

Rule 1.5 [4-200] Fees for Legal Services
(Commission's Proposed Rule Adopted on October 21–22, 2016 – 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 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 performance of described services 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] 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 §§ 6147 and 6148.

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

TOTAL = 4 **A = 2**
D = 1
M = 1
NI = 0

| No. | Commenter/Signatory | Comment on Behalf of Group? | A/D/M/NI ¹ | Rule Section or Cmt. | Comment | RRC Response |
|------------|--|-----------------------------|-----------------------|----------------------|--|--|
| Y-2016-25a | Bar Association of San Francisco (Banola) (01-13-17) | Y | A | (b)(1) | We appreciate the consideration given to our comment relating to the use of the term "overreaching" in subsection 1.5(b)(1). However, the synopsis of the Committee's comment, as stated in the Executive Summary released by the Commission for the Revision of the Rules of Professional Conduct ("Commission") did not reflect why we find this term ambiguous. Although we understand that this term has been used in case law, we are concerned about the meaning of "overreaching" in regard to the negotiation of an initial fee agreement. The negotiation of an initial fee agreement is generally considered an arms-length transaction, and "absent issues of duress, unconscionability and the like, [a client] has no cause to complain that the terms [the lawyer] negotiated were favorable to [the lawyer]." <i>Ramirez v. Sturdevant</i> (1994) 21 Cal.App.4th 904, 913. Accordingly, the use of "overreaching" in subsection (b)(1) appears to undermine this general principle. We are, therefore, clarifying this point in | Supreme Court precedent recognizes "fraud and overreaching" as a basis for discipline involving the negotiation of an initial fee agreement. See <i>Bushman v. State Bar</i> (1974) 11 Cal.3d 558, 563 ["[M]ost cases warranting discipline on this ground involve an element of fraud or overreaching by the attorney, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds. [Citation omitted.]".) These principles are not inconsistent with <i>Ramirez</i> which excluded "issues of duress, unconscionability and the like." |

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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| | | | | (e) | <p>case the Commission misunderstood it.</p> <p>We appreciate the Commission's consideration of our comment relating to the clause "as long as the lawyer performs the agreed upon services" in subsection (a) and support the revision made to incorporate this comment.</p> | |
| Y-2016-10a | Miller, Merwyn J. (01-04-17) | N | M | 1.5(e) | My recommendation is to include minimum flat fees in the definition of flat fees under 1.5(e) and make clear that an attorney will not violate the rules for charging more if the client requires the attorney to deposit the fee in their client trust account. | The Commission did not make the suggested change. The Commission believes that the term "minimum flat fee" as used by the commenter is simply another way of characterizing a "non-refundable" fee or "earned upon receipt" fee arrangement. Because the fee arrangement the commenter describes is not a "true retainer" under paragraph (d), to include the term within the scope of paragraph (e) would create a conflict with paragraph (d). |
| Y-2016-21d | State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17) | Y | D | | | First, the Commission thanks the commenter for its endorsement of paragraphs (c), (d) and (e). The Commission notes, however, that it previously responded to the remainder of the commenter's points during the initial 90-day public comment |

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| | | | | | <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 the same fee for these non-legal services at the legal services rate.</p> | <p>period. It continues to maintain those positions. Nevertheless, it repeats them as follows:</p> <p>1. As set forth in the Commission’s Report and Recommendation, 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. 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>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. |
| Y-2016-7b | State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16) | Y | A | | COPRAC supports the adoption of proposed Rule 1.5 as revised. | No response required. |

