

~~THE STATE BAR OF CALIFORNIA~~

~~Sample Written Fee Agreement Forms~~

~~{Prepared by the State Bar Committee on Mandatory Fee Arbitration.~~

~~Approved by the Board of Governors June 20, 1987; amended effective~~

~~November 22, 1996; May 15, 2001; June 23, 2005; March 8, 2010; November 20, 2010}~~

SAMPLE WRITTEN FEE AGREEMENTS FORMS

INSTRUCTIONS AND COMMENTS

I. INTRODUCTION

~~Attached are three sample attorney client fee agreements prepared by~~ The Committee on Mandatory Fee Arbitration of the State Bar ~~of California and approved by~~ has prepared three sample attorney client fee agreements which the Board of ~~Governors~~ Trustees have approved. They are advisory only. ~~They~~ are not required, and are not binding ~~upon~~ on the Courts, the State Bar of California, ~~its~~ the Board of ~~Governors~~ Trustees, any persons or tribunals charged with regulatory responsibility; or any ~~member~~ members of the State Bar.

~~The first two agreement forms are designed for use in non-contingent fee arrangements. They cover~~ The three attached agreements are : (1) an hourly litigation ~~on an hourly basis, and~~ (2) an hourly non-litigation ~~on an hourly basis. The third form is for agreement and~~ (3) a contingency fee matter. Finally, agreement. There are ~~Other~~ also other documents entitled "Optional Clauses ~~of Interest in Fee Agreements"~~ of Interest in Fee Agreements" which ~~list~~ lists optional ~~clauses~~ provisions for specific circumstances and "Disclosure Forms" which an attorney may need to consider in certain situations.

II. OVERVIEW

A. ~~INTENDED PURPOSE AND LIMITATIONS~~

~~The accompanying forms are samples. These "Instructions and Comments"~~
~~Intended Purpose and the forms are intended for use only by attorneys Limitations~~

~~Attorneys who are~~ admitted to practice in California, ~~who are expected to utilize~~ may use
the attached sample agreements and should use their own independent legal and business
judgment when ~~evaluating the forms and these comments.~~

~~creating their attorney-client fee agreement. The agreementssamples are prepared in the~~
~~format of a relatively-formal agreement while attempting to eliminate unnecessary "legalese."~~
~~For those attorneys who prefer a more colloquial contract style, such as~~ and various provisions
can be incorporated into a letter- fee agreement, if the language can be adapted attorney chooses
to use that format. Attorneys are encouraged to ~~not~~ modify the samples to fit their needs.

B. SUMMARY OF ~~THE~~ STATUTES AND RULES OF CONDUCT

• ~~1.~~ Non-Contingent Fee Agreements-B&P 6148

~~In non-contingent matters, Section 6148 of the~~ Business and Professions Code
Section 6148 governs non-contingent fee agreements. It requires ~~California~~ attorneys to have a
written fee agreements with their clients agreement whenever it is reasonably foreseeable that
the client's total expense, including attorneys' fees, will ~~foreseeably~~ exceed \$1,000 ~~and to~~
~~provide a duplicate copy of the fully executed agreement to the client.~~

~~The fee agreement must state:~~

- ~~(a) Any basis for compensation including, but not limited to, hourly rates, statutory or flat fees, and other standard rates, fees and charges;~~
- ~~(b) The general nature of the legal services to be provided to the client;~~
- ~~(c) The responsibilities of attorney and client under the agreement.~~

~~—— If an attorney fails to comply with the statute, the fee agreement becomes voidable at the client's option, whereupon the attorney is entitled to a "reasonable" fee.~~

~~—— 1000. A written fee agreement is not required when services are rendered in an emergency, to avoid prejudice to the client or where the writing is otherwise impractical; ~~when the client is a corporation;~~ when the client, after full disclosure, makes a written waiver of the benefits of Section 6148; or when the fee agreement is implied in fact by prior services of the same general kind having been rendered to and paid for by the client. ~~The attorney is urged to use caution in relying upon these "exceptions." There can be very few circumstances where a written fee agreement is not advisable.~~~~

The agreement must state: (a) any basis for compensation including, but not limited to hourly rates, statutory or flat fees and other standard, rates and charges; (b) the general nature of the legal services to be provided; and (c) the responsibilities of attorney and client under the agreement. The attorney is required to provide a fully executed copy of the agreement to the client at the time the contract is signed.

