

**SUMMARY ANALYSIS OF PROPOSED NEW RULE OF
PROFESSIONAL CONDUCT, RULE 1.5(e) (4-200) (FEES FOR LEGAL
SERVICES), ABOLISHING NON-REFUNDABLE RETAINERS**

A. The Proposal is the latest in a continuing effort by the Commission to prohibit non-refundable retainers¹ in California.

Paragraph (e) is the latest effort by the Commission to change fee agreements used by lawyers and clients in California for over 100 years by amending Rule 1.5 (4-200) to abolish non-refundable retainers. This seemingly endless process is a solution in search of a problem. Similar though somewhat different proposals were made: (1) in 1991 by the Commission, (2) in 1997 by the Committee on Professional Responsibility and Conduct (“COPRAC”), and (3) in 2008 by the Commission.² The 1991 and 1997 proposals were soundly rejected based on the negative responses from a wide cross section of California lawyers. In August 2008, in the face of widespread opposition, the Commission scrapped the proposed revision to Rule 1.5(f) and instead decided to completely redraft Rule 1.5, by adding and renumbering newly proposed paragraph (e) and adding a number of Comments. In November of 2009, without any meaningful notice to members of the Bar, the Commission presented this latest Proposal to the Board of Governors for approval along with 34 other separate rule revisions. As far as I can determine, almost no one in the general bar membership who opposed the discarded proposal was aware of the request to approve these revisions and therefore no one could or did submit their opposition or appear to oppose these extreme changes that had never been publicly circulated for comment.

¹ “Non-refundable retainer” refers to non-refundable retainers, advance fees earned when received, and minimum fees.

² The 2008 Proposed Rule 1.5(f) stated:

“A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter.”

The latest Proposal (Ex. 2) begins with the statement that a lawyer “cannot make an agreement for, charge, or collect a non-refundable fee, except . . .” This language demonstrates the Commission’s clear intent to abolish non-refundable retainers subject to the limited exceptions in (e). The relatively narrow exceptions of paragraph (e), however, do not permit traditional non-refundable fee arrangements that benefit clients.

1. Exception (e)(1) – “True Retainer”

Paragraph (e)(1) prohibits, for example, the long-established practice of charging a minimum fee to ensure availability (true retainer) where the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. This arrangement benefits the client because the client does not need to pay additional attorney’s fees until: (1) the true retainer is used up under the hourly calculation and/or (2) until some conditional event occurs (i.e. filing of criminal charges or a civil suit), even though the lawyer will remain available and do all work, under the initial true retainer, for agreed upon services (i.e. attempting to prevent the filing of a case). Paragraph (e)(1), however, does not permit this arrangement because if any portion of the original true retainer is used to pay for the attorney’s work in the potential case, then the entire fee is automatically converted into an advance, unearned fee. *See* Comment [8]. Paragraph (e)(1), therefore, deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received.³

2. Exception (e)(2) – “Flat Fee”

Paragraph (e)(2) (*see* Exh. 2) is the product of the Commission’s attempts to “assuage” their critics by attempting to make their attempted abolition of the

³ Paragraph (e) also reflects the lack of practical experience by the members of the drafting four-person subcommittee (which includes a law professor who served as a consultant and actually drafted Paragraph (e)) in how non-refundable retainer and fixed fees are set and earned in private practice.

non-refundable retainer “more palatable” to their critics.⁴ This novel and convoluted fee arrangement appears at first to allow for “non-refundable” flat fee agreements “which constitute[] complete payment for those services” so long as there is a written fee agreement that states, “in a manner that can easily be understood by the client,” a number of things including: “(v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.” The obvious problem with paragraph (e)(2) is that if any portion of a “non-refundable” fee “may be” refundable, then the entire fee cannot be the lawyer’s property.

The less obvious but equally troubling problem is that when read in context of the entire Rule and Comment [5], Paragraph (e)(2) would often require that the presumably “non-refundable” flat fee cover fees for services spanning the entire length of the case, including trial.⁵ Particularly in complex

⁴ See, e.g., Dashboard for Paragraph (e) at p. 65 (when presenting Paragraph (e) to the California Bar Board of Governors, the Commission explained that the “changes” to the prior Proposed Rule 1.5(f) “may assuage the concerns raised” by public commenters in 2008).

