

**Preliminary Issue Outline for Opinion Regarding Flat Fees****I. ISSUES/QUESTIONS**

- When is a flat fee paid in advance earned?
- What obligations does a lawyer have to explain when the flat fee will be earned?
- How to determine the amount of a flat fee which is unearned and must be refunded to the client if the lawyer is terminated or does not complete the legal services required under the agreement?
- Unconscionability issues in connection with flat fee agreements.
- What must a lawyer disclose to a client for a client's agreement to allow a flat fee paid in advance to be deposited into the lawyer's operating account so that the client can reasonably understand the risks?
- Can an attorney renegotiate the terms of a flat fee agreement during the course of representation?

**II. BACKGROUND AND AUTHORITIES****A. Background**

A flat or fixed fee is an alternative to the more traditional hourly fee agreement. A flat-fee agreement is a fee arrangement pursuant to which the client agrees at the inception of the representation to pay a fixed sum in exchange for which the attorney agrees to provide a specified service or group of services. The fee is a fixed amount that constitutes complete payment for the described services regardless of the amount of work ultimately involved. (Rule of Professional Conduct 1.5(e).)

Flat fee agreements have traditionally been used in situations where the legal work is routine or the amount of legal work is predictable such as in criminal cases, wills and estate planning documents, certain transactional matters, bankruptcy cases and other routine legal services. A flat fee provides a client with a measure of certainty as to the cost of a lawyer's services in that it represents the maximum amount that will be charged for the services to be performed. In addition to certainty, flat fees can also address other potential issues with hourly billing, including bill padding, multiple attorneys working on the case, billing for in-house conferences. (See, State Bar Mandatory Fee Arbitration Program Arbitration Advisory 2016-02 [Analysis of Potential Bill Padding and Other Billing Issues].) However, flat fee agreements can be problematic when the attorney-client relationship ends prior to the specified services being completed or where the scope of services to be provided is ambiguous or may change during the representation.

Flat fees can be paid in a variety of ways, including in installments tied to the performance of certain services or periodic intervals. However, flat fees are often paid at the outset of the representation. A flat fee paid at the outset of representation, before any services have been provided, is essentially an advance fee deposit because it is paid before the fee has been earned. Prior to the adoption of the current Rules of Professional Conduct, courts in California were divided on whether an advance deposit for fees had to be deposited in the attorney's client trust account. In *Baranowski v. State Bar* (1979) 24 Cal.3d 153, the Supreme Court declined to resolve the question of whether or not an advance fee payment had to be deposited into an attorney's client trust account. Two courts after *Baranowski*, declared that it was undecided in California whether, under former Rule 4-100, an advance payment for services or a security deposit must be deposited into the client trust account (*SEC v. Interlink Data Network* (9th Cir. 1996) 77 F.3d 1201, n.5; *Katz v. Worker's Comp. Appeals Bd.* (1981) 30 Cal.3d 353, n.2.) However, in *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, the Appellate Department of the Los Angeles County Superior Court held that under Rule 4-100 an advance fee must be deposited into an attorney's trust account, and that an attorney's failure to segregate the advance fee or security deposit from his general funds constituted a breach of fiduciary duties.

#### **B. Impact of the Current Rules of Professional Conduct**

The prior Rules of Professional Conduct did not specifically address flat fees. However, new Rule of Professional Conduct 1.5(e) specifically provides that a lawyer may make an agreement for, charge, or collect a flat fee for specified legal services and defines a flat fee as "a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved. Rule 1.5(e) further provides that a flat fee "may be paid in whole or in part in advance of the lawyer providing those services."

The current Rules make it clear that an advance for fees must be deposited into a trust account. (Rule 1.15(a).) Therefore, a flat fee paid in advance of the services being provided must be deposited into the lawyer's trust account, unless one of the exceptions set forth in Rule 1.15(b) applies and the lawyer has made the required disclosures to the client. Pursuant to Rule 1.15(b), a flat fee paid in advance may be deposited into the lawyer's or law firm's general operating account, instead of a client trust account, provided that (1) the lawyer/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) if the flat fee exceeds \$1,000.00, 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.