Section 6148(b) also requires attorneys to provide their clients with written billing statements, bills. A client may request such statements a bill at ~~minimum~~ intervals of 30 days or greater. The attorney must provide ~~a statement~~ the bill within 10 days after the demand. All ~~statements, whether requested by the client or not, bills~~ must state "...the amount, rate and basis for calculation or other method of determination of determining the attorneys attorney's fees and costs." (subd.(b)).

~~—— 2. Contingency~~ Finally, if an attorney fails to comply with any provision of the statute, the fee agreement becomes voidable at the client's option and the attorney is only entitled to a reasonable fee.

- Contingent Fee Agreements, B&P 6147

~~—— In contingency fee agreements, Section 6147 of the Business and Professions Code~~ Section 6147 governs contingent fee agreements. It contains the same requirements as non-contingency the Non-Contingent fee agreements (discussed in Section one above) for a written fee agreement and a duplicate copy of the executed agreement being provided to the client.

~~—— There are, and the following~~ additional requirements ~~for contingency fee agreements.~~ The agreement must include:

- (a) A statement of the contingency fee percentage amount.
- (b) A statement as to how disbursements and costs will affect the contingency fee and the client's recovery.
- (c) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee agreement. This may include any amounts collected for the client by the attorney.
- (d) Unless the claim is subject to the provisions of Business and Professions Code Section 6146 (Claim Against Health Care Provider), a statement that the fee is not set by law but is negotiable between the attorney and client.
- (e) If the claim is subject to Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee and that the attorney and client may negotiate a lower rate. ~~If the matter involves a claim for injury or damage against a health care provider based upon negligence, the attorney should carefully review Business and Professions Code Section 6146.1.~~

~~—If The attorney is required to provide a fully executed copy of the agreement to the client at the time the contract is signed.~~

Finally, if an attorney fails to comply with any ~~contingency~~ provision of the statute, the fee agreement ~~does not comply with the statutory provisions, the agreement is~~ becomes voidable at the client's option ~~of the client,~~ and the attorney is ~~then~~ only entitled to a "reasonable" fee.

~~C. SUMMARY OF RULE OF PROFESSIONAL CONDUCT 3-410~~

~~• —Disclosure Concerning Professional Liability Insurance-CPRC 3-410~~

California Rule of Professional Conduct (CPRC) 3-410 requires ~~that California~~ attorneys who know or should know that they do not have professional liability insurance ~~must~~ to inform a client in writing, at the time the client ~~engages the attorney, that the attorney does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of legal representation in~~ hires the client's matter attorney. The attorney must disclose they are not insured ~~whenever it is foreseeable the representation~~ will exceed four hours.

~~—An attorney who must give a client the written disclosure has the option of doing so in the fee agreement. Rule 3-410 suggests the following language for inclusion in the fee agreement or in a separate writing:~~

~~*"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."*~~

~~Rule 3-410 provides limited exemptions to the disclosure requirement. The written disclosure is not required of attorneys when they are government lawyers or in-house counsel and representing a client in that capacity; when they provide legal services in an emergency to avoid prejudice to the rights or interests of a client; or when they have already advised the client in a fee agreement or separate writing that the attorney does not have professional liability insurance. Attorneys are urged to use caution in relying on the exemptions. Attorneys also should be aware that Rule 3-410 contains a separate written disclosure requirement if the attorney does not provide written notice to the client at the time of the client's engagement of the attorney.~~

~~Attorneys are urged to review Rule 3-410 in its entirety.~~

~~III. GUIDELINES FOR COMPLIANCE WITH THE STATUTES~~

~~Compliance with the statutes requires the judgment of the individual attorney. Forms alone cannot tell an attorney how to comply. Rather, compliance will result from the attorney's understanding of the statutory provisions and the issues those provisions raise.~~

~~A. STANDARD FOR DISCLOSURE~~

~~Due to the consumer orientation of the statutes and the fiduciary nature of the attorney-client relationship, the statutes must be examined in the light most favorable to the client. Disclosures required by statute should be accompanied by all additional information necessary to make the disclosure complete, accurate, and not misleading. The statutory requirements should be considered minimum standards.~~

~~B. AGREEMENT IN WRITING~~

~~_____ To meet the statutory requirement of an agreement in writing, the fee agreement must be signed by both the attorney and the client. An attorney must be firm in requesting that the client sign the agreement before work commences.~~

