

CACJ California Attorneys for Criminal Justice

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May 25, 2010

Howard B. Miller
State Bar President
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, California 90017

Special Commission for the Rules of Professional Conduct
c/o: Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, California 94105

Re: Opposition to Proposed New Rule of Professional Conduct,
Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers

Dear Mr. Miller,

As the current President of California Attorneys for Criminal Justice (hereafter "CACJ"), I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors. There are many features about the proposal that raise strong concerns for our membership, some of which I highlight herein.

California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. It is administered by a Board of Directors and its bylaws state a series of specific purposes, including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 2,000 criminal defense lawyers working in both the private and public sector from around the State of California and elsewhere, as well as members of affiliated professions. For over 36 years, CACJ has appeared before numerous courts including the United States Supreme Court as *amicus curiae* on matters of importance to the administration of justice, to our members and to our clients. We write in this capacity to urge the proposed amendment be rejected as unnecessary; essentially interfering with the ability of lawyer and client to contract in a way that benefits the client.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

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We are unclear why the Board is now considering a ban on non-refundable fee agreements. As I understand it, there have not been a substantial number of complaints from consumers/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.

As with all fees and fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the rule against charging excessive fees (Rule 1.5(a)) and 2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.

As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.

Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and is not practical. Since the proposal would require the "flat fee" to cover contingencies (e.g., trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the "sanctified" State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.¹

We also think the proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged

¹ In her article in the California Bar Journal, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee forms:

"Lawyers are urged to use the State Bar fee forms [. . .]. These represent the 'gold standard.' The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify regarding issues involving an agreement, it's a stronger case if it's the sanctified State Bar Fee agreement . . ." Diane Karpman, "Time for Tuning Up Those Fee Agreement", California Bar Journal (February 2010)

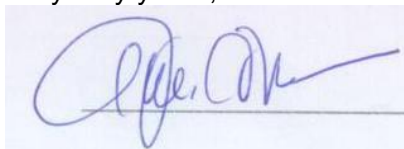
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at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, s/he will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or cuts short the life of the case, the Proposal encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee", which, under this Proposal would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.

For these and other reasons, CACJ urges the State Bar Board of Governors to reject the proposed amendment (Rule 1.5(e)(4-200)). Thank you for your consideration of this letter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ann C. Moorman", is written over a horizontal line on a light blue background.

ANN C. MOORMAN, President
CACJ Board of Governors

cc:

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