>lawyer provides legal services. (e.g., <i>Birbrower, Montalbano, Condon and Frank v. Superior Court</i> (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; <i>In re Wells</i> (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.) Paragraph (b) defines an unconscionable fee. (See <i>Herrscher v. State Bar</i> (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; <i>Goldstone v. State Bar</i> (1931) 214 Cal. 490 [6 P.2d 513].) 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.</u></p>	
<p><i>Basis or Rate of Fee</i></p> <p>[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses</p>	<p><i>Basis or Rate of Fee</i></p> <p>[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses</p>	<p>The Commission recommends that Model Rule 1.5, cmt. [2] be rejected for the reasons given in the Explanation of Changes for Model Rule 1.5(b).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.</p>	<p>or disbursements in the course of the representation. A written statement concerning the fee terms of the engagement reduces the possibility of misunderstanding.</p>	
<p>[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.</p>	<p>[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.</p>	<p>The Commission recommends that Model Rule 1.5, cmt. [3] be rejected for the reasons given in the Explanation of Changes for Model Rule 1.5(c).</p>
	<p>[2] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement, and provide consequences for a lawyer's failure to comply with the requirements. (See, e.g., <i>In re Harney</i> (1995) 3 Cal. State Bar Ct. Rptr. 266.)</p>	<p>Comment [2] has no counterpart in the Model Rule. It contains cross-references to Bus. & Prof. Code §§ 6147 and 6148, which govern contingent and other fee agreements in California. See also Explanation of Changes Model Rule 1.5(b) and (c).</p>
	<p>[3] With respect to modifications to the basis or rate of a fee after the commencement of the lawyer-client relationship, see Rule 1.8.1, Comments [5], [6].</p>	<p>Comment [3] has no counterpart in the Model Rule. The Commission has recommended that modifications to the basis or rate of fee after a lawyer-client relationship has been established</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>be addressed in Rule 1.8.1, and so Comment [3] includes a cross-reference to the relevant provisions of that Rule.</p>
<p><i>Terms of Payment</i></p> <p>[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.</p>	<p><i>Terms of Payment</i></p> <p>[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. (See Rule 1.16(d)(e)(2).) A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client <u>1.8.1</u>.</p>	<p>Comment [4] is based on Model Rule 1.5, cmt. [4]. The second sentence has been deleted because it concerns Model Rule 1.8(i), which the Commission has not recommended be adopted. The other changes are to correct the cross-references to the appropriate proposed Rule or provision of a proposed Rule.</p>
<p>[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to</p>	<p>[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to</p>	<p>Comment [5] is identical to Model Rule 1.5, cmt. [5] except that the last, hortatory sentence of the Model Rule comment has been deleted.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.</p>	<p>define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.</p>	
<p><i>Prohibited Contingent Fees</i></p> <p>[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.</p>	<p><i>Prohibited Contingent Fees</i></p> <p>[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances <u>past</u> due under <u>child or spousal</u> support, alimony or other financial orders because such contracts do not implicate the same policy concerns.</p>	<p>Comment [6] is based on Model Rule 1.5, cmt. [6]. The first sentence has been deleted because it simply restates the prohibition in paragraph (d)(1) and uses terminology different from that used in California. See Explanation of Changes for paragraph (d). The second sentence has been revised to substitute terminology used in California for the Model Rule terminology.</p>
	<p><u><i>Payment of Fees in Advance of Services</i></u></p> <p>[7] <u>Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (e)(1) or (e)(2), is subject to Rule 1.5(a) and may not be unconscionable.</u></p>	<p>Comment [7] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [10].</p>
	<p>[8] <u>Paragraph (e)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability</u></p>	<p>Comment [8] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [13]. It carries forward the substance of the definition for "true retainer" in current rule 3-</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (e)(1). The written true retainer agreement should specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt.</u></p>	<p>700(D)(2). The Comment also provides guidance on determining whether a particular fee arrangement is a true retainer.</p>
	<p><u>[9] Paragraph (e)(2) describes a 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.</u></p>	<p>Comment [9] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [14]. The Comment clarifies that if all the requirements set forth in subparagraph (e)(2) are not satisfied, the flat fee must be treated as if it were an advance fee under Rule 1.15.</p>
	<p><u>[10]If a lawyer and a client agree to a true retainer under paragraph (e)(1) or a flat fee under paragraph (e)(2) and the lawyer complies with all applicable requirements, the fee is considered the lawyer's property on receipt and must not be deposited into a client trust account. See Rule 1.15(f). For definitions of the terms "writing" and "signed," see Rule [1.0(n)].</u></p>	<p>Comment [10] has no counterpart in the Model Rule. It is based in part on Washington Rule 1.5, cmt. [15]. The Comment clarifies the legal effect of satisfying the requirements set forth in paragraphs (e)(1) and (2). Brackets have been placed around "1.0(n)" pending the Commission's final recommendation on whether to adopt that rule.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[11]When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2).² In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2) of this Rule, the lawyer must comply with Rule 1.15(d)(2).</p>	<p>Comment [11] has no counterpart in the Model Rule. Comment [11] points lawyers to Rule 1.15(d)(2) for their obligations when disputes arise concerning fees advanced under paragraph (e)(1) or (e)(2).</p>
<p><i>Division of Fee</i></p> <p>[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the</p>	<p><i>Division of Fee</i></p> <p>[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. and In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the</p>	<p>Comments [7] and [8] have been deleted because they relate to fee divisions, which are covered separately under proposed Rule 1.5.1. See also Explanation of Changes for paragraph (c).</p>

² **Consultant's Note:** The substance of Comment [11] is already covered in proposed Comment [4], which is based on MR 1.5, cmt. [4]. I recommend deleting this first sentence.

<p align="center"><u>ABA Model Rule</u> Rule 1.5 Fees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5 Fees for Legal Services Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.</p>	<p>representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.</p>	
<p>[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.</p>	<p>[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.</p>	<p>See Explanation of Changes for Comment [7].</p>
<p><i>Disputes over Fees</i></p> <p>[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.</p>	<p><i>Disputes over Fees</i></p> <p>[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.</p>	<p>The Commission has recommended that Comment [9] be deleted because arbitration of fee disputes in California is largely governed under the Mandatory Fee Arbitration Act, Bus. & Prof. Code § 6200 et seq.</p>