The current Rules also make clear that a lawyer may not "make an agreement for, charge, or collect a fee that is denominated as 'earned on receipt' or 'non-refundable, or in similar terms' unless the fee is a "true retainer." (Rule 1.5(d). Rule 1.5(d) defines a true retainer as "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.” Thus, where a flat fee is for the performance of legal services, it cannot be a true retainer and therefore must be deposited into a client trust account and the fee is subject to the rules applicable to client trust accounts, unless the lawyer has complied with Rule 1.15(b).

Rule 1.16(e)(2) provides that a lawyer shall promptly refund any part of a fee which is not earned upon termination of the representation. Because a flat fee does not depend on the amount of time spent in connection with the legal representation, questions arise as to when the fee is earned and how to determine the portion of the fee which must be refunded to the client where the fee is paid in advance and the attorney does not complete the services specified in the agreement.

### C. General principles regarding attorney-client fee agreements

“Attorney fee agreements are evaluated at the time of their making and must be fair, reasonable and fully explained to the client. Such contracts are strictly construed against the attorney.” (*Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037; *Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, 1572; *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419, 430-431.) Any ambiguity in a retainer agreement is construed in favor of the client and against the attorney. (*Banning Ranch Conservancy v. Superior Court* (2911) 193 Cal.App.4th 903, 913).

Attorneys have a professional responsibility to ensure that fee agreements are neither unreasonable nor written in a manner that may discourage clients from asserting any rights they may have against their attorney. (Los Angeles Co. Bar. Assn. Ethics, Op. No. 489; see also, *Ojeda v. Sharp Cabrillo Hospital* (1992) 8 Cal.App.4th 1, 17.)

Although considered an "arms-length" transaction, any lack of specificity in the fee agreement's language will be construed against the attorney. (*In re County of Orange* (1999) 241 B.R. 212, 221 [attorney fee contracts strictly construed against attorney]; *Matter of Lindmark* (Rev.Dept. 2004) 4 Cal. State Bar Ct.Rptr. 668, 676 [rule that ambiguities in contract interpreted against the drafter applies with Aextra force@ when contract is drafted by attorney]; *Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569 [fee agreement calling for Aregular hourly rates@ construed in client=s favor to preclude increase in rates without notice to client].)

A lawyer may not make “an agreement for, charge or collect an unconscionable or illegal fee.” (Rule of Professional Conduct 1.5(a). While fee agreements are generally not subject to Rule 1.8.1 (Business Transactions with a Client), all fee agreements are subject to scrutiny in accordance with Rule 1.5(b). Therefore, the amount of a flat fee is subject to scrutiny for unconscionability. The unconscionability determination is made based upon the facts and factors that exist at the time the contract is entered into, not whether it is unconscionable in light of subsequent events. (*Brobeck, Phleger & Harrison v. Telex Corp.* (9th Cir. 1979) 602 F.2d 866; *Matter of Yagman* (Rev.Dept. 1997) 3 Cal. State Bar Ct.Rptr. 788, 800.)

Business and Professions Code §6148(a) provides that in cases not involving a contingent fee in which it is reasonably foreseeable that the total expense to the client will exceed \$1,000, the fee agreement must be in writing. Thus, an agreement for a flat fee in excess of \$1,000 must be in writing unless one of the exceptions in Section 6148(d) applies. Section 6148(a)(2) and (3) further require that the written agreement set forth the general nature of the legal services to be provided to the client and the respective responsibilities of the attorney and client as to the performance of the agreement. Specificity regarding the scope of services to be performed is key in connection with flat fee agreements as disputes can arise when the scope of the representation is ambiguous.

### III. DISCUSSION

As lawyers and clients explore alternatives to the traditional billable hour, agreements to charge a flat fee have become more common. Clients seeking flat-fee agreements typically do so to avoid the uncertainty and potentially negative consequences of paying for legal services on an hourly basis. A flat fee is a fee for a set amount for performance of agreed legal services. A lawyer earns a flat fee by performing the services for which the fee was charged, and that fee is the maximum amount that will be charged for the services to be performed. Flat fees are based on factors independent of the actual number of hours involved in a representation and they provide the client a degree of certainty about the cost of the legal services.

