

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 make an agreement 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. A flat fee is a fixed amount that constitutes complete payment for the full performance of described regardless of the amount of work ultimately involved, and is 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] Rule 1.15(a) and (b) govern whether a lawyer must deposit in a trust account a fee paid in advance.

[3] 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

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

Written Fee Agreements

[5] Some fee agreements must be in writing to be enforceable. See, e.g., Business and Professions Code §§ 6146, 6147 and 6148.

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- (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 make an agreement¹ 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

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

- (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, ~~but a lawyer may not retain the fee unless the lawyer has performed the agreed upon services.~~ A flat fee is a fee which fixed amount that constitutes complete payment for the full performance of described ~~legal services to be performed in the future for a fixed sum~~ regardless of the amount of work ultimately involved, and ~~which may be is~~ paid in whole or in part in advance of the lawyer providing those services.²

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] Rule 1.15(a) and (b) govern whether a lawyer must deposit in a trust account a fee paid in advance.

~~[2]~~[3] 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]~~[4] A division of fees among lawyers is governed by Rule 1.5.1.

Written Fee Agreements

² The following provision has been proposed by Bob Kehr to inform the reader that a flat fee lawyer generally should be entitled to some compensation for a job partially completed. The redline is to paragraph (e) as included in this draft:

(e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services; however, a lawyer who does not complete the agreed upon services may retain the flat fee only to the extent of the value to the client of the services provided. A flat fee is a fixed amount that constitutes complete payment for the full performance of described regardless of the amount of work ultimately involved, and is paid in whole or in part in advance of the lawyer providing those services.

[5] Some fee agreements must be in writing to be enforceable. See, e.g., Business and Professions Code §§ 6146, 6147 and 6148.

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Synopsis of Public Comments

TOTAL = 15	A = 1
	D = 6
	M = 8
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	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.
X-2016-32m	Law Professors (Zitrin) (07-25-16)	Yes	D	1.5	1. The Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the	1. The issue was considered by the Commission in its prior deliberations. As set forth in its Report and Recommendation,

¹ 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 & 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>2. 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>2. 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	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (08-17-16)	Yes	M	1.5	COPRAC suggests a limited exception to the currently proposed prohibition of contingent fees in criminal matters set forth in Proposed Rule 1.5(d)(2). This subsection	The Commission did not make the suggested change. An asset forfeiture proceeding is civil in nature.

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					should be amended to provide the following language; "however, a lawyer may charge and collect a contingent fee for representation in an asset forfeiture proceeding if not otherwise prohibited by law."	
2016-48	Brain, Robert (08-18-16)	No	M	1.5	<p>1. The prohibition against making an arrangement for, or collecting, an "unconscionable or illegal" fee should be changed to a prohibition against collecting, or seeking to collect an "unreasonable" fee.</p> <p>2. A prohibition against making an arrangement for, or the collection of, "unreasonable expenses" should be added.</p> <p>3. The provision prohibiting lawyers from entering into contingent fee arrangements in criminal matters should be deleted.</p>	<p>1. See response to Law Professors (Zitrin), X-2016-32m, above.)</p> <p>2. The Commission did not make the suggested change. Whether an expense is unreasonable should not be the subject of discipline but should be addressed in fee arbitration.</p> <p>3. The Commission did not make the suggested change. The Commission believes there are important policy reasons implicating an accused's Sixth Amendment rights that warrant including this provision in the rule. A lawyer who is being paid on a contingent basis would recover a fee only if the client is found not guilty. That would create a conflict for a lawyer if the best</p>

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						interests of the client, in light of the evidence, warrant the client entering a plea.
2016-52m	Law Professors (Zittrin) (08-24-16)	Yes	D	1.5	See X-2016-32m Law Professors (Zittrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to Law Professors, X-2016-32m, above.
X-2016-66d	San Diego County Bar Association (SDCBA) (Riley) (09-21-16)	Yes	A	1.5	We support the proposed rule with the following comments. For purposes of lawyer discipline, we support the proposed rule's continued adoption of California's traditional "unconscionable fee" standard as opposed to the ABA's "reasonable fee" standard, especially given the former's long-standing support in California Supreme Court case law. We support the additional factors to be considered when determining unconscionability. We welcome and support the inclusion of subsections (c), (d), and (e).	No response required.
X-2016-68m	Law Professors (Zittrin) (09-22-16)	Yes	D	1.5	See X-2016-32m Law Professors (Zittrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to Law Professors, X-2016-32m, above.
X-2016-71	Hoffman, Nathan (09-23-16)	No	D	1.5	That opens a huge can of worms about what it means for a "flat fee" to be "earned." Also, consider the situation	The Commission understands the commenter's concerns but it is the law that a lawyer may not retain a fee that is not earned because the promised