⁵ Comment [5] states, in part, that:

“An agreement may not be made whose terms might induce the lawyer improperly curtail services for the client or perform them in a way contrary to the client’s interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.”

Paragraph (e), however, fails to provide any guidance on what it means to “adequately explain” that “more extensive services probably will be required.” Unfortunately, it will certainly be clarified in the future bar complaints and fee disputes. In practice, it is often difficult to precisely estimate the work that needs to be done in any reasonably complex case since for example no one really knows if the case will be tried or not. In civil cases and in the criminal

cases, since this flat fee is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur. If the attorney was either fired without cause or withdrew from the case before trial or the case resolved before trial, the fees that would have covered the trial would have to be refunded (either on a pre-tax or post-tax basis)⁶ because they are not earned.⁷

law context, in most felony cases, particularly in anything that is relatively complicated, a lawyer cannot obtain discovery before being retained, to assess the merits of the case (and also to determine whether or not a lawyer wants to take on the case). For this reason, practitioners in complex civil or criminal cases often use hybrid fees which might use a true retainer, a nonrefundable retainer earned when received with hourly credits that would cover the provision of legal services through the different steps (i.e. pre-filing, discovery, pre-trial, trial, administrative hearings, post-trial, sentencing) of a complicated case. In these situations, non-refundable retainers are often used as a partial payment in combination with fixed fee payments or often hourly credits against the retainer.

Paragraph (e), however, would force attorneys not only to speculate about what services “probably will be required,” but somehow also to “adequately explain” this “situation” to the client, without any guidance before being retained and without any meaningful analysis of the case. It is unclear how a lawyer can “adequately explain” the “situation” to the client when the attorney herself often cannot determine, with any reasonable degree of certainty, whether “more extensive services probably will be required” prior to meaningfully evaluating the case.

⁶ Lawyers pay income taxes on non-refundable fees. Under Paragraph (e), the lawyer may have to pay income tax on the “non-refundable” flat fee paid when received from the client even though it may be refundable.

⁷ One important purpose of a “flat fee” or “fixed fee” that is earned when received is to assure the client in advance that the fee will be no more than a particular amount. Many clients who have become relatively sophisticated consumers of legal services do not want fees calculated or based upon the time

On closer examination, Paragraph (e)(2) does not actually permit truly “non-refundable” “flat fees” as the Commission asserts that it does. The Commission’s effort to dress up the ban on non-refundable retainers in an attempt to make it more palatable to the critics fails and actually creates more problems for the lawyer and the client. My detailed and lengthy analysis of the significant, additional problems created by these proposed changes will be made available to you, if you would like to review it.

B. Paragraph (e) is a Solution in Search of a Problem.

There simply has not been an identifiable pattern of abuse by California lawyers resulting from the current rules which mandates the abolition of the non-refundable retainer or which would be remedied by this sweeping change. With the latest Proposal, the Commission offers a one-sentence rationale, unsupported by any California case authority:

“Paragraph (e) has no counterpart in the [ABA] Model Rule.⁸ The Commission recommends its adoption because charging a nonrefundable fee is inimical to California’s strong policy of client protection. . .” (Commission’s Explanation of Changes to the ABA Model Rule, Ex. 2 to Executive Summary at p. 77)

that is expended. This type of fee is not determined based on fixed values for individual steps in the litigation. Cases develop differently and the “fixed fee” is often an educated but fair estimate, since there is no way to determine when or how, for example, a civil litigation or administrative matter or a criminal case will be resolved.

⁸ The ABA Model Rules contain no prohibition on “nonrefundable fees” and “earned upon receipt fees.” *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §44, cmt.[f] (2000) (“if a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer” and need not be deposited in a client trust account).