Like any attorney-client relationship, attorneys providing services under a flat fee agreement have duty of competence and diligent representation. (Rules of Professional Conduct, Rules 1.1 [Competence] and 1.3 [Diligence].) A flat fee rewards efficiency, but an attorney who underestimates the time necessary to perform the specified services may seek to cut corners.

A flat fee must be earned by performing the specified services, and, like any fee agreement, a flat fee is subject to review for unconscionability. Where the fee is paid in advance, flat fee agreements give rise to ethical considerations as to where the fee must be deposited, when the fee is earned, and what portion of the fee is refundable if the representation is terminated or the lawyer does not complete the specified services.

#### A. Disclosure of the risks of depositing an advance payment of a flat fee into the lawyer's operating account.

An agreement for payment of a flat fee legal services must comply with Business & Professions Code §6148(a) and Rules of Professional Conduct, Rules 1.5 and 1.15. Business & Professions Code §6148 sets forth the *minimum* requirements for non-contingent fee agreements, including that the agreement must be in writing and contain the general nature of the legal services to be provided, the basis of compensation, and the respective responsibilities of the attorney and the client as to performance of the agreement.

While Business & Professions Code §6148(a) only requires that the fee agreement state "the general nature of the legal services to be provided," in the case of an agreement for a flat fee it is especially important that the agreement clearly identify the scope of the services to be

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provided. Attorneys have an obligation to inform clients of matters they are not handling where a reasonable client would rely on the attorney to advise them on such matters. (*Nichols v. Keller* (1993) 15 Cal.App.4<sup>th</sup> 1672, 1686-87; *Meighan v. Shore* (1995) 34 Cal.App.4<sup>th</sup> 1025, 1041.) Accordingly, a flat fee agreement should carefully identify the services which will be provided for the flat fee as well as what services are not included.

Aside from the requirement that an attorney disclose that the client has a right to have the flat fee deposited into a trust account, and that the client is entitled to a refund of any amount of the fee which is unearned if the representation is terminated, Rule 1.15(b) is silent as to whether an attorney is required to disclose other potential adverse consequences if the flat fee is not deposited into a trust account until the fee is earned.

**QUESTION FOR COMMITTEE:** Rule 1.15 requires disclosure to the client that the client has a right to have the flat fee deposited into a trust account until earned, and that the disclosure must be in a writing signed by the client if the flat fee excess \$1,000. Neither Rule 1.15(b) or Rule 1.0.1 define disclosure. Former Rule 3-310(A)(1) defined disclosure as meaning “informing the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client . . .” However, that definition was omitted from the new rules.

While Rule 1.15(b) does not use the term consent, implicit in the requirement that the client sign the disclosure for a flat fee in excess of \$1,000 is that the client thereby consents to the funds being deposited into the lawyer’s operating account. However, does the client’s consent have to rise to the level of informed consent as defined in Rule 1.0.1(e)? If so, the attorney would have to explain the relevant circumstances, material risks and reasonably foreseeable adverse consequences to the client of depositing the flat fee in the operating account.

The Executive Summary of proposed Rule 1.15, states that “Paragraph (b) is intended to balance competing interests: (i) the public protection afforded by a rule intended to assure that unearned fees are available for a refund to a client; and, (ii) the public draft provided no exceptions to the requirements that disclosures and client’s agreement to placing funds in the lawyer’s operating account to be in a writing signed by the client.”

**What are the Committee’s thoughts about requiring disclosure beyond that specifically required by Rule 1.15(b)?** The court in *In re Mance* (D.C. 2009) 980 A.2d 1196, 1207, applying the District of Columbia Rules of Professional Conduct, imposed an “informed consent” standard where the flat fee will be deposited into the attorney’s operating account. The court in *Mance*, held that a flat fee must be held in the lawyer’s trust account until earned unless the client gives informed consent to a different arrangement. The court stated that a bare mention of a trust account option will usually be insufficient unless accompanied by some explanation of the features that distinguish a trust account from an operating account. In reaching that conclusion, the court quoted from a Colorado case, *In re Sather* (Colo, 2000) 3 P.3d 403, 413-414. The court in *Sather* stated that while in some instances a client may agree to allow the attorney to treat funds paid in advance of legal services as property of the attorney, they cautioned that “at a minimum such arrangement will be construed against the attorney and in favor of the client.” The court further

stated that “the fee agreement must clearly explain the basis for this arrangement and explain how the clients’ rights are protected by the arrangement.”