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

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	D			<p>Criminal practitioners are often unable to collect fees as it is.</p> <p>Defendants have options should they be misrepresented.</p> <p>Agrees with Barry Tarlow's comments.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Bloom, Allen	D			<p>Non-refundable and fixed fee arrangements (1) provide certainty to the client; (2) provide better and full service to the client because the client need not weigh the benefits of pursuing a particular meritorious motion or legal task against what it would cost; (3) increase access to the attorney because a client will not be billed for communications with the attorney.</p> <p>A non-refundable fee agreement is not something the client must accept; the client is always free to hire a different lawyer.</p> <p>A client may refuse arbitration in a dispute regarding a refundable fee agreement while an attorney must accept an arbitration in a dispute regarding a non-refundable fee agreement.</p> <p>The problem of unscrupulous attorneys can occur in any billing system.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
14	Boltax, Jack J.	A			1.5(f) will prevent predatory practice of retained attorneys refusing to refund a fee after subbing in for a court appointed attorney who has already negotiated a plea bargain.	No response necessary.
21	Borden, Mark	D			1.5(f) singles out criminal defense attorneys, usually one or two person firms who use non-refundable retainers to assure availability.	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
37	Brodsky, Stephen R.	D			Non-refundable fee agreement confers benefits on both attorney and client. Supports Barry Tarlow's position.	To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows: (2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

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

TOTAL = __ Agree = __
Disagree = __
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4	California Attorneys for Criminal Justice (Rickard Santwier)	D			<p>Commission has not cited evidence of problems, abuse, or adverse impact that warrants such a sweeping change to the way fees have historically been negotiated.</p> <p>Non-refundable fixed fees provide certainty to the client and simplified administration to the lawyer.</p> <p>Rule would prohibit informed agreements even when in both lawyer and client believe it to be in their best interest.</p> <p>Since the fee will be retained in a trust, it will be subject to claims from collateral sources.</p> <p>Net effect of increasing costs of services for clients across the board.</p> <p>Some attorneys will not be able to survive in the economic environment created by the proposal.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
28	Chodos, Rafael	D			1.5(f) if interpreted literally would mean that every fee except for "true retainer fees" would have to be refundable, even fees charged for	To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee

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					<p>work done and completed.</p> <p>The real issue the proposed rule is trying to address is not the nature of the fee agreement, but the obligation of the attorney to refund any unearned portion of the fee, which is already addressed in 3-700(d).</p> <p>Nonrefundability of the fee should not be affected even if some of the work ends up not having been done (e.g. quick settlement or client changes his mind after attorney has declined other employment opportunities to make himself available for the client).</p>	<p>payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
24	Clarence, Nanci	D			<p>Proposal has not been sufficiently publicized in a manner that permits members to respond.</p>	<p>The proposal was issued for a 90-day public comment period posted on the State Bar website and was also the subject of a public hearing in Sacramento that was noticed by several methods, including: a posting at the State Bar website; public notices in the <i>Daily Journal</i>, the <i>Daily Recorder</i>, and the <i>Sacramento Bee</i>; e-mail</p>

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					<p>Exposes lawyers to financial risk.</p> <p>Will result in increased legal fees and limit availability of low, fixed fee services.</p> <p>1.5(f) will adversely affect attorney-client relationships.</p>	<p>notifications to approximately 14,000 interested persons; and a press release to the media.</p> <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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7	COPRAC	A			<p>Some practitioners may not be familiar with the distinction between a “non-refundable fee” and a “true retainer”.</p> <p>Commission should include reference to case law to provide additional guidance in Comment [2], including possible citation to: <i>Baranowski v. State Bar</i>, 24 Cal.3d 153; <i>In the Matter of Fonte</i>, 2 Cal. St. Bar Ct. Rptr. 752, 757; <i>S.E.C. v. Interlink Data Network of Los Angeles, Inc</i>, 77 F.3d 1201; <i>Matter of Lais</i>, 3 Cal. St. Bar Ct. Rptr. 907, 923; <i>Matter of Brockway</i>, 4 Cal. St. Bar Ct. Rptr 944, 950-51.</p>	Commission revised the rule comments to include a discussion of advance fee payments and “true retainer” fees (see Comments [7] – [11]).
39	Cron, Steve	D			<p>Bar should not eliminate fixed fee agreements completely, but instead focus on fixed fee agreements calling for unconscionable fees or cases where lawyer clearly does not deserve the fees charged based on the services rendered.</p>	<p>To address the commenter’s concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer’s property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total</p>

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						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.
32	Diamond, Roger Jon	D			<p>Under 1.5(f), fees paid at the beginning of the case are not earned and the attorney is faced with the possibility of having the government seize the funds held in trust while the lawyer is forced to remain on the case.</p> <p>1.5(f) will impose overwhelming record keeping burdens on attorney and will disproportionately affect sole practitioners.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's</p>

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						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.
40	Feldman, Steven	D			None	
11	Garza, Florentino	D			1.5(f) will affect the ability of individuals in need of representation to obtain legal services. Similar proposals were rejected in 1991 and 1997.	To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows: (2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer

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					The proposal has not been adequately publicized.	<p>relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p> <p>The proposal was issued for a 90-day public comment period posted on the State Bar website and was also the subject of a public hearing in Sacramento that was noticed by several methods, including: a posting at the State Bar website; public notices in the <i>Daily Journal</i>, the <i>Daily Recorder</i>, and the <i>Sacramento Bee</i>; e-mail notifications to approximately 14,000 interested persons; and a press release to the media.</p>
36	Greenberg, Stanley	D			<p>Proposed rule would have detrimental effect on defendants accused of crimes, their ability to retain counsel to assure representation throughout the matter.</p> <p>Agreement to pay a flat fee represents a negotiated compromise in which both sides assume certain risks.</p> <p>Agrees with Barry Tarlow's comments.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope</p>

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						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.
9	Harris, David	D			<p>Proposal prevents an informed client from entering into a fee agreement that can often reduce the cost of representation.</p> <p>Proposal interferes with attorney client relationships, generates increased client bar complaints, economically impacts small and large firms, increases unnecessary accounting and record keeping, results in increased legal fees, restricts availability of legal services to consumers of fixed fee services, and restricts the constitutional right of the criminally accused to retain a lawyer of one's choice.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the</p>

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						fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.
18	Hermansen, Kurd David	D			None	
27	Hughes, Peter J.	D			Adopts and supports positions advocated by Barry Tarlow and John Phillips.	To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows: (2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's

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						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.
10	Jenness, Evan A.	D			<p>1.5(f) would prohibit a common form of retention in criminal cases and could result in many clients of limited means being unable to hire a lawyer.</p> <p>It is not the form of retainer but a lawyer's lack of integrity that causes over-billing, and provision does not address that problem.</p> <p>Padded hourly billing is a more widespread problem.</p> <p>The "unconscionability" standard provides a suitable and uniform standard to use in addressing client complaints about over-billing and applies regardless of the form of a retainer.</p> <p>It is unclear what type of retainer is a "nonrefundable" fee agreement within the meaning of the proposed rule; the revisions do not define the term.</p> <p>If promoting national uniformity is a reason for the proposed revisions then subparagraph (f) should be rejected because it is not in the</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not</p>