The Commission, however, fails to demonstrate that clients need protection from the pattern of misconduct by the membership of the State Bar involving the non-refundable retainer. No recent California reported cases have demonstrated any pattern of abuse involving non-refundable retainers. The Commission has not only failed to cite a single, reported recent case to support the need for Paragraph (e) (despite our repeated requests since 1991), it ignores the reality that thousands of Californian lawyers have been using some form of the non-refundable retainer (that fall outside of the limited exceptions to Paragraph (e)'s ban on non-refundable retainers in (e)(1) and (2)) since the 19th century without creating any identifiable pattern of abuse.⁹

The Commission ignores and does not even disclose that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."¹⁰

⁹ There are a myriad of examples of legal transactions other than criminal matters that have traditionally involved non-refundable retainers, fees earned when received, and minimum fees and are not calculated based on the time devoted to the assignment. These legal transactions are in a variety of practice areas, including: (1) real estate, (2) criminal law, (3) securities, (4) family law, (5) tax, (6) entertainment, (7) bankruptcy, (8) immigration, (9) appellate law, and (10) SEC matters.

¹⁰ Ironically, it was COPRAC that first suggested (*see* May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. *Id.*

Indeed, in many jurisdictions, the use of non-refundable retainers is recognized as appropriate, if not essential in both civil and criminal cases.¹¹ Although Paragraph (e) abolishes the well-recognized and long-utilized non-refundable retainer (with the exception of the extremely limited categories discussed above), the Commission: (1) has not, and indeed cannot, demonstrate any need to completely alter the way law has been practiced in California or (2) how well this novel procedure will work in the actual practice of law.

The critical question here is not whether a rogue lawyer can gouge, exploit, and steal from his/her client using a non-refundable retainer or whether non-refundable retainers are prudent or wise in any given situation (this should be left to the lawyers and fully-informed clients to decide between themselves and memorialized in a written fee agreement that meets the requirements of Cal. Bus. & Prof. Code §6148(a) and Rule 1.5(a).)¹² Rather, the critical inquiry is whether the non-fraudulent or ethical use of non-refundable retainers is nonetheless so corrosive as to require a per se prohibition. The answer to this question is a resounding no.

¹¹ John M. Burkoff, *Criminal Defense Ethics: Law & Liability*, § 10.1, at 501-505 (2d ed. 2003); John Wesley Hall, Jr, *Professional Responsibility of the Criminal Lawyer* (2d. ed. 1996) at p. 163. *See also, e.g., Bunker v. Meshbesh*, 147 F.3d 691 (8th Cir. 1998) (Minnesota); Tennessee Op. 92-F-128(b) (1993) (reaffirming earlier opinion approving nonrefundable retainers); Georgia Op. 03-1 (2003) (affirming use of non-refundable retainers); South Carolina Rule 1.16(d) ("The lawyer may retain a reasonable nonrefundable retainer."); Texas Op. 431 (1986) (affirming use of non-refundable retainers); Maryland Op. 87-9 (1987) (a non-refundable retainer is ethically proper so long as the amount involved is reasonable); Louisiana Rule 1.5(f)(2) ("When the client pays the lawyer all or part of a fixed or of a minimum fee for a particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid..."); Kentucky Op. 380 (1995) (affirming use of non-refundable retainers).

¹² Do California lawyers really need to consult a Rule of Professional Responsibility to determine that a law license is not a permit to steal, pillage, and plunder?

Paragraph (e) is a source of overreaching and proves too much. A few dishonest lawyers may cheat their clients by removing money from their trust accounts. Yet, no one has proposed that the solution is to abolish trust accounts.

C. The Washington Rule

The Commission's claim that the Proposal relied on, and is supported, by the Washington Rule (Rule 1.5(f) of Washington's Rules of Professional Conduct), *see* Dashboard and Introduction to proposed Rule 1.5(e)), is simply incorrect. First, non-refundable fees, advance fees, and fees earned when received are not prohibited under the Washington Rule. This fact is supported by: (a) the plain language of the Washington Rule, (b) Washington Supreme Court's rejection of the proposal to ban the use of the terms "nonrefundable," "earned upon receipt," and "minimum," and, (c) the fact that the Washington Rule does not even mention the word non-refundable and the fact that Washington previously had no rule requiring written fee agreements. Second, the Washington Rule has little, if any application, to the stated purpose of the Commission's Proposal. Rather than preventing lawyers from "charging or collecting a nonrefundable fee" as the Proposal seeks to do, the Washington Rule instead was intended to (a) change the rule that prevented lawyers from placing a fee for future services in their trust accounts and (b) impose requirements requiring lawyers to inform the client about the nature of the fee arrangements since Washington (unlike California) does not have a statute requiring lawyers to explain the fee arrangement in a written fee agreement.