~~_____ C. _____ DISCLOSURE OF STANDARD RATES, FEES AND CHARGES~~

~~_____ An attorney should err on the side of inclusion when enumerating standard rates, fees and charges. In an hourly case, fixed or minimum charges for specific functions should be clearly set forth in the agreement to avoid misleading the client. For example, most firms have a minimum billing unit; some charge a minimum time for a telephone call, letter, or court appearance; others charge flat fees for the use of standardized documents developed over the years, or for specific tasks.~~

~~_____ Costs and expenses that are passed through should be enumerated in enough detail to avoid misunderstanding. Charges passed through other than "at cost" should be detailed to avoid omitting a "standard rate, fee or charge." Caution should be exercised in "marking up" or "surcharging" costs, as some authorities consider such practices unethical. Caution should also be exercised in charging for items that would be considered general office overhead.~~

~~_____ D. _____ NATURE OF SERVICES/DUTIES OF PARTIES~~

~~_____ When the statute requires disclosure of the nature of the services to be rendered and the respective duties of the attorney and the client, it simply enumerates two of the indispensable terms of an agreement. When the fee is on an hourly basis, these items can be covered in simple, short generalities. In flat or "premium" fee the sample agreements, however, the scope of the attorney's responsibilities should be defined carefully. In contingency fee agreements, the scope of the services and costs covered and excluded under the percentage fee is especially important there is a provision to disclose whether you have professional liability insurance or not.~~

~~_____ E. _____ BILLS: AMOUNT, RATE AND BASIS~~

~~———— All bills must state the amount, rate and basis for calculation (or other method of determination) of the attorney’s fees and costs. A bill that simply states “for services rendered” is not sufficient. In an hourly case, the bill should describe the services, identify the attorneys who performed services, the time each expended, their hourly rates and the resulting fee for each attorney’s time. In other types of cases, such as flat or premium fees, the bill should refer to the “basis of calculation” which should be set forth in the fee agreement. Bills for costs and expenses must clearly identify the costs and expenses and provide the amount of the costs and expenses incurred. It is recommended that costs be individually itemized.~~

~~———— F. ——— EXEMPTIONS~~

~~———— Except for the provision exempting corporate clients from the required disclosures, the exemptions in the statute are narrow. Attorneys should rely on these exemptions with caution.~~

~~———— G. ——— BREVITY AND CLARITY v. COMPLETE DISCLOSURE~~

~~———— The statute embraces two potentially inconsistent goals: detailed disclosure on one hand, and information in an understandable format on the other. Each attorney should strive to strike a balance between these goals when drafting fee agreements. In addition to a proper agreement, it is suggested that the attorney take the time and effort to explain the terms of the agreement and to determine that the client fully understands its terms.~~

~~IV. ———~~ III. INSTRUCTIONS FOR USE OF FORMS

A. FORM NO. 1: HOURLY LITIGATION

- ~~———— 1. ———~~ Conditions (Par. 1) and Effective Date (Par. ~~14~~17)

~~At the threshold, the attorney must determine at what point the agreement comes to life. Until it does, there is no written agreement that complies with the statute. Once it does, the attorney is obligated to render services, even if the client has not paid. If services are performed before the written agreement takes effect, the attorney will be limited to a "reasonable" fee. This form and the other samples embody one solution to these intertwined issues. It is not the only solution, nor will it always be the best solution.~~

~~Par. 1 (Conditions) interacts closely with Par. 14 (Effective Date). Working together, the two clauses are designed to delay the attorney's obligation to perform services until the client signs the agreement and pays the deposit; however, the clauses also are drafted to bring within the agreement any services performed before signing and payment. The delay in the attorney's obligation to perform services is based on a cautious reading of the statute's written agreement requirement. We assume that no written agreement exists until both parties sign and perform the conditions precedent. At the same time, however, we recognize that attorneys frequently will (or must) perform services before signing and payment; they will often do so under circumstances that will not fall within the statute's exemptions for emergencies or impracticality. For that reason, "premature" services are brought under the agreement's protection; upon signing and payment the agreement will take effect, but retroactively to the date the attorney first performed services. Without the retroactivity provision compensation for "premature" services would be limited to a reasonable fee, because the services were performed without a written agreement.~~

~~Of course, if the agreement never takes effect, then the statutory penalty limits the attorney to the reasonable value of any services performed.~~

~~If the attorney expects to perform services before the agreement is signed and the deposit paid, then the attorney should document the facts in a writing, preferably one signed by the client.~~

~~Likewise, document reliance on any statutory exemptions, such as emergency or impracticality.~~