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					ABA Model Rules.	been completed.
17	Johnson, Knut	D			<p>1.5(f) effectively eliminates any flat fees for criminal practitioners despite fact that many clients prefer the flat fee.</p> <p>Lawyers will charge higher fees because the proposal forces lawyers to absorb potential accounting costs, lose use of fees for overhead early in a case, and plan against the potential loss of fees if a client fires the lawyer.</p> <p>Hourly billing structure promotes fraud, inefficiency, overstaffing of cases, and prolonging rather than shortening litigation.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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30	Kahn, Robert A.	D			Rule presents difficulty for law firms trying to arrange fee agreements with corporate clients who demand alternatives to hourly billing, such as monthly, flat-fee payments.	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
20	Katz, Louis S.	D			Non-refundable retainers useful when lawyer is unable to calculate how much time he or she is likely to spend on a case.	To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee

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					Many individuals can only afford to pay a one time retainer.	<p>payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
38	Kolodny, Stephen A.	D			<p>Insufficient notice was given to the members of the bar.</p> <p>Eliminating right to collect non refundable retainers will affect family lawyers' ability to not be unfairly conflicted out of cases.</p> <p>Result based and contingency fees are not</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified</p>

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					<p>allowed in family law except in limited circumstances. This rule will prevent lawyers in this field of law from earning a reasonable fee in many cases.</p> <p>Disallowing non-refundable fees works against the goal in family law of quick resolution of the case.</p> <p>Disproportionate negative impact on low income people.</p> <p>Fixed fee gives client certainty and permits retainer of a lawyer for an acceptable and affordable amount.</p>	<p>legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
5	Langford, Carol M.	D			<p>Rule 1.5(d) should not use the word "unconscionable" because it conflicts with sections 6147 and 6148 of the CA Bus & Prof Code, which set a "reasonable" standard for attorneys' fees.</p> <p>The "unconscionable" standard is inconsistent with the ABA Model Rules, which require attorneys' fees to not be "unreasonable".</p> <p>The "unconscionable" standard has not been</p>	<p>Commission's recommendation for paragraph (a) of the Rule is to retain the prohibition on an "unconscionable or illegal" fee, in part, because the Commission has considered existing California case law and supports the policy reflected in that case law.</p>

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					applied consistently in California, as a number of courts have equated it with the "unreasonable" standard.	
13	Levine, Hugh Anthony	D			1.5(f) ignores possibility that an exceptional attorney charging a non-refundable fee may be able to obtain a superior result for a client despite spending only a small amount of time on the matter than a less capable, less accomplished attorney would achieve after spending numerous hours of unnecessary litigation.	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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12	Lincenberg, Gary	D			<p>Non-refundable retainers 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.</p> <p>Non-refundable retainers also benefit clients who prefer certainty of a flat fee to the uncertainty of hourly billing.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
22	Lombard, Matthew	D			None	

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19	Los Angeles County Bar Association (Toby J. Rothschild)	D			<p>1.5(f) should be deleted entirely from the proposed rules. Alternatively, 1.5(f) and Comment [2] should employ a different and expanded definition of “retainer” to acknowledge hybrid retainers and provide that the rule is not intended to prohibit contracting for, charging, or collecting a flat fee.</p> <p>1.5(a) fully protects against the risk of an unconscionable “non-refundable” fee without the unanticipated consequences and ambiguities created by 1.5(f).</p> <p>Flat fee arrangements represent a legitimate, bargained-for exchange, between lawyer and client.</p> <p>Prohibited non-refundable fees, as in 1.5(f), does not address the true concern, which is ensuring that unearned fees are returned to a client and that any non-refundable portion of a fee is not, under all the circumstances, unconscionable.</p> <p>ABA Model Rules do not prohibit flat fees or non-refundable fees.</p>	<p>To address the commenter’s concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer’s property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer’s property immediately on receipt; (iv) that the fee agreement does not alter the client’s right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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41	Martinez, Martin	D			<p>Attorneys have always engaged in the use of non-refundable retainers.</p> <p>Ambiguity about when a fee is “earned.”</p> <p>Rule ties the hands of the criminal defense bar by requiring the lawyer to place funds in trust that would otherwise be available to the attorney to work on other matters.</p> <p>Funds held in trust accounts may be subject to seizure, preventing the attorney from being compensated adequately for work performed.</p> <p>Rule 4-200 provides enough protection for clients.</p>	<p>To address the commenter’s concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer’s property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer’s property immediately on receipt; (iv) that the fee agreement does not alter the client’s right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

**Rule 1.5 Fees for Legal Services.
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25	National Association of Criminal Defense Lawyers (John Wesley Hall)	D			<p>Flat fee agreements are the most commonly used form of retainer in criminal cases, and they are critical to enabling clients of lesser means to retain defense counsel.</p> <p>Lawyers can seldom determine the exact potential length of a matter and clients of limited means cannot afford to pay a refundable retainer large enough to assure counsel a fair hourly rate.</p> <p>Legitimacy of non-refundable fees should depend on the facts. A lawyer with a strong reputation, just by agreeing to represent a client may cause a lawsuit to vanish and thereby obtain a substantial benefit for the client and should be entitled to keep the amount paid to him.</p> <p>Dishonest lawyers will attempt to overcharge a client regardless of the type of retainer.</p> <p>Use of "unreasonable fee" in Model Rules 1.5(a&b) could replace "unconscionable".</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
26	Orange County Bar Association (Trudy Levindofske)	D			None	

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						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.
29	Pollack, Randy Sue	D			Rule would unnecessarily interfere with the attorney client relationship and an attorney's ability to charge for the real value of his or her services.	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not</p>

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						been completed.
8	Russo, Daniel J.	D			<p>Many criminal law practitioners use a non-refundable retainer agreement.</p> <p>Many criminal defendants cannot guarantee payment of hourly fees because their resources are limited and a flat fee allows them to assess the costs ahead of time so they can marshal their resources.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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31	Sall, Robert K.	D			<p>CA should adopt the “unreasonable” fee standard.</p> <p>With respect to the definition of “unconscionability” in subsection (b), the reference to determining unconscionability “at the time the agreement is entered into” is problematic because many of the key elements in subsection (c) (i.e. time spent, results obtained, nature of litigation and effort involved) are determined at the end of representation, not at the beginning.</p> <p>Supports subsection (f) but better guidance is needed as to the definition of a “true retainer.”</p>	<p>Commission’s recommendation for paragraph (a) of the Rule is to retain the prohibition on an “unconscionable or illegal” fee, in part, because the Commission has considered existing California case law and supports the policy reflected in that case law.</p> <p>In addition to modifying the approach to advance fee payments fees in paragraph (e) of the Rule, Comment [13] was added to discuss what constitutes a “true” retainer</p>
33	San Diego County Bar Association (Heather L. Rosing)	D			<p>CA should adopt ABA Model Rule 1.5(a) with the addition of the factors in rule 4-200 to determine reasonableness.</p>	<p>Commission’s recommendation for paragraph (a) of the Rule is to retain the prohibition on an “unconscionable or illegal” fee, in part, because the Commission has considered existing California case law and supports the policy reflected in that case law.</p>
34	San Diego Criminal Defense Bar Association (Michael L. Crowley)	D			<p>Non-refundable retainers prevent “check-book defenses” in which the decision as to whether a meritorious motion or legal task should be undertaken is made based on funding. Criminal defense requires that every meritorious action be taken to provide zealous advocacy even when chances of success are</p>	<p>To address the commenter’s concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete</p>