**FURTHER QUESTION FOR COMMITTEE:** if a lawyer is allowed to deposit a flat fee paid in advance of services into the lawyer’s operating account, is that a pecuniary interest adverse to the client subject to Rule 1.8.1?

There are reasonably foreseeable adverse consequences of a flat fee being deposited into an attorney’s operating account because such accounts lack the safeguards provided by trust accounts, including the protections in Rule 1.15(d). For example, a reasonably foreseeable material risk where a flat fee paid in advance is deposited into the attorney’s operating account is that the attorney may not have the funds available if a refund of an unearned flat fee is required. Another risk of the flat fee being deposited into the lawyer’s operating account is that the funds could be subject to attachment by the lawyer’s creditors. It is the opinion of the Committee that if a client is not informed of the risks and reasonably foreseeable adverse consequences of an agreement to let a flat fee paid in advance of services to be deposited into the lawyer’s operating account, then the client may not understand the consequences of that decision, and hence the terms of the fee agreement.

#### **B. When is a flat fee earned?**

The current rules also make it explicit that with the sole exception of a true retainer, all attorney’s fees are refundable if the lawyer does not complete the legal services or the representation is terminated before the work is done. (Rule 1.5(d) and 1.16(e)(2).) Rule 1.5(d) provides that a “lawyer may not 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 or all or part of the fee charged.” Thus, a representation in fee agreement entered into after the current Rules of Professional Conduct went into effect on November 1, 2018, that a flat fee is nonrefundable or fully earned on receipt may constitute deceit or an intentional misrepresentation under Rule of Professional Conduct 8.4(c).

Clients have the absolute right to terminate their lawyer’s services at any time with or without cause. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790; *Matter of Van Sickle* (Rev.Dept. 2006) 4 Cal. State Bar Ct.Rptr. 980, 989.) Even if a flat fee is deemed non-refundable or earned on receipt, if the client terminates the attorney’s representation before the services have been completed under a flat fee agreement, the attorney must refund the unearned portion of the fee.

One of the most common situations giving rise to attorney-client disputes regarding flat fees is where the attorney’s services are terminated before all of the work is completed. This can arise where a client exercises their right to terminate the lawyer’s services, or where the lawyer withdraws from the representation before the agreed upon work is fully performed. Because a discharged attorney may recover in quantum meruit for the reasonable value of services

rendered, in either situation a determination will have to be made regarding the reasonable value of the services performed by the attorney before the representation terminated.

Whether a fee is reasonable, unreasonable or unconscionable is often a matter of degree and involves the assessment of a multiplicity of factors. (State Bar Mandatory Fee Arbitration Program Arbitration Advisory 1998-03, p.3.) As noted in Advisory 1998-03, the factors considered under former Rule 4-200(B) [current Rule 1.5(b)] for determining an unconscionable fee are generally identical to the factors considered in analyzing the reasonableness of a fee. Those factors include comparison of fee charged to value received (Rule 1.5(b)(3), whether the fee is fixed or contingent (Rule 1.5(b)11) and whether the client gave informed consent to the fee (Rule 1.5(b)13). As described by one court, the question is whether the client got what she or he paid for. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4<sup>th</sup> 993, 1002.) However, a reasonable fee should never exceed the contract fee. (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287.) Thus, in the flat fee scenario, where the representation terminates before all of the services have been provided, the maximum the attorney can recover is the specified flat rate fee.

In the absence of an agreed upon method, the amount of unearned fee that must be returned if the representation terminates before the legal services are completed will depend on a number of factors similar to the factors used in the evaluation of whether the fee paid to the lawyer represents the reasonable value of the lawyer's services and is not unconscionable. (Rule of Professional Conduct 1.5(b).)

There are several approaches which may be used to determine the amount of an unearned fee under a flat fee agreement where the representation terminates before all of the services have been provided, including benchmarks or milestones which specify when a portion of the fee is earned.<sup>1</sup> Under this approach, the fee agreement may include milestones based upon the completion of specified tasks, the passage of time or other mutually agreed upon factors. However, because the terms of the agreement must be reasonable and fully explained to the client, milestones which provide for front-loading the entitlement to fees are subject to scrutiny. In addition, a milestone based solely on the passage of time may be unseasonable as it is not specifically tied to the performance of services.