~~2. Paragraph 1 (Conditions) and paragraph 17 (Effective Date) work together and outline various conditions which must be met before the fee agreement is binding on the parties. If the conditions are not met, the agreement may not take effect but the attorney may still be entitled to recover a reasonable fee.~~

- ~~• Scope of Services and Attorney's Duties (Par. 2) and Client's Duties (Par. 3)~~

~~The attorney should fill in a briefdetailed description of the subject of the representation (Par. 2), services to be provided. This is a statutory requirement. Enumeration of the client's and attorney's duties likewise is required by the statute (Par. 3).~~

~~The scope of services providedThis paragraph excludes representation in an appeal from the judgment and execution~~

~~, collection proceedings. The attorney may exclude more, less, after judgment or nothing. Any exclusion from the scope of services should be carefully drawn, and consistent with the duty of care owed by the attorneyproceedings regarding the specific matterrenewal of a judgment. It also provides that is the subject of the representation, a separate written agreement is required for these services and any other services not provided in the description. Paragraph 3 lists all the duties the client must fulfill during the attorney-client relationship, which is a statutory requirement.~~

- ~~3. Deposit (Par. 4)~~

~~ThisAlthough a deposit is an optionalnot required, if the attorney chooses to require a deposit, he or she should keep this clause- in the agreement and fill in the amount of anythe initial deposit and the date by which it must be paid. Since an attorney cannot withdraw funds from the trust account without the client's express authorization. We have provided for that, an authorization. If a more cautious approach to the authorization question is preferred, the attorney might provide that sums will be withdrawn from the trust account only after they are invoiced to client and "x" days pass without client's protest of any of the charges.~~

~~The attorney need not require a deposit of any kind. This paragraph sets forth one way to handle the deposit if the attorney opts for one. This clause places a ceiling on further deposits. Without a ceiling, the right to require further deposits is so open ended that it might be unenforceable for uncertainty. In addition, provision is made for advance payment of all fees and costs to be incurred in preparing for and conducting trial or arbitration. Because it is calculated based on objective facts, no ceiling has been placed on the pre trial deposit.~~

~~_____ The "Replenishing Deposit" clause provided in the "Additional Provisions" forms may be used as an alternative.~~

~~_____ 4. Legal Fees (Par. 5)~~

~~_____ The attorney must inform the client in the fee agreement whether and under what conditions rates are subject to change.~~

~~_____ Also, the attorney should add any standard or minimum time or dollar charges for specific functions for example, ".x" hours for a telephone call or letter. Failure to disclose such practices probably misleads the client when the agreement states that fees are charged by the actual time by the hour and some fraction of an hour.~~

~~_____ Some firms either do not charge for travel time or charge at reduced rates. The attorney should discuss this with the client.~~

~~_____ 5. Costs and Expenses (Par. 6)~~

~~_____ This is not an inclusive list. The attorney may include more or less. The attorney should disclose the rate or charge for any items not passed through strictly at cost; if not done, the attorney may violate the statute's requirement that standard rates, fees and charges be disclosed.~~

~~_____ A Rate Schedule should be is included for charges that are not usually passed through strictly at cost. All such charges should be enumerated to comply with the statute's requirement that attorneys disclose their standard rates, fees and charges.~~

~~_____ The attorney should specifically address how air travel other than economy, hotel accommodations and meals will be charged.~~

~~_____ The sample paragraph allows the attorney to incur costs and retain consultants, etc., without client consent. Optional clauses, to be initialed by the client, would require client approval before costs in excess of a specific dollar amount or of a certain nature, (e.g., experts) were incurred.~~

~~_____ Language is included notifying the client that in certain cases, it may be the client's responsibility to pay other parties' costs.~~

~~_____ **6. Billing Statements (Par. 7)**~~

~~_____ Attorneys' statements shall describe the services rendered, and must state the "basis" of the charges, including the amount, rate, and basis for calculation or other method of determination of fees and costs.~~

~~_____ **7. Lien (Par. 8)**~~

~~_____ This is an optional clause, but is recommended for the attorney's protection. The California Supreme Court has determined that a lien in an hourly fee case gives the attorney an interest adverse to the client, and therefore the attorney must comply with Rule 3-300 of the Rules of Professional Conduct by fully disclosing the acquisition and terms of the lien and transmitting that information to the client in writing in a manner which should reasonably be understood by the client, advising the client in writing that the client may seek the advice of an independent lawyer of the client's choice, and giving the client a reasonable opportunity to seek that advice before the client gives written consent to the lien. The Supreme Court left open whether the same requirements must be met for a valid lien in a contingent fee case, but caution dictates that the same procedure be followed.~~