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					<p>slim.</p> <p>Non-refundable retainers are often made by savvy legal consumers in arms-length transactions. The consumer has the opportunity to reject or negotiate a different contract.</p>	<p>payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>
35	Santa Clara County Bar Association (Christine Burdick)	A			<p>Subsection (f) should read: "A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, or non-refundable retainer, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter".</p> <p>Comment [2] should explain the differences between an advance fee, flat fee, a non-</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a</p>

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					<p>refundable fee or non-refundable retainer and a true retainer.</p> <p>Comment [6] should include a clarification that the rule does not apply to the attorney withdrawing from representation for non-payment of attorney fees by the client, assuming the attorney complies with the rules for termination of the attorney-client relationship.</p>	<p>flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p> <p>In addition, Comment [13] contains discussion regarding what constitutes a "true" retainer and Comment [14] contains discussion regarding what constitutes a "flat fee."</p>
6	Sevilla, Charles	D			<p>Current rules on excessive fees are sufficient.</p> <p>Non-refundable fees are beneficial to a criminal defendant by providing certainty to the client while insuring access to attorney services.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The</p>

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						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.
23	Stepanian, Michael	D			1.5(f) will require experienced criminal attorneys to jump through hoops for their fees by eliminating their ability to negotiate and resolve cases through the rapport they have established in the profession.	To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows: (2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of

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						payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.
3	Tarlow, Barry	D			<p>Subparagraph (f) is not in the ABA Model Rules and has not been sufficiently publicized, disseminated or explained in a manner that informs members of the bar of its existence and permits them to respond or object.</p> <p>Proposed rule would prevent fully informed client and attorney from entering into a non-refundable retainer agreement where this fee arrangement is in the client's best interest.</p> <p>Threatens economic viability of high volume, low fee practices.</p> <p>Under the proposal, any portion of fees for future legal services would be the property of the client and may be subject to restraint or</p>	<p>The proposal was issued for a 90-day public comment period posted on the State Bar website and was also the subject of a public hearing in Sacramento that was noticed by several methods, including: a posting at the State Bar website; public notices in the <i>Daily Journal</i>, the <i>Daily Recorder</i>, and the <i>Sacramento Bee</i>; e-mail notifications to approximately 14,000 interested persons; and a press release to the media.</p> <p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in</p>

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					<p>forfeiture. This exposes attorneys to financial peril by facilitating restraint/seizure of fees if any client has potential criminal or bankruptcy problem or has a dispute with the IRS, SEC or even a vulnerability to creditor's claims.</p> <p>Will generate more client bar complaints (e.g. attorney and client cannot agree on amount of funds to be returned in an advance fee case).</p> <p>Deprives criminal defendants of constitutional right to retain lawyer of their choice.</p> <p>Similar proposals were made by the Commission in 1991 and by COPRAC in 1997 and were rejected based on negative responses from CA lawyers.</p> <p>Non-refundable retainers are justified when there is a strong likelihood that taking on this client's case will preclude the attorney from accepting another present or future client.</p> <p>Disciplinary cases that may have been the reason for the Commission to propose subparagraph (f) (i.e. Matthew v. State Bar; 49 Cal.3d 784; In the Matter of Scapa, 2 Cal.State Bar Ct. Rptr. 635; In the Matter of Cooperman, 83 N.Y.2d 465.) do not warrant a per se ban of non-fraudulent and ethical use of non-refundable retainers. Those cases dealt with lawyers who committed fraud and theft and conduct that would already be</p>	<p>advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.</p>

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					<p>controlled by Rule 4-200(A) prohibiting unconscionable fees.</p> <p>There are existing protections against misuse of non-refundable fees: (1) 4-200 preventing charging excessive fees and (2) State Bar Rule 1.16 requiring lawyer to refund unearned fees upon withdrawal.</p> <p>If fixed fees are required to be deposited into a trust account until portions of services are completed, fees will increase because of the time value of money (money today is worth more than money potentially available tomorrow).</p> <p>Non-refundable fixed fees provide client with assurance that they will not be charged more than a particular amount.</p> <p>Proposed rule forces a lawyer after a dispute arises to place those funds out of reach in a trust account, limiting attorney's ability to pay operating expenses.</p> <p>Proposal creates increased accounting costs and overhead.</p> <p>Fees in a trust account will be vulnerable to attachment by other potential creditors increasing the risk of nonpayment, and increasing fees to account for that risk.</p> <p>Non-refundable fee agreements might be the</p>	

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					<p>result of rational negotiation between attorney and client and/or in the client's best interest.</p> <p>Under federal law, attorneys' fees may be subject to restraint or forfeiture under a number of statutes, including 21 USC § 853, 18 USC § 981-82, or 18 USC § 1963 (RICO). Under these statutes, a lawyer must show an interest as an owner in the property to defend a forfeiture, which will not be possible if funds remain the property of the client.</p>	
16	Troiano, Kenneth J.	D			<p>Non-refundable fees should be judged by a set criteria, not made per se unconscionable.</p> <p>Many less wealthy individuals who choose sole practitioners benefit from non-refundable fees by setting an amount and avoiding higher fees associated with hourly billing.</p>	<p>To address the commenter's concerns but still provide for enhanced client protection, the Commission revised the approach to advance fee payments in paragraph (e) of the Rule to provide as follows:</p> <p>(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the</p>

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						fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

Rule 1.5: Fees for Legal Services

STATE VARIATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part 1215 Written Letter of Engagement

§1215.21 Requirements

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

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

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

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

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

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

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

§1215.2 Exceptions

This section shall not apply to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (10/13/2009)**

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August 18, 2009 KEM E-mail to Drafters (Vapnek, Ruvolo & Voogd), cc Chair & Staff:

I've attached Rule 1.5 [4-200], Draft 7 (8/14/09), redline, compared to Draft 6.2 (1/7/09), the draft considered at the July 2009 Meeting. In Word & PDF.