The Proposal is a solution in search of a problem. The unconscionable fee limitation already protects clients from: (1) the crooked lawyer and (2) unanticipated circumstances. In the absence of a pattern of demonstrable abuses that can be remedied by either a limitation or a ban on the use of the non-refundable retainer, the primary concern of the State Bar ought to be the protection of the interests of clients and lawyers.

D. Significant Problems Created by Paragraph (e)

Paragraph (e), if codified, will impact on lawyers who practice in every area including entertainment law, matrimonial/divorce, immigration law, civil

litigation, securities, bankruptcy, tax, real estate, appellate, and criminal law. In fact, prohibiting non-refundable retainers will in essence appear to make these fee payments the property of the client until the work is performed, regardless of the intent of the lawyer or client set out in a written fee agreement. This will expose lawyers performing any type of legal work to great financial risk, by facilitating the restraint or seizure of their fees if the client has a potential problem involving securities law,¹³ bankruptcy, criminal law¹⁴ and jeopardy tax assessments¹⁵ and even creditors' claims.

The forfeiture/restraining order problems raised by the previous Proposed Rule 1.5(f) have not been resolved by the Commission as it claims. Rather than protecting the client's entitlement to a refund of the "non-refundable" flat fee (*see* proposed Rule 1.5(e)(2)(v)), the convoluted theoretically "non-refundable" flat fee structure created by the Commission in the proposed Rule 1.5(e)(2)

¹³ *S.E.C. v. Interlink Data Network of Los Angeles*, 77 F.3d 1201, 1205 (9th Cir. 1996) (portion of advance fee payment not for services already rendered remains property of client for purposes of determining whether the funds are subject to seizure).

¹⁴ *See United States v. Saccoccia VI*, 165 F.Supp.2d 103, 111-13 (D.R.I. Aug. 3, 2001) (discussing government forfeiture of attorneys' fees); *People v. Superior Court, (Clements)*, 200 Cal. App. 3d 491 (1988) (refusing to recognize an exemption for attorneys' fees under California's forfeiture statute).

¹⁵ *See Buker v. Superior Court*, 25 Cal. App. 3d 1085 (1972) (developed principles involving an "irrevocable assignment," the equivalent of a non-refundable retainer, in a jeopardy assessment case, enabling the client to receive representation and the lawyer to maintain the fee); *People v. Vermouth, supra*, 42 Cal. App. 3d at 359 and *People v. Vermouth*, 42 Cal. App. 3d 353, 359 (1974) (reversing conviction holding that the trial court deprived the defendants of their right to be represented by the counsel of their choice by failing to determine the validity of Mr. Tarlow's irrevocable assignment (treated as a non-refundable retainer) of the seized funds that had priority over the IRS lien). This approach has been used by hundreds of California lawyers to protect their client's constitutional right to representation while collecting their fee. *See also* Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 UCLA L. Rev. 1191 (1976).

requiring lawyers and clients to inaccurately describe that the fee is “the lawyer’s property on receipt” actually will deprive the client from ever receiving a refund if these funds are the subject of any seizure, forfeiture, or restraining order arising out of any: (a) criminal case, state or federal, (b) SEC civil restraining order, or (c) a jeopardy assessment by the IRS or the Franchise Tax Board. In fact, to make the situation even more egregious, if money to be paid to the lawyer is contingent on an event that never occurs (i.e. trial), in the face of either (a), (b), or (c) above, the lawyer cannot return these funds to the client. The attorney may not return any funds subject to restraint to the client even when she is fired by the client and even if they are necessary to retain a new lawyer. Lawyers have been accused of and charged with obstruction of justice and/or criminal contempt as well as being subject to discipline by the court which issued the restraining order if the money is returned to the client. The fee agreement required under Paragraph (e)(2) does not even attempt to focus on or resolve this significant problem.