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					<p>(which may occur often in estate planning) where the client pays a "flat fee" that is now required to be deposited into the attorney's trust account but then the client drops the ball in the follow-through to get the job finished, notwithstanding attorney's efforts to "complete" the assignment. At some stage, the attorney should be paid at his/her hourly rate for the time spent in the initial interview; file startup tasks and other proper work done for this client and presumably then refund to them the difference.</p> <p>This rule sets up a new dispute area between clients and counsel assuming that the clients do not agree with counsel as to the amount of fee requested and what it means for a flat fee to be earned. There is no incentive to meet the client's request for a flat fee and only bill them hourly so that the attorney is timely paid for his/her work for the client.</p>	<p>services have not been provided. Only a true retainer as defined in paragraph (d) is earned upon receipt. A lawyer can mitigate the occurrence of a dispute over when a flat fee is earned by drafting a fee agreement that identifies benchmarks that describe when services have been provided. The lawyer also has other remedies including quantum meruit where the client's actions prevent the lawyer from completing the work</p>
X-2016-81	Melchior, Kurt (09-26-16)	No	M	1.5	<p>Proposed Rule 1.6 [1.5], as well as comments 2 and 3 to Proposed Rule.1.15, draw a line between a "true retainer" and a flat fee, and an advance deposit against future fees although the latter is only implied, not spelled</p>	<p>[Although filed under Rule 1.5.1, the commenter's submission appears to be directed at proposed Rule 1.5.]</p> <p>The timing of payment (i.e., prepayment or payment after</p>

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					out. I appreciate that State Bar Court precedent supports this distinction, but I think that it does not reflect reality -- specifically, in that there are fee agreements -- I have made some myself and seen a substantial number of others -- where the client agrees to pay what is both a flat fee and a prepayment of fees for certain designated work. on the lawyer's part.	services are rendered) is distinct from whether a fee is a true retainer, a flat fee, or compensation for hourly services. When a client deposits money with a lawyer intended for the payment of fees, the timing of the deposit does not affect the characterization of the money as a true retainer, a flat fee or as advance deposit against hourly billings. The terms of the fee agreement determine the nature of the compensation arrangement between client and attorney. The Rule is not designed to address all possible variants of fee agreements.
X-2016-104j	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Yes	M	1.5	<p>1. OCTC finds the term "unconscionable fee" vague, difficult to understand, confusing, and very difficult to enforce.</p> <p>2. OCTC also urges the Commission to consider adding an additional factor to the list set forth in subsection (b): whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging</p>	<p>1. See response to comment #1 of Law Professors, X-2016-32m, above.</p> <p>2. The Commission did not make the suggested change, which it believes is unnecessary in a rule that regulates "fees for legal services." The Rule cannot exhaustively address all possible factors that might make a fee unconscionable.</p>

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					<p>the same fee for these non-legal services at the legal services rate.</p> <p>3. OCTC recommends that the rule be amended to make the failure to have a written fee agreement disciplinable. Written fee agreements protect the public and are an integral part of an attorney's duty to communicate significant developments relating to his or her employment.</p> <p>4. OCTC believes that Comment 1 should be in the rule, not a Comment.</p>	<p>3. The Commission did not make the suggested change. The requirement of a written fee agreement under certain situations is already address by statute. See, e.g., Bus. & Prof. Code §§ 6147 and 6148. The Commission believes that the remedy provided in those statutes – the fee agreement is voidable at the client's option – is the appropriate remedy for not having a written agreement. The suggestion that a fee agreement should be required in all circumstances would undermine these section. Nevertheless, the Commission has added Comment [5], which directs lawyers' to those statutes.</p> <p>4. The Commission has not made the suggested change. The substance of Comment [1], simply explains that the identified fee arrangement does not come within the language of paragraph (c)(1), and therefore, is not an exception that normally should be in the text itself.</p>

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					5. Comments 2 and 3 seem unnecessary because these Comments are merely duplicative of the rule.	5. The Commission has retained Comments [2] and [3] (now renumbered [3] and [4]) because they provide cross-references to rules imposing related duties on lawyers, thus enhancing compliance with the Rules.
X-2016-96a	Bar Association of San Francisco (BASF) (Banola) (09-27-16)	Yes	M	1.5	<p>1. The Commission's use of the term "overreaching" in subsection (b)(1) is ambiguous. We recommend that the Commission either define the term or eliminate the term altogether.</p> <p>2. The clause "as long as the lawyer performs the agreed upon services" in subsection (e) creates some uncertainty as to when the fees are earned and how to determine the amount due under a flat fee arrangement when services are not fully completed. We recommend striking this clause or adding a comment that addresses these uncertainties.</p>	<p>1. The Commission has not made the suggested change. The term overreaching is well-understood. <i>Warner v. State Bar</i> (1983) 34 Cal.3d 36, 43</p> <p>2. The Commission agrees and has revised paragraph (e) to remove the ambiguity.</p>
X-2016-125a	California State Bar Committee on Mandatory Fee Arbitration (Harper) (10-04-16)	Yes	M	1.5	As to the proposed definition of a flat fee, we recently drafted language for the Sample Fee Agreements on this point that was approved by the Board of Trustees and is posted on our webpage. We suggest that the following definition of a flat fee be	The Commission has not made the suggested but has revised paragraph (e) to remove the implied concern that it might cause confusion. The Commission questions, however, whether a definition of flat fee should include a

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					<p>incorporated in the proposed rule:</p> <p>A flat fee is fixed and does not depend on the amount of work performed or the results obtained.</p>	statement that the fee “does not depend on ... the results obtained.” The Commission believes such a statement is overbroad as there may be situations where the client agreed to the payment of the flat fee with the expectation of a certain result. Sample Fee Agreements are also subject to revision to conform to the Rules, not the other way around.
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	M		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 the situation and throw in a term that is ill defined in the literature.	See response to Law Professors, X-2016-32m, above.