1. I've made the changes approved at the July meeting. I've also attempted to respond to Harry's direction for further drafting.
2. There are several issues that still require drafter input:
 - a. Note 2. Do you agree that we should change the language as I've suggested in the footnote? I don't have strong feelings about this but the language changes approved during the July 2009 meeting seem to be a bit off.
 - b. Note 7. A couple of outstanding issues:
 - (1) See subparagraph 1. concerning the possibility that OCTC might request a comment. I don't think one is necessary.
 - (2) See subparagraphs 2 & 3 that concern issues OCTC raised in its 8/26/09 letter to the RRC. Cydney Batchelor was going to inquire further w/ Russ Weiner re whether these issues should be pursued further. I think the drafters' recommendation in each instance is correct and that no further changes are required.
 - c. Note 13, last paragraph. I don't think any further change is necessary. Do you agree?
 - d. Note 34. Do you agree w/ my explanation?
 - e. Note 35. I've moved Comment [8] in Draft 6.2 to the end of the comment. Otherwise, the ordering remains the same. Do you agree?
 - f. Note 46. Do you agree?
2. Please note that per the "rolling" agenda Randy has drafted at Harry's direction, Rule 1.5 is set for consideration at our October 2009 meeting. The October meeting deadline for submitting the comparison charts for this Rule is 9/30/09. We can help you set up the template for the charts but we need your input on the attached draft before we can do that.
3. If I don't hear from you about this draft by September 15, 2009, I'll assume you agree w/ my proposals and we'll (i.e., Mimi and I) will prepare a comparison chart template for you to input the explanations for submission by the 9/30/09 deadline.

Please let me know if you have any questions.

August 18, 2009 Ruvolo E-mail to KEM, cc Drafters, Chair, & Staff:

I have reviewed the latest version and your comments. I agree with all of them. I still think we are making a huge mistake by not adopting the unreasonable fee standard.

August 27, 2009 McCurdy E-mail to Vapnek, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

1. **III.C. Rule 1.1 Competence [3-110]** (Dec. 2008 Comparison Chart - Post Public Comment Rule Draft #7 dated 6/18/07)

Codrafters: Peck, Ruvolo

Assignment: (1) a chart comparing proposed Rule 1.1 to MR 1.1; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

2. **III.F. Rule 1.8.8 Limiting Liability to Client [3-400]** (Post Public Comment Rule Draft #5 dated 6/23/07)

Codrafters: Kehr, Martinez

Assignment: (1) a chart comparing proposed Rule 1.8.8 to MR 1.8(h); (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. **III.BB. Rule 8.4 Misconduct [1-120]** (Dec. 2008 Comparison Chart)
Codrafters: PECK (co-lead), Tuft
Assignment: (1) a chart comparing proposed Rule 8.4 to MR 8.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

2. **III.HH. Rule 1.5 Fees for Legal Services [4-200]** (Post Public Comment Draft #6.1 dated 1/1/09 to be revised following the July 2009 meeting)
Codrafters: Ruvolo, Voogd
Assignment: (1) a chart comparing proposed Rule 1.5 to MR 1.5; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **IV.Q. Rule 6.5 Limited Legal Services Programs** [only if adopted by Sup. Ct.] (NOTE: If the California Supreme Court declines to approve the proposed new rule that is presently pending with the Court, then this assignment becomes moot.)
Codrafters: Martinez, Ruvolo, Sapiro
Assignment: (1) a comparison chart with any recommended changes to the anticipated new RPC 1-650; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

**RRC – Rule 1.5 [4-200]
E-mails, etc. – Revised (10/13/2009)**

September 16, 2009 KEM E-mail to Drafters (Vapnek, Ruvolo & Voogd), cc Chair & Staff:

Please refer to my 8/18/09 e-mail, below. Our submission deadline is Wednesday, 9/30/09 but we need your response before that so we can make any final changes to the rule draft and prepare the Comparison Chart templates and get them back to you to revise.

I've asked specific questions below. Please provide a response at your earliest convenience. For us to have time to turn around the templates so you have time to draft explanations, we probably need your response by Tuesday, September 22, 2009. Please respond even if you agree with the proposed changes.

If I don't hear from you about this draft by September 22, 2009, I'll assume you agree w/ my proposals and we (i.e., Mimi and I) will prepare a comparison chart template for you to input the explanations for submission by the 9/30/09 deadline.

For your convenience, I've re-attached the the rule draft, as well as my meeting notes from the July 2009 meeting.

Please let me know if you have any questions.

See August 18, 2009 KEM E-mail to Drafters (Vapnek, Ruvolo & Voogd), cc Chair & Staff:

September 16, 2009 KEM E-mail to Ruvolo, cc Drafters, Chair & Staff:

I just realized you already responded. On August 18, 2009, you wrote:

I have reviewed the latest version and your comments. I agree with all of them. I still think we are making a huge mistake by not adopting the unreasonable fee standard.

Therefore, you need not review the materials again. However, it would be a great help if you could write a short paragraph that sets out the minority position on the "reasonable" standard for inclusion in the Introduction

September 17, 2009 Ruvolo E-mail to KEM:

The only info I would like at this point is the state comparison chart. I'd like to point out how many states use an unconscionable fee standard to protect clients.

September 17, 2009 KEM E-mail to Ruvolo:

I've attached the Comparison Chart for Rule 1.5. Here's the tally, which you will also find on the last page of the chart:

Reasonable Fee (41)

34 have adopted the 2002 Model Rule provision (Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah,

Vermont, Washington, West Virginia, Wisconsin and Wyoming).²

7 have retained the 1983 Model Rule provision (D.C., Georgia, Hawaii, Kansas, Mississippi, New Jersey, Virginia).³

Illegal or Clearly Excessive (8)

Alabama, Florida, Massachusetts, New York, North Carolina, Ohio, Oregon, Pennsylvania⁴

Illegal or Unconscionable (2)

California, Texas

The 2002 version of MR 1.5(a) provides in pertinent part: “(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”

The 1983 version of MR 1.5(a) provides in pertinent part: “(a) A lawyer’s fee shall be reasonable.”

This should help w/ the minority position. Please let me know if you have any questions.

September 18, 2009 Ruvolo E-mail to KEM:

Here is a draft paragraph for the Introduction. The attached is a work in progress as I haven’t got the majority introduction yet. Also, the tone is pretty strident. Your thoughts?

September 21, 2009 KEM E-mail to Ruvolo:

I’ve suggested some revisions to more closely tie the argument to the Commission’s charge. I’ve also removed most of the adverbs and adjectives; I don’t think they are necessary to get across the point.

I’ve attached a red-line of draft 2, compared to the draft you sent me, as well as a clean version of the same.

There is no introduction yet. That’s the last thing that’s written after we’ve drafted the rule and comparison charts. The latter can’t be drafted until the drafters sign off on the proposed draft I’ve circulated to the team. You’ve signed off but we’ve given the other members of the drafting team until tomorrow. If I don’t hear, I’ll assume they agree w/ the Rule as I drafted it after the July 2009 meeting.

