

**September 24, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

- 1) A question: Why is “enter into an arrangement” used in paragraph (c) as part of a phrase that in paragraphs (a), (d), and (e) is rendered as “make an agreement”? If no difference in meaning is intended, wouldn’t the use of the same language each time avoid possible confusion?
- 2) I am troubled by paragraph (e). Under current law, a flat fee lawyer who does not perform the agreed services might be obligated to refund the unearned portion, but this seems to turn that failure into a disciplinary matter (even if the unearned portion is refunded). My view is that discipline in this situation should be limited to violation of some other standard, such as client abandonment, and should not be based on the fact that the lawyer entered into the fee agreement.

**September 25, 2016 Mohr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I've made some suggested changes to rule 1.5 in the attached to address Bob's points below and also to correct a typographical error in paragraph (c) that LACBA's ethics committee identified.

With respect to Bob's point #2, I think that paragraph (e) as drafted conflicts with proposed Rule 1.15(b), which provides:

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

- (1) The lawyer or law firm discloses to the client in writing (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed, and
- (2) The client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing signed by the client.

Rule 1.15(b) implies that a lawyer may enter an agreement, charge or collect (up front) an advance fee before the services are provided. What the lawyer can't do is retain the fee if the services are not provided. I'm not sure that "charge" or "collect" is limited to a situation where the lawyer has "earned" the fee.

Attached:

RRC2 - [1.5][4-200] - Rule - DFT4 (09-25-16)RLK-KEM - Cf. to DFT3 (09-26-15).docx

**September 25, 2016 Martinez Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I'm ok with these changes, but would delete the word “advance.” I think “advance” flat fee adds unnecessary confusion.



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

- (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~~make an agreement<sup>1</sup> 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.

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<sup>1</sup> Per 9/24/16 Kehr email to drafting team, change made to conform to term used in paragraphs (a), (d) and (e).

- (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 in advance<sup>2</sup> flat fee for specified legal services, but a lawyer may not retain the fee as long as unless the lawyer has ~~performs~~ performed the agreed upon services. A flat fee is a fee which constitutes complete payment for legal ~~fees~~ services<sup>3</sup> 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.

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<sup>2</sup> The concern is with flat fees that are paid in advance but not earned. The modifier “advance” has been placed in brackets because it is thought use of that term may confuse.

<sup>3</sup> Change made to correct typographical error that was identified .