Another option for determining earned fees in connection with flat fee services is the application of an hourly rate to the lawyer's services at the time the representation terminates. However, as a flat fee agreement is not based on providing legal services based on an hourly rate, this approach may not be appropriate as the number of hours spent on the client's case under a flat fee agreement may not be determinative of the reasonable value of the services in relation to the specified flat fee.

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<sup>1</sup> Milestones have been approved in ethics opinions and case authorities from other jurisdictions. (See, San Diego County Bar Association Ethics Opinion 2019-03 – Refunding Unearned Advanced Flat Fees, p.5; *Matter of Gilbert* (2015 Colo. Supreme Court) 346 P.3d 1018, 1027; *In Re Mance* (2009 Dist. of Columbia) 980 A.2d 1196, 1204; DC Bar Ethics Opinion 355; Utah State Bar Ethics Opinion 2012-02.

**C. Ethical concerns regarding renegotiation of a flat fee agreement during the course of the representation.**

Another issue is whether an attorney can renegotiate a flat fee where the attorney miscalculated the complexity of the matter and the amount of time required to perform the agreed upon services. It is unsettled in California whether lawyer must comply with Rule 1.8.1 before negotiating a modification of a fee agreement with an existing client. However, where the lawyer obtains a pecuniary interest adverse to the client as a result of the renegotiation, the lawyer must comply with Rule 1.8.1.<sup>2</sup>

The issue was addressed by Texas State Bar in Opinion No. 679 (2018). The question presented in that ethics opinion was whether a lawyer may renegotiate a flat fee for representing a client in litigation after the litigation is underway if the matter turns out to be greater in scope and complexity than the lawyer and client contemplated. The Texas State Bar Ethics Committee concluded that a lawyer may renegotiate a flat fee in a litigation matter after the litigation is underway if modification of the fee agreement is fair under the circumstances. The Texas Ethics Committee concluded that that the burden of proving fairness is the lawyer's and will depend upon factors such as the length of the lawyer-client relationship, whether the reason for the renegotiation could have been anticipated at the outset of the representation, and the client's level of sophistication. The Committee further concluded that before seeking to renegotiate a fixed fee, the lawyer should be mindful of the risks that the lawyer voluntarily assumed when proposing or agreeing to that fee—including the possibility that the fixed fee might not be adequate to compensate the lawyer when compared to other fee arrangements.

The issue was also address by the Utah State Bar Ethics Advisory Committee in Opinion No. 20-01. The issue addressed in that opinion is whether a lawyer may permissibly renegotiate the terms of a flat fee agreement if, after commencing the representation, the circumstances, scope or complexity of the matter becomes materially different and greater from what the lawyer unilaterally contemplated at the commencement of the representation. The Utah Committee concluded that the fact after commencing the representation, the circumstances, scope or complexity of the matter becomes materially different and greater from what the lawyer contemplated that the time of commencement of the representation does not permit a renegotiation of the fee agreement, unless the lawyer complied with Rule 1.8(a) of the Utah Rules of Professional Conduct.<sup>3</sup> However, the Committee stated that its opinion would be different if the scope of the engagement was enlarged by the client, or was not reasonably

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<sup>2</sup> Rule 1.8.1 provides that a lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to the client unless the terms are fair and reasonable to the client and fully disclosed to the client in writing and in a manner that should reasonably have been understood by the client, the client is advised in writing to seek the advice of an independent lawyer of the client's choice, and the client provides informed written consent to the terms of the transaction.

<sup>3</sup> Utah Rule 1.8(a) is substantively the same as California Rule 1.8.1, which governs business transactions with a client and pecuniary interests adverse to a client.



foreseeable or contemplated by the lawyer and the client as included in the original scope of work contemplated when the parties entered into the original fee agreement. The Committee also noted that their opinion would be altered where the client misrepresented the facts or issues or there was a mutual mistake of fact.

Whether former Rule 3-300, or current Rule 1.8.1, applies to the renegotiation of a fee agreement during the course of the representation in general, and a flat fee agreement in particular, has not specifically been address in prior California State Bar ethics opinions. In 2008, the Committee om Professional Responsibility and Conduct issued a proposed Formal Opinion regarding the ethical ramifications associate with modification of an attorney fee agreement (Proposed Formal Opinion Interim No. 05-0001). The Committee concluded that Rule 3-300 does not apply to a modification of a fee agreement unless the agreement confers on the attorney an ownership, security, possessory or other pecuniary interest adverse to the client. The Committee concluded that while Rule 3-300 did not per se apply to a modification of a fee agreement after the attorney-client relationship has commenced, any modification is subject to close scrutiny and must be fair, reasonable and fully explained to the client. However, the Board of Trustee's Committee on Regulations, Admissions and Discipline did not approve the proposed opinion.

Unlike hourly or contingent fee agreements, a flat fee agreement contemplates full payment for all of the specified services regardless of the amount of the work ultimately performed. As a result, a mid-stream renegotiation of a flat fee agreement which requires that the client pay more than the terms of the original agreement presents different considerations. In most cases, the attorney will be in the better position to estimate the time required to perform services under a flat fee agreement when the parties are negotiating the terms of the original agreement. If the attorney underestimates the amount of time necessary to perform the specified services and seeks to modify the fee, the client may not want to change representation feel compelled to agree to the higher fee and is therefore at a disadvantage in negotiating with their attorney.

#### IV. POTENTIAL HYPOTHETICALS

**Scenario One:** Attorney and client enter into a written fee agreement pursuant to which the attorney agrees to represent client in a criminal case involving an alleged robbery for a flat fee of \$25,000. The full flat fee is paid in advance and is deemed in the fee agreement as earned on receipt and states that no portion of the fee will be refunded. The fee agreement does not specify the scope of services, other than the general statement that Attorney will represent client in the criminal case. After the arraignment and preliminary hearing, client is dissatisfied with Attorney's services and terminates the representation. Client requests a refund of the flat fee, but attorney declines to refund any portion of the fee because the fee agreement states that was fully earned on receipt and that no portion of the fee will be refunded.

**Analysis of Scenario No. 1:** The \$25,000 flat fee paid when the attorney and client entered into the fee agreement is an advance deposit because it relates to the performance of legal services and therefore is not a true retainer. The flat fee must therefore be deposited into a client trust account until the fee is earned, unless Attorney

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has made the written disclosures required by Rule 1.15(b)(1). The provision that the \$25,000 flat fee is deemed earned upon receipt and is not refundable violates Rule 1.5(d) and is not enforceable. Because the client has the right to terminate the attorney, and because attorney therefore has not performed all the legal services specified in the agreement, the client is entitled to a refund of the portion of the fee that has not been earned. As the fee agreement did not include any milestones or other provisions regarding whether any portion of the fee is earned prior to completion of the entire agreement, attorney will only be entitled to recover a reasonable fee under a quantum meruit analysis and attorney will have the burden of proof.

**Scenario Two:** Client consults attorney for representation in a marital dissolution action. Client represents that the parties are in agreement regarding their divorce and the division of property. Attorney agrees to handle the case through execution of a marital settlement agreement for a flat fee of \$10,000. Other than the provision regarding execution of a marital settlement agreement, the fee agreement does not include milestones for when any portion of the fee is earned. After commencing the representation and obtaining financial disclosures, the attorney discovers that the parties do not agree with respect to the division of marital property and that the case will likely have to go to trial. Attorney wants to renegotiate the flat fee to more fairly cover the likely time and expense of a trial regarding disputed property issues, but client refuses.

**Analysis of Scenario No. 2:** Similar to contingent fee agreements, a flat fee agreement involves a certain amount of risk by both parties. There is risk to the lawyer that time required may exceed what the lawyer might have earned under an agreement to bill hourly for the lawyer's services. There is risk to the client that the client may end up paying more than the client would have paid under an hourly fee agreement if the lawyer is able to complete the representation for less time than anticipated when the parties entered into the agreement. Renegotiation to increase the amount of the fee for the services specified in the agreement because the attorney underestimated the amount of time necessary to perform the specified services raises ethical concerns and should be subject to close scrutiny as the client as the client may not want to change representation if the attorney withdraws during the representation and is therefore at a disadvantage in negotiating with their attorney. Additionally, in most cases the attorney will have been in the better position to estimate the time required to perform services under a flat fee agreement when the parties are negotiating the terms of the original agreement, and renegotiating the terms of the agreement after the representation has commenced may be an undue burden for the client. However, in the situation presented in this scenario, the attorney relied on the client's representation that the parties were in agreement regarding the division of property and their intent to enter into a marital settlement agreement. Accordingly, renegotiation of the flat fee is ethically permissible under the circumstances provided that the modified fee is fair, reasonable and not unconscionable. If the client refuses to renegotiate the fee, the attorney may seek to withdraw under Rule 1.16(b).

**Scenario Three:** Client consults with attorney regarding a dispute with the Internal Revenue Service regarding failure to properly file tax returns and pay taxes over

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a 10-year period. Attorney and client enter into a written fee agreement pursuant to which the attorney agrees to represent client in the tax dispute with the Internal Revenue Service for a flat fee of \$50,000. The full fee is paid in advance of attorney performing any services. The agreement does not include any milestones, but states that Attorney will prepare amended tax returns for the past 10 years, if needed, and represent the client in negotiations with the IRS regarding tax liability, penalties and collection. After commencing the representation, attorney advises client to not file amended returns for the any of the prior tax years as doing so may not be in client's best interests, but attorney spends about 20 hours negotiating with the IRS, but has not reached an agreement regarding the client's tax liability. Client terminates Attorney's representation and demands a refund of the \$50,000 flat fee. Attorney claims that language "if needed" disclosed that amended returns may not be necessary. Attorney further claims that even though negotiations with the IRS were not successful as of the date of termination by the client, attorney has performed the services set forth in the fee agreement and is entitled to keep the entire flat fee.

**Analysis of Scenario No. 3** The \$50,000 flat fee paid when the attorney and client entered into the fee agreement must be deposited into a client trust account until the fee is earned, unless Attorney has made the written disclosures required by Rule 1.15((b)(1) and thereby obtained Client's agreement to deposit the fee into attorney's operating account. When Client terminates the representation, attorney has only provided one of the two tasks because after the representation commenced attorney advised Client that it may not be in Client's best interests to file amended returns. The more limited scope of services provided were the result of the attorney's post-retention judgment that filing amended returns may not be in the client's best interests. Attorney's decision is not based on any new information, but rather based on a more thorough analysis of the previously filed returns and the risks to the client associated with filing amended returns. The mere proviso "if needed," is not sufficient to disclose to the client that scope of the services the attorney would actually perform under the agreement to earn the \$50,000 flat fee. Rather, whether amended returns will be filed, and hence the scope of services attorney will actually provide, is left entirely to the post-engagement decision of the attorney.

**Scenario Four:** Attorney and client enter into a written fee agreement estate planning matter. In exchange for a flat fee of \$7,500, attorney agrees to draft a will, living trust and durable power of attorney. Attorney prepares drafts of the agreements but client and attorney disagree regarding some of the terms and client refuses to sign the agreement, terminates attorney and demands a refund of the flat fee.

### **Analysis of Scenario No. 4:** ADD ANALYSIS

**Scenario Five:** Client consults with attorney for potential representation in connection with \_\_\_\_\_. Attorney has been experiencing financial difficulties arising from \_\_\_\_\_. Attorney proposes to handle client's case for a flat fee of \$XXXX. Attorney sends a

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proposed fee agreement which requires that client pay the full flat fee in advance of the attorney performing any of the services covered by the agreement. In a cover letter, attorney states that client has the right to required that the flat fees be deposited into the attorney's trust account until the services have been completed, but states that attorney intends to deposit the flat fee into attorney's operating account unless otherwise instructed by client. Client signs and returns the flat fee agreement without responding to attorney's statement that the funds will be deposited into the operating account upon receipt. After attorney commences the representation attorney's financial difficulties get worse and result in the garnishment of attorney's operating account. Client becomes dissatisfied with attorney's representation, terminates attorney and demands that attorney refund \_\_% of the flat fee, but attorney states that the fees are no longer available because his operating account has been garnished and he does not have funds necessary to refund the portion of the flat fee.

### **Analysis of Scenario No. 5:** ADD ANALYSIS