Please let me know if you have any questions.

² Three (Michigan, Tennessee & West Virginia) all propose adopting the 2002 version of MR 1.5(a). At present, they have the 1983 version.

³ Of these seven, four have not yet completed their Ethics 2000 Review.

⁴ New York, Ohio and Oregon only recently adopted the Model Rules after being ABA Code states for over 30 years.

September 21, 2009 KEM E-mail to Drafters, cc Chair & Staff:

As Nace's request, I put together a chart that tracks the adoption of MR 1.5's "reasonable fee" standard in the various jurisdictions. The last page of the chart summarizes my research.

Please let me know if you have any questions.

September 21, 2009 Vapnek E-mail to KEM:

Fabulous piece of work. A couple of minor points: on page 8 of 8 I would add to the list of 8 states that have the illegal or clearly excessive language that the language comes directly from the ABA Model Code, DR 2-106 (A); on the first page in the District of Columbia something went astray in the Comments box (in bold face no less):

September 21, 2009 KEM E-mail to Drafters, cc Chair & Staff:

I've made a change in the chart that Paul suggested. See note 4 on the last page, which notes that the "illegal or clearly excessive" language comes from the ABA Code of Professional Responsibility (1969).

September 21, 2009 Lee E-mail to KEM, cc:

Attached you will find comparison tables for Rules 1.5, 8.1, and 1.17. These rules were not included with the ones we had sent you on Friday. These comparisons were a little harder to do. I'd appreciate it if you could review them before we send them out to the drafters.

September 23, 2009 KEM E-mail to Lee, cc Difuntorum & McCurdy:

It took a while, but I've finally gotten out of my faculty meeting. I've attached a slightly revised Rule & Comment comparison chart for Rule 1.5. The major change was to paragraph (a) but I also had to change some of the rule references in the comments because I had not updated all the references in the previous draft I circulated.

Please let me know if you have any questions.

September 24, 2009 Difuntorum E-mail to KEM, cc McCurdy & Lee:

Here are the Rule 1.5 assignment materials. Please take a look and let me know if they seem ready to go.

September 24, 2009 KEM E-mail to Difuntorum, cc McCurdy & Lee:

I've revised and attach the public comment chart (sorted alphabetically) and the Introduction (minor formatting).

Otherwise, they are good to go.

September 24, 2009 McCurdy E-mail to Drafters, cc RRC:

Paul & Codrafters (Nace & Tony):

This message provides the assignment background materials for Rule 1.5 [4-200] on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attachments:

Dashboard Template (9/23/09)
Introduction Template (9/24/09)KEM
Rule & Comment Explanation Template (9/23/09)ML-KEM
Public Comment Chart – DFT1.1 (9/24/09)RD-KEM
State Variations (2009)

September 24, 2009 McCurdy E-mail to Drafters, cc Chair & Staff:

p.s. I received a call from Jim Demetriou today regarding this rule. He said he wanted to point out that there were some grammatical problems in paragraphs (A) & (B). I encouraged him to comment on it and specifically point out his concerns, but he wasn't inclined. I told him I would pass his comments along.

September 24, 2009 Vapnek E-mail to Drafters, cc Chair & Staff:

I'll call Jim and get his input directly.

September 27, 2009 KEM E-mail to Drafters, cc Chair & Staff:

I've attached the following:

1. A single scaled PDF that includes the following documents:
 - a. Dashboard, Draft 1 (9/27/09)KEM;
 - b. Introduction, Draft 1 (9/27/09)KEM;
 - c. Rule & Comment Comparison Chart, Draft 1.1 (9/25/09)KEM;
 - d. Public Comment Chart, Draft 1 (9/25/09)RD-KEM.
2. Word versions of each document in item #1.
3. A PDF of new Draft 8 (9/26/09), showing the changes I've recommended to Draft 7.1, the draft that is the basis for the Rule & Comment comparison chart. My recommendations are primarily to update the language per Commission actions in the intervening year since we last

revised the rule (e.g., remove references to the current rule numbers). However, see Note 2 under item #3.A., below.

KEM Notes: I've added highlights to the attached COMBO PDF with Adobe's highlight tool to focus you on the changes to the rule I've proposed [that's why the file is named "Marked" at the end]. Here are the issues:

1. Dashboard. We'll enter the vote after the October meeting. However, there are several issues:
 - a. Substantially rejected. Do you agree the Model Rule has been substantially rejected? I think we should so state given our rejection of the reasonable standard in MR 1.5, which is the heart of the Rule.
 - b. Stakeholders. Do you agree w/ my characterization of the stakeholders?
 - c. Controversy. I've characterized the rule as "very controversial". Do you agree? Although we might think the revisions we've made to paragraph (e), i.e., subparagraph (e)(2), will likely assuage the criminal defense bar, it's still very possible they will come out in full force for the final public comment.
2. Introduction. Please review to see if you agree with how I have characterized the Rule. I've tried to state a majority position. Do you agree w/ that what I have written fairly represents the majority view? I have also included Nace's minority opinion.
 - a. Paragraph 4. Do you agree that this paragraph is necessary? I think we should include it. Although we discuss the public comment and our response in the Explanation for paragraph (e)(2), I think we need to call it out for BOG and the S.Ct.
3. Rule & Comment Comparison Charts. I've highlighted those parts where I have questions. I have specific suggestions/questions at the following footnotes & related text:

A. As to footnotes:

- a. Note 1. Is there any reason why we can't use the Model Rule language in paragraph (c)(5)?
- b. Note 2. I recommend deleting the first sentence of Comment [11] because its substance is already covered by Comment [4]. Do you agree?

B. As to Explanations I've proposed, please take a look at the Explanations for the following. Do you agree w/ what I have written?

Paragraph (a). Do you agree with the third paragraph of the Explanation?

Paragraph (a). Do you think we need a definition of "in-house expense"? Any ideas?

Paragraph (d). Should we include the highlighted part of the Explanation? There were some questions why these two kinds of contingent fee cases are called out from other kinds and I've tried to provide the rationale as stated in the Restatement and the literature.

Paragraph (e). Is this explanation adequate for why we have included an express prohibition against non-refundable fees.

4. Public Comment Chart. I've made no changes to Randy's fine public comment chart except to resort the comments alphabetically by commenter.
5. Proposed Draft 8. As to the proposed Draft 8, I've included it so you can quickly see the revisions I've suggested to Draft 7.1, the draft on which the comparison chart is based.
6. All the Word documents are clean versions.

