

**Rule 1.5 [4-200] Fees for Legal Services**  
**(Commission's Proposed Rule Adopted on September 25 – 26, 2015 – Clean Version)**

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.
- (b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:
  - (1) whether the lawyer engaged in fraud\* or overreaching in negotiating or setting the fee;
  - (2) whether the lawyer has failed to disclose material facts;
  - (3) the amount of the fee in proportion to the value of the services performed;
  - (4) the relative sophistication of the lawyer and the client;
  - (5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - (6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - (7) the amount involved and the results obtained;
  - (8) the time limitations imposed by the client or by the circumstances;
  - (9) the nature and length of the professional relationship with the client;
  - (10) the experience, reputation, and ability of the lawyer or lawyers performing the services;
  - (11) whether the fee is fixed or contingent;
  - (12) the time and labor required;
  - (13) whether the client gave informed consent\* to the fee.
- (c) A lawyer shall not enter into an arrangement for, charge, or collect:
  - (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a

marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

- (2) a contingent fee for representing a defendant in a criminal case.
- (d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “non-refundable,” or in similar terms, only if the fee is a true retainer and the client agrees in writing\* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.
- (e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services as long as the lawyer performs the agreed upon services. A flat fee is a fee which constitutes complete payment for legal fees to be performed in the future for a fixed sum regardless of the amount of work ultimately involved and which may be paid in whole or in part in advance of the lawyer providing those services.

## **Comment**

### *Prohibited Contingent Fees*

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

### *Payment of Fees in Advance of Services*

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

### *Division of Fee*

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

**Proposed Rule 1.5 [4-200] Fees for Legal Services**  
**Synopsis of Public Comments**

**TOTAL = XX**      **A = X**  
**D = X**  
**M = X**  
**NI = X**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-4	Schrag, Frederic (07-01-16)	No	M	1.5	The proposed rule should be modified to allow lawyers to contract with clients to work on a specified matter for a minimum fee to be billed hourly at a specified rate of pay.	The Rule is not designed to regulate specific variants of fee agreements.
X-2016-5	Frieder, Linda (07-01-16)	No	D	1.5	Clarify Subdivision (e) of the proposed rule to address whether a flat fee must be deposited into a client trust account and disbursed only when the work is completed, or whether fees are earned for future services when paid by the client and need not to be deposited into a client trust account.	These issues are addressed in Rule 1.15.
X-2016-6	McCready, Zack (07-01-16)	No	D	1.5	The proposed rule does nothing to create or improve consumer protection and will most likely increase the cost of legal services in California. Flat fees protect clients from the very common and unethical practice of lawyers "churning" fees by filing frivolous motions, doing excessive amounts of discovery, reading and re-reading information solely for the purpose of increasing fees.	The Rule does not prohibit flat fees. It also does not prohibit nonrefundable fees under certain conditions.
2016-32m	Law Professors (Zitrin) (07-25-16)	Yes	D	1.5	The Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the	The issue was considered by the Commission in its prior deliberations. As set forth in its Report and Recommendation,

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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					<p>propriety of fees. The ABA uses the far more intelligible word “unreasonable.” California’s own Business &amp; Professions Code, in evaluating fee recoveries without written contracts, also uses the “reasonable” standard. Finally, the term “unconscionable” appears to create a higher threshold than “unreasonable,” thus being lawyer- rather than client-protective. Thus, the California rule would perpetuate use of a difficult-to-define, archaic, and lawyer-protective term that is at odds with the ABA formulation and at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act.</p> <p>The Commission should remove the word unconscionable and replace it with “unreasonable.”</p>	<p>retaining the unconscionability standard will carry forward the public policy rationale stated over 80 years ago by the Supreme Court in <i>Herrscher v. State Bar</i> (1934) 4 Cal.2d 399, 402-403.). Using a reasonableness standard would bog down the discipline system with ordinary fee disputes. California law, unlike other states, provides a client with other forums, in particular mandatory fee arbitration, to contest an unreasonable fee.</p> <p>Retaining the unconscionable standard reserves a disciplinary remedy for those situations where the fee charged by a lawyer reflects unfitness to practice law.</p>
2016-43i	COPRAC (Baldwin)	Yes				
2016-48	Robert Brain	No				
2016-52m	Law Professors (Zitrin) (08-24-16)	Yes	D	1.5	<p>The Commission has insisted, repeatedly and counter-intuitively, in retaining the word “unconscionable” to define the propriety of fees. The ABA uses</p>	<p>The issue was considered by the Commission in its prior deliberations. As set forth in its Report and Recommendation, retaining the unconscionability</p>

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Public Hearing	Law Professors (Zitrin, Richard) (Provided oral public hearing testimony on July 26, 2016. See pages 20-23 of the public hearing transcript.)	Yes			<p>The use of the term "unconscionable" is a bizarre term because it doesn't really have any purpose for an intelligible meaning. If "unconscionable" means "unreasonable," according to case law and to the Fee Arbitration Committee, then change the word to "unreasonable." Unconscionable does nothing, other than confuse</p>	<p>See Response to 7/25/16 Law Professor's letter, above.</p>

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					the situation and throw in a term that is ill defined in the literature.	