~~_____ **8. Discharge and Withdrawal (Par. 9)**~~

~~_____ This clause is declaratory of applicable law and the Rules of Professional Conduct.~~

~~_____ **9. Disclaimer of Guarantee (Par. 10)**~~

~~_____ This is an optional clause.~~

~~_____ **10. Construction Clauses (Pars. 11–13)**~~

~~_____ These are optional clauses found in many formal agreements.~~

~~_____ **B. FORM NO. 2: HOURLY NON-LITIGATION**~~

~~_____ With the exceptions and additions recited below, the comments on the Hourly Litigation Form apply equally to the Hourly Non-Litigation Form.~~

~~_____ **1. Scope and Duties (Par. 2)**~~

~~_____ An exclusion for litigation has been added.~~

~~_____ **2. Client's Duties (Par. 3)**~~

~~_____ References to appearances at legal proceedings are deleted.~~

~~_____ **3. Deposit (Par. 4)**~~

~~References to trial and arbitration dates and related fees are deleted.~~

~~**4. Costs and Expenses (Par. 6)**~~

~~Reference to litigation related costs is deleted.~~

~~**5. Lien**~~

~~The attorney's lien has been deleted because it may be inappropriate in a non-litigation context.~~

~~**C. FORM NO. 3: CONTINGENCY FEE**~~

~~With the exceptions and additions recited below, the comments on the Hourly Litigation Form 1 apply equally to the Contingency Form 3.~~

~~**1. Conditions (Par. 1) and Effective Date (Par. 19)**~~

~~The instructions for these paragraphs are the same as those for the Hourly Litigation Form, Paragraphs 1 and 14.~~

2. Scope of Services (Par. 2), Responsibility of the Parties (Par. 3), and Limitation of Representation (Par. 10)

~~Fill in the defendant's name, the nature of the event giving rise to the claim and the date (Par. 2). in this paragraph and Paragraph 10 (Limitation of Representation), describe the scope and limitations of the representation. A description of the subject of the representation is a statutory requirement. Enumeration of the client's and attorney's responsibilities likewise is required by the statute (Par. 3). There is also a recitation that the deposit is not an estimate of the total fees and costs to be charged.~~

~~The point at which the covered services ends should be carefully defined to avoid any question of the obligation to provide additional services without additional fees. The scope of services in the sample excludes appeal from the judgment and execution proceedings. The attorney may exclude more, less or nothing. Any exclusion from the scope of services should be carefully drawn, and should be consistent with the duty of care owed by the attorney regarding the specific matter that is the subject of the representation.~~

~~The scope of representation is also limited to the specific matter defined in Paragraph 2. Business and Professions Code Section 6147 requires a statement as to what extent, if any, the client could be required to pay any compensation to the attorney that arises out of their relationship but is not covered by the contingency fee agreement. The sample (Par. 10) provides that representation as to related matters will require a separate agreement. As to the related matter of defending the client on cross-complaints, the option of a separate agreement or engaging separate counsel is given. Here again, the attorney may broaden the scope of the services to include those related matters which are excluded in the sample.~~

~~**3.** When the initial deposit is exhausted, the provision permits the attorney to require a further deposit and the attorney should fill in the amount. Finally, in "Other Clauses" there is a provision for a "Replenishing Deposit" which permits the attorney to require the client replenish the deposit each month.~~

- Legal Fees (Par. 45)

~~As required by statute, this paragraph explains the contingency on which fees become due, the method of calculation of fees at various points in the litigation, and deduction of costs. An optional clause includes non-monetary proceeds as part of the net recovery on which the~~

~~fees are based. If this clause is used, consideration should be given to whether or not to enumerate the potential non-monetary items, e.g., the value of continued insurance coverage.~~

~~Neither the particular stages in litigation at which the percentage of the fee changes, nor the specific basis for computation of a reasonable fee in the event of discharge, should be viewed as being endorsed by the State Bar. It should be noted that no specific contingency fee amounts are recommended in these forms. These provisions are illustrative only. Other provisions may be more appropriate in particular cases.~~

~~Business and Professions Code Section 6147 provides that a reasonable fee is owed in the event of failure to comply with the statute, and existing case law provides for payment of a reasonable fee in the event of discharge of the attorney by the client prior to occurrence of the contingency on which fees become due. Accordingly, this paragraph states that the reasonable fee in such a case is payable on the occurrence of the contingency and provides assistance in the determination of the amount of a fee which may be considered reasonable.~~

~~4. Negotiability of Fees (Par. 5)~~

~~This statement is required by statute.~~

~~5. Billing Statements (Par. 8)~~

~~This optional paragraph is intended for use in the event the client is to pay costs as the litigation progresses, rather than deducting all costs from the recovery.~~

~~6. Since Business & Professions Code Section 6148 requires the attorney to list hourly rates, the attorney should fill in the rates for each attorney and the attorney's personnel. The provision also states that rates are subject to change on 30 days written notice to the client. The attorney may withdraw from the representation if the client declines to pay the increased rate and if permitted under the California Rules of Professional Conduct. The paragraph also contains a list of various tasks for which an attorney may charge the client. The agreement provides for a minimum charge of one-tenth of an hour. This list may be modified.~~

- ~~• Costs and Other Charges (Par. 6); Other Fees and Costs (Par. 7)~~

In paragraph 6 there is a list of common costs and expenses in a litigation matter. The attorney can add to or delete from the list and should fill in the rates for certain charges to comply with the statute. The provision also allows the attorney to hire experts and consultants and to obtain the client's consent before a certain amount is incurred. The attorney should fill in the amount in subparagraph (d).

Paragraph 7 describes the situation where the Court awards attorney's fees and costs to another party after trial or arbitration and states it is the obligation of the client to pay these fees and costs. It also recites the client understands that any award for attorney's fees to the client does not affect the amount of fees and costs the client owes the attorney under the fee agreement.

- Bills (Par. 8)

Paragraph 8 complies with the statute regarding billing requirements. The attorney should fill in when payment is due. It also highlights the client's obligation to review each bill and communicate any objections, questions or concerns so the issue can be resolved promptly.

- Client Approval ~~Necessary~~ for Settlement (Par. 9)

~~———— This provision is optional.~~

~~———— **7.** ——— Paragraph 9 recites the client has the absolute right to accept or reject settlement and the attorney will not settle or compromise the client's claim without the client's consent.~~

- Discharge and Withdrawal (Par. ~~11~~10)

~~———— This is declaratory of applicable law and rules. Together with Paragraphs 4 (Legal Fees), 12 (California Rule of Professional Conduct 3-700 recites the circumstances in which an attorney can or must withdraw from the representation. Paragraph 10 lists these circumstances and whether the attorney may recover attorney fees and costs after withdrawal.~~

- Conclusion of Services ~~and 13 (Lien),~~ (Par. 11)

This paragraph ~~notifies the client of~~ states that final payment ~~obligations if theis due on~~ completion of the attorney services, when an attorney is discharged or withdraws. It also contains a description concerning return of the client's original file under CPRC 3-700(D) and whether the file will be maintained or disposed of when the client does not request its return. The attorney should fill in the period the attorney will keep the file. If the client wants the file to be retained for a different period of time, the provision requires that agreement to be in writing and specify who will bear the cost of storage.

~~8. Conclusion of Services (Par. 12)~~

~~Returning the file and other property is required under existing law and the Rules of Professional Conduct.~~

~~9. Receipt of Proceeds (Par. 14)~~

~~This is an optional clause.~~

- ~~10. Disclaimer of Guarantee (Par. 15)~~

~~This is an optional clause.~~

~~11. This paragraph states the attorney makes no guarantee about the outcome of the client's matter and any statements the attorney makes should not be construed as a guarantee. It also provides that any client deposit or attorney statements about fees and costs are not a limitation on fees or any guarantee they will not exceed the deposit or estimate. Since this is an important provision, the attorney and client should initial it acknowledging their understanding and agreement.~~

- ~~No Tax Advice (Par. 14)~~

~~Since many documents an attorney prepares may have significant tax implications, this paragraph provides the attorney has not been retained to give tax advice and the client should consult with tax advisors regarding the matter. This paragraph should be deleted when the client hires the attorney to provide tax advice.~~

- ~~Construction Clauses (Pars. 16-18)~~

~~These Paragraphs 15-18 are standard provisions concerning the construction of the agreement.~~

B. FORM NO. 2: HOURLY NON-LITIGATION

The Instructions and Comments concerning the Hourly Litigation Sample Agreement apply to the Hourly Non-Litigation Sample with the following exceptions:

- Scope of Services (Par. 2)

The references to litigation services are deleted.

- Client's Duties (Par. 3)

The references to legal proceedings are deleted.

- Deposit (Par. 4)

The references to trial and arbitration are deleted.