DEADLINE. The agenda submission due date is next **Wednesday, September 30, 2009**. I realize you're all under the gun with your own rules. Nevertheless, I've tried to identify the issues so you can review the attached in relatively quick fashion. If I don't hear from you by **Tuesday, September 29, 2009 at noon**, I'll assume you're OK my proposed changes and will implement them. You'll still have an opportunity to object during the e-mail comment period but I have several items to prepare for the agenda and I want to submit them in a timely fashion so I can start working on items for the November agenda. Keep them doggies rollin'

Please let me know if you have any questions.

September 28, 2009 Vapnek E-mail to Drafters, cc Chair & Staff:

Kevin and Drafters (Nace and Tony): First, thanks to Kevin for pulling all this material together. I'll review this all tonight and get my comments to you all by tomorrow some time. If my drafter colleagues have any comments I would appreciate them sooner, rather than later. Nace, I know how you feel on this rule, but how about the rest of the rule, other than unconscionable?

September 28, 2009 Ruvolo E-mail to Drafters, cc Chair & Staff:

The rest of the rule is fine with me.

September 29, 2009 Vapnek E-mail to Drafters, cc Chair & Staff:

Gentlemen: On page 3 and 15 of 17 of the Compare - Rule and Comment Explanation, DFT 1.1 there are two Consultant's Notes that need addressing: the first on page 3 is in rule 1.5 (c)(5) where the draft changed "involved" in the Model Rule to "at stake." Shall we change it back? I'm not sure there is any difference in meaning. On page 15, Comment 11, Kevin suggests deleting the first sentence as redundant because there is a similar sentence in Comment 4. I think there is a difference in that Comment 11 refers to refund after termination, while Comment 4 is more general, referring to refund of the unearned portion of an advanced fee. Shall we keep both? My vote is to keep both sentences.

I have made or am making a few copy editorial changes, but otherwise the material is ready to go after the two questions above are resolved. Please respond ASAP as our material is due tomorrow.

September 29, 2009 Ruvolo E-mail to Drafters, cc KEM:

I say go back to “involved” As to page 15, I am ok with leaving it in but have no strong preference.

September 29, 2009 Voogd E-mail to Drafters, cc KEM:

I agree with Nace.

September 30, 2009 Vapnek E-mail to McCurdy, cc Drafters, Chair & Staff:

Attached are the revised materials for this Agenda item. I will shortly send Lauren a clean version of the Rule. There were a couple of minor (?) changes I made after the drafters approved these materials, based on my conversation with Jim Dimitriou. First, he pointed out a problem in trying to read rule 1.5(b), in that there was a comma after "shock the conscience" in the second line that caused reading and comprehension difficulties. I changed the comma to a semi-colon and now it reads well. The second was what we meant by "in-house" in reference to expenses, as they were not defined in the Rule or Comments. I therefore added a sentence to Comment 1, at the end: "In-house expenses are charges by the lawyer or firm as opposed to third-party charges." If not acceptable, I'll take my punishment; otherwise the drafters are done with this rule.

The clean version of the rule follows in a separate email.

October 5, 2009 Kehr E-mail to RRC:

Here are my comments on these materials:

1. A word is missing from the penultimate line of paragraph 1 of the Introduction. The word “fee” should be inserted after “non-refundable”.
2. On Kevin’s fn. 1, I like “at stake” better than “involved”, but not enough to spend a moment on it. I agree with his recommendation that we restore the MR language.
3. There is some awkward language in the fourth paragraph of the Comment [1] explanation. Beginning in the second line, I would say: “... that the eleven factors in paragraph (c) are not exclusive, and that not all of them necessarily will be relevant in every instance.”
4. I notice that Comment [10] refers to Rule 1.0. Given our several references in other Rules to Rule 1.0.1, I wonder if we shouldn’t do the same here to avoid possible confusion.
5. I agree with Kevin’s fn. 2 and his recommended solution.
6. I suggest adding to the response to Carol Langford’s comment: “Sections 6147 and 6148 govern the enforceability of a fee agreement, which is a civil matter as the

Supreme Court stated in *Herrscher v. State Bar*, while this Rule governs professional discipline.”

October 5, 2009 Sondheim E-mail to RRC:

The last line for "Very Controversial" in the Dashboard (Agenda materials, p. 124) states "the changes made should assuage the concerns raised by the criminal defense bar." I suggest the word "should" be changed to "may" since we will find out whether we have solved the problem when the last batch is sent out for comment.

October 7, 2009 Sapiro E-mail to RRC List:

This is an excellent report. I vote “yes” on both the rule and the question of whether to forward it to the Board.

I offer three minor suggestions.

1. First, in the Introduction, paragraph 4, I think our statements are too defensive. I would add after the second sentence a statement to the effect that the Commission believes that those who disagreed with the rule misinterpret current California law, which does make fixed or flat fees refundable. I would then add that, nevertheless, to address the concerns stated by those who expressed opposition, the Commission revised paragraph (f) [and then pick up the language of the third sentence]. After the third sentence, I would insert a statement to the effect that stating the requirements for a non-refundable flat fee in the rule itself brings current California standards into the rule explicitly, rather than leaving them to be read only from decisional law.
2. In the explanation of changes at page 9 of 17, for Comment [1], last paragraph, third line, I would insert the word “not” after the word “will.”
3. In Comment [8], I recommend that, in the second sentence, which begins at the bottom of page 13 of 17 and continues at the top of page 14, after the word “alone” at the top of page 14, we either insert a period and start the next sentence with the phrase “That is,” or insert a semicolon after the word “alone.”

October 7, 2009 Sondheim E-mail to RRC List:

Since this is not a consent item, Jerry's suggestions will be considered at the meeting.

October 11, 2009 Tuft E-mail to RRC List:

Comments on proposed Rule 1.5

1. Introduction:
 - a. Please add the following paragraph to the minority position in paragraph 2:

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

- b. Please add the following minority position to paragraph 4:

A minority of the Commission believes that proposed paragraphs (e) and (e)(2) as drafted would be a source of overreaching and confusion. There are many different fee arrangements involving flat or fixed fees. While a lawyer may require advance payment of a fixed or flat fee, the lawyer remains obligated under the rules in all jurisdictions, including Washington, to return any unearned portion. See Model Rule 1.16(d); current California Rule 3-700(D)(2) and Washington Rule 1.5(f)(2). Washington Rule 1.5(f) is not intended to authorize lawyers to charge "non-refundable fees" as proposed rule 1.5(e) purports to do. Rather, Washington's rule provides that the client and the lawyer may agree in writing that a flat or fixed fee paid in advance is the lawyer's property and, therefore, need not be placed in the lawyer's client trust account, which Washington's rule would otherwise require. California does not required advance fee payments be place in a client trust account, unlike the rule in most jurisdictions. However, California law does not permit lawyers to make an agreement, charge or retain a "non-refundable" flat or fixed fee that has not been earned. *Matthew v. State Bar* (1989) 49 Cal. 3d 784, 787-788; *Matter of Lais* (Rev.Dept 1998) 3 Cal. State Bar Ct. Rptr. 907, 923; *Federal Sav. & Loan Ins. Corp. v. Angell, Holmes & Lea* (9th Cir. 1988) 838 F.2d 395, 397 (applying California law). A rule that authorizes lawyers to charge "non-refundable" flat or fixed fees is not good public policy. "Non-refundable" when used to signify a prepaid fee is misleading because the lawyer's fee is never truly nonrefundable until earned. When used in connection with a "true" or "classic" retainer, the term "nonrefundable" is redundant. Not only is the label not controlling, the term "non-refundable" retainer has been the source of confusion and should not be encourage in a rule of professional conduct. Most authorities are in agreement. See, Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 Fla. Coastal L. J. 293 (1999), ABA Manual on Professional Responsibility 45:109 (1993), *In re Mance*, DC Ct of Appeals, 06-BGT-890 (09-24-2009). Many criminal defense lawyers, including some who submitted comments to the earlier version of proposed Rule 1.5, said they would agree to refund a portion of a flat or fixed fee to a client who changed counsel shortly after paying the fixed fee or if charges were dismissed soon after the lawyer was retained.

2. Explanation for Changes to Paragraph (d): Change "if the client is innocent" in the fourth paragraph on page 134 to "if the client if found not guilty."
3. Comment [3]: This comment should be deleted.

4. Comment [11]: The comment should be retained particularly in view of including paragraph (e). Comment [4] deals with an advance fee not a fixed fee.

October 11, 2009 Martinez E-mail to RRC:

I join with Mark in objecting to (e)(2). The Washington rule that we tried to follow does not use the term "non-refundable." Our Rule does. The Washington rule only says that the fee is the "lawyer's property on receipt." These are different concepts. By saying the fee can be non-refundable in (e) we are signaling that the Rule overrides contract defenses the client might have that would entitle the client to a refund, like failure of consideration, breach of contract, etc.. The Washington rule also requires specific language in the retainer agreement stating that the client may or may not be entitled to a refund if the legal services are not performed. The proposed rule thus offers less client protection than the Washington rule. The Washington rule is at http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=garpc1.05&pdf=1

October 12, 2009 Melchior E-mail #1 to RRC List:

Availability fees, and advance fees and flat fees paid in advance

Though this subject has been discussed ad infinitum, I do not think that we have got it right, yet.

1. First, availability fees are clearly earned by the lawyer upon receipt, not subject to trust account deposit, and nonrefundable. *Baranowsky v. State Bar* [cite] plainly so held. However, since that decision the State Bar Court (not the Supreme Court, whose *Baranowsky* case stands unassailed and has been cited elsewhere as authoritative [cite]) has whittled away at its holding to establish [cite]. In practice, the protection a lawyer has on receipt of an availability fee under *Baranowsky* has been eroded and scarcely exists. *(I have the cites elsewhere but do not want to delay this transmission to find them at this late hour . I will try to supply them later.)*
2. Secondly, in real life there is no point or almost no point in an availability fee as we have narrowly defined that term, i.e., a fee purely for having the lawyer available – presumably, by refusing other work which may or may not come along – **but** where the lawyer is also required to charge the client separately for the work when the lawyer performs that work. Under what circumstances would a lawyer institute this arrangement, and what would be the required non-unconscionable level at which such a second fee could be established? Or how would one measure the value of time (i.e., of availability), except by the work to be done and separately billed for?
3. Yet, as criminal defense lawyers have made amply clear to us. and as applies equally to lawyers representing bankrupts and certain other debtors, and perhaps other relationships which have not been brought forward to us as well, such lawyers need to have a fully earned fee upon engagement, because to the extent that the fee has not been fully earned (i.e., that it may be refunded), it does not wholly belong to the lawyer; and law enforcement or similar adverse parties may seize the funds from the lawyer, leaving the lawyer unpaid and, unless a court orders the lawyer to work without fee, leaving the client unrepresented.
4. Thus, one defect in our rule is that in the praiseworthy effort to protect clients against certain potential improprieties – the lawyer's being paid and then not performing the work, or the

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client changing her mind and not being able to recover an advance fee so that she can pay a successor – we are creating another, serious trap for lawyer and client alike.

5. The same fault underlies our proposal that where the lawyer accepts an availability fee, there must also be a separate charge for the work being done, beyond the availability fee: if that is not the case, it is not a true availability fee. The availability fee may thus never be used to pay the lawyer for actual work on the client's matter.
6. I appreciate that this concept comes out of early case law; and indeed, in the early days of our state there may have been situations where a client came to a lawyer to say that the client would pay the lawyer just to be able to call on him if needed. But I daresay that this was before the rise of the billable hour; and there is no authority and to my knowledge no anecdotal experience which indicates that more recent history (say, since WW II) actually shows such situations, where an availability fee was followed by hourly or other pro rata charges for the work when done.
7. So, I think that we are either carrying forward into the 21st century a formulation which has had no meaning since the 19th, or ignoring the true meaning of an availability fee.
8. I appreciate that the motive behind this approach is client protection – as is true with the post-Baranowsky cases I have discussed. Yet, I have tried to point out that lawyers in fact use the availability fee, or a “fully earned at the time of payment” version of a flat fee, for legitimate and client-beneficial purposes. Our formulation undercuts both points of this established practice, which is allowed under our present Rule. In the interest of one aspect of client protection, our proposal deprives both client and lawyer of an important and necessary means to allow clients to retain lawyers, and lawyers to accept certain engagements, in socially valuable situations.
9. There are other ways to solve this problem. One, but not necessarily the only one, which occurs to me is **not** to limit or forbid “true retainer” fees or fully earned advance fees which also include payment for work to be done, **but rather** to require that lawyers may not willfully (a) fail to do the work whose value is included in the flat fee or availability retainer, or (b) refuse to refund a prorated portion if the contemplated work is not done.
10. Anyhow, I feel that we are badly missing the point here; and if the Commission does not come around to my position, I ask that this message be included as my dissent.

October 12, 2009 Melchior E-mail #2 to RRC List:

Rule 1.5: In intro, l. 1, I suggest that we say that the unconscionability standard “is incorporated from current Rule 4-200.”

P. 126: though I am not in the minority here, We should say at item 3, line 3 that “It contends that by retaining”

P. 129: Nit: Rule (b) line 4: “or if the lawyer”

P. 135: I strongly disagree with this comment. See my separate memo which discusses the subject at some length. I also disagree for the same reasons with the explanation for para. (e), which is wrong in my opinion.

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P. 140: I suggest deletion of the sentence in Comment 5 that “Otherwise, the client might have to bargain for further assistance [etc].” Not only is that a pure musing, but it selects and features one possible adverse consequence among many. This sentence seems pointless and inadequate.

p. 141: see my position on true retainers.