A client's funds that are deposited in a trust or general account under this Proposal will often be subject to federal or state restraint and/or forfeiture or attachment by potential creditors. Paragraph (e) will substantially increase the risk of attorney fee forfeiture or civil seizure because it will be impossible for an attorney who holds a fixed fee payment in trust or who has deposited it in a general account even when it is owned by the client to assert that he or she is a bona fide purchaser for value without knowledge. Therefore, compliance with the proposed rule and amendments will make it impossible for a client to be represented by any counsel in many civil and criminal matters.

Moreover, paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the fee by asserting that the fee “is the lawyer’s property on receipt.” The problem is not what the fee is called but who owns the funds.

There are a number of other, significant policy reasons why these changes should never be adopted, including unnecessary interference in attorney-client relationships, the generation of increased client bar complaints, arbitration proceedings and civil suits, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees and the need to preserve the availability of legal services to the people of California including consumers of low, fixed fee services, as

well as to protect the constitutional rights of those accused of crimes to retain the lawyer of their choice.

In fact, on August 26, 2008, the Office of the Chief Trial Counsel of the State Bar (“OCTC”), recognized that the impact of a ban on non-refundable retainers is that “it will make members subject to discipline for charging or collecting a non-refundable retainer,” when currently, any disputes related to the charging or retention of a non-refundable fee are “typically handled as either a fee arbitration matter or, in egregious cases . . . as a failure to return unearned fees in violation of current rule 3-700(D)(2).” OCTC’s 8/26/08 comment on prior, revised Rule 1.5(f).

Current California law does not prohibit non-refundable fees and existing protections against unreasonable and unconscionable fees currently protects clients from: (1) the crooked lawyer and (2) unanticipated circumstances. Rather than bringing current California standards into the Rule, Paragraph (e) creates ambiguities and uncertainties in the Rules in part by grossly departing from the current and long-standing California custom, standards, practice, and principles governing fee agreements (even including the specific form fee agreements that have been endorsed and distributed by the State Bar for years and are still available on its website¹⁶). The current standards, custom, and

¹⁶ The existing “fixed fee clause” distributed in the form fee agreements by the State Bar (and likely included in hundreds of fee agreements across the spectrum of specialties in State Bar sample fee agreements) explicitly provides that:

“unless the attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under the agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed.” “The State Bar of California Sample Written Fee Agreement Forms” at pp. 30-31 (available at <http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf>).

practice (endorsed by the State Bar which provides that the fixed fee will be earned in full and no portion of it will be refunded once any material services have been provided) are entirely irreconcilable with Paragraph (e), which in paragraphs (e)(2)(iv) and (v) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and then file an arbitration claim, a lawsuit, or a Bar complaint against the lawyer. It appears the Commission has never addressed this significant inconsistency.

E. Failure to Effectively Advise the Bar of the Amendment

When the Commission attempted to prohibit non-refundable fees in 2008, it was done in a manner that was not designed to notify a meaningful cross section of the California Bar of the amendment.¹⁷ With the latest proposal, the Commission totally redrafted and expanded Rule 1.5(e) and presented it along with 34 other rules to the Board of Governors for conditional approval in

In her latest column of the California Bar Journal, legal ethics expert Diana Karpman describes these “sanctified” State Bar fee forms as the “gold standard” and urges California lawyers to use them. She states:

“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 agreements,” California Bar Journal (February 2010)

¹⁷ With the 2008 proposed revision to abolish non-refundable fees, aside from the posting of the 209-page Discussion Draft of 13 proposed amendments to the rules of professional conduct (including the prior proposed Rule 1.5(f) banning non-refundable retainers) on the state bar website, it was not publicized (as far as we know) other than a short article in the May 2008 California Bar Journal that made no mention of non-refundable retainers. Most California lawyers were completely unaware that these significant changes to Rule 4-200 had been proposed.

November of 2009, without informing the membership of the State Bar and the known stakeholders who opposed the 2008 proposal. It is unlikely that any meaningful number of members of the California bar, other than a lawyer who is on the Commission or a member of the Board of Governors, actually knew about the latest Proposal (draft Rule 1.5(e)) and the Commission's attempt to present it to the Board of Governors for approval. There was no time or opportunity to learn about, scrutinize, or comment on draft Rule