- Costs and Other Charges (Par. 6)

The references to litigation costs are deleted.

- Other Costs and Fees (Par. 7)

The paragraph entitled "Other Costs and Fees" is deleted.

C. FORM NO. 3: CONTINGENT FEE

The Instructions and Comments concerning the Hourly Litigation Sample Agreement apply to the Contingent Fee Agreement with the following exceptions:

- Scope of Services (Par. 2)

This paragraph excludes the defense of the client in any matter and the representation of the client on a cross-complaint or cross-claim.

- Legal Fees (Par. 4)

This paragraph complies with the statutory requirements of Business and Professions Code Section 6147, which governs contingent fee agreements. It also recites the attorney fee is based on the net recovery depending on the stage at which the settlement or judgment is reached. Since the amount of the fee is subject to negotiation, this provision can be changed. The optional clauses found in many formal agreements document contains other arrangements. The paragraph also addresses the situation where the Court orders another party to pay the client's attorney's fees and costs. It recites that the award is considered part of the client's recovery. Finally, the paragraph lists eleven (11) factors from Rule of Professional Conduct 4-200 that are considered when determining whether an attorney is entitled to a fee when the attorney fails to comply with the requirements of

Section 6147, when the attorney is discharged or when the attorneys withdraws with justifiable cause.

~~V.~~ — ADDITIONAL PROVISIONS

- ~~—~~ Negotiability of Legal Fees (Par. 5)

Business and Professions Code Section 6147 requires this provision.

- Costs and Litigation Expenses (Par. 6)

This paragraph requires the client to pay for the costs of litigation and lists various costs which can be charged. It also states that any award of fees and costs as a discovery or other sanction or under a contract or statute shall belong to the attorney. If the Court assesses monetary sanctions against the client for bad faith, this provision states the client must pay the sanction.

- Lien (Par. 10)

This paragraph provides the attorney has a lien on all claims that are the subject of the attorney's representation. While under current law an attorney's lien in a contingency fee agreement (in contrast to an hourly engagement or a combination of hourly and contingency) is not an adverse interest as defined in Rule of Professional Conduct 3-300, it is recommended that the paragraph recite the client may wish to seek the advice of an independent attorney before agreeing to this provision. It is also recommended that both client and attorney should initial this paragraph to acknowledge their understanding. IV. OPTIONAL CLAUSES

There are ~~innumerable many~~ additional ~~provisions that clauses~~ an attorney may include in ~~at the~~ fee agreement. ~~The following~~ Below is a compilation of additional clauses which are all optional. ~~In addition, there~~ are several ~~which the~~ disclosure forms an attorney may ~~wish~~ need to consider. ~~All of these clauses are optional~~ They are appended in Section VI. -DISCLOSURE FORMS.

1. Arbitration Clause

An attorney ~~should~~ may want to consult the firm's malpractice insurance carrier regarding its position on arbitration and particular arbitration provisions, including any award of attorney's fees.

The suggested clause is appropriate for binding arbitration of all claims other than fee disputes which are subject to non-binding arbitration under Business and Professions Code Sections 6200, *et seq.* ~~Such clauses may only be enforceable with~~ The agreement provides for full disclosure to the client of the ramifications of those choices and the comparative advantages and

disadvantages of other alternatives. This clause advises the client of the right to have an independent attorney review it, and requires initialing to approve it.

2. Mediation Clause

This is an optional clause. Under Business and Professions Code Section 6200, a mediation option may be offered to the parties after the attorney or client files a request for fee arbitration with some local bar association or the State Bar fee arbitration programs.

The attorney may want to consider this in determining whether to include a pre-filing mediation clause such as the suggested clause.

3. Interest Clause

It is legally and ethically proper to charge interest on fees. If the attorney elects to do so, this clause provides appropriate language. Please keep in mind that interest, if charged, must be reasonable so as not to violate either the prohibition against unconscionable fees nor the usury provisions of the California Constitution. ~~It must be simple interest, made a part of the agreement, and separately stated as an increment on the monthly or other periodic billing. I A~~ periodic interest rate that does not exceed 10% per annum simple interest should not violate California's usury law. Generally, interest should begin running only after a certain specified period, i.e., thirty, sixty or ninety days after the billing invoice is rendered, if not paid within that time.

~~———— If the Agreement uses the terms “finance charges,” “late fees,” “penalty payment” or anything other than simple interest, this may create problems with the Federal Truth In Lending Law and the California Unruh Act.~~

~~————~~ **4. Replenishing Deposit**

This is an alternative to Par. 4 in Forms 1 and 2, and provides for an automatically replenishing deposit.

5. Attorneys' Fees Clause

An attorneys' fees clause is permitted, except that attorneys' fees are not recoverable in fee arbitrations under Business and Professions Code Sections 6200, et seq. Further, an attorney may not usually recover fees for representing him or herself. If this clause and an arbitration clause are both used, the attorneys' fee provisions should be the same. Inclusion of this clause should be cleared with the attorney's malpractice insurance carrier.

6. Other Payor Clauses- Insurance

~~These clauses may be appropriate where someone other than the client is responsible for paying the attorney's fees, and may be used only in compliance with Rule 3-310(F) of the Rules of Professional Conduct.~~

~~This clause may be used when an insurance company pays for some or all of the client's attorney fees. It also provides that if the insurance company refuses to pay the fees or only pays some of the fees, the client is still responsible for payment.~~

7. ~~Fixed~~Flat Fee Clause

This clause is a suggested alternative to Paragraph 5 (Legal Fees and Billing Practices) where the work is being performed on a fixed fee basis.

8. Division of Contingency Fees

This clause is required under California Rules of Professional Conduct 2-200 if the attorney wants to associate another attorney who is not a member of his or her firm and will split the contingency fee with the other attorney. The associated attorney should sign the fee agreement or other writing acknowledging the fee division.

9. "Other Attorney-Clauses" Clause-Hourly

~~See~~This clause is required under California Rules of Professional Conduct Rule 2-200(A). ~~These clauses(.~~ This clause may be appropriate where the attorney contemplates working with another attorney who is not a partner, associate or shareholder of the attorney. Charging associate counsel fees as a cost in an hourly fee case is appropriate, but is a suspect practice in contingency fee litigation. Separate sample clauses are therefore offered for hourly and contingency fee cases.

~~9. Professional Liability Insurance Clause.~~

~~See~~10. Payment of Referral

This clause is required under California Rules of Professional Conduct ~~Rule 3-410. An attorney who knows or should know~~2-200 and provides that ~~he or she does not have professional liability insurance at the time~~payment of the referral fee to the referring attorney will not increase the client's engagement of the attorney must make a written disclosure to the client, subject to limited exemptions listedlegal fees.

11. Lien-Hourly Fee Agreement

This clause satisfies the requirements set forth in the Supreme Court case, Fletcher v. Davis (2004) 33 Cal. 4th 61. In that case the court held an attorney who wishes to secure payment of hourly legal fees and costs with a lien must comply with California Rules of Professional Conduct 3-300. That rule. Rule 3-410 suggests the language of this clause for inclusion requires the attorney must advise the client in writing of the adverse consequences of the lien and advise the client of his or her right to obtain an independent attorney to review the lien provision before the client signs the fee agreement-or.

The attorney should have the client initial this clause.

12. Excluded Services

An attorney may limit or exclude certain services in the fee agreement and this clause provides for the exclusion. Under Nichols v. Keller (1993) 15 Cal. App. 4th 1672 the attorney must alert the client of the possible need to employ other counsel to handle the excluded services. Pursuant to Meighan v. Shore (1995) 34 CA 4th 1025, an attorney also must alert the client's spouse of a separate writing-possible claim for loss of consortium and whether the attorney will be handling the loss of consortium claim.

13. Contingency Language Options

There are a variety of ways an attorney can represent a client in a contingent fee. These various clauses describe the various options including how the fee is paid, whether the client or the attorney advances cost and how it affects the client's recovery.

V. DISCLOSURE FORMS

There are two Third Party Payor agreements which are appended. These can be used when someone other than the client pays the client's attorney's fees and costs. One form allows an attorney to share information regarding the representation with the Third Party payor and the other form prohibits sharing information. Finally there is a form which is appended for disclosure and waiver of conflicts of interest in dual representation.

1. Third Party Payor Forms

These forms may be appropriate where someone other than the client is responsible for paying the attorney's fees.

2. Joint/Multiple Client Disclosure and Consent Form

This form may be appropriate for use when an attorney represents more than one individual/entity and wants to disclose potential conflicts of interest and obtain waivers.

VII. CONCLUSION

These forms are disseminated in the hope that they will be useful to attorneys in their practices. Attorneys are urged to make alterations to these forms so that they conform to the attorney's practice and the needs and requirements of the attorney and clients, subject always to satisfying the statutory requirements for fee agreements and the Rules of Professional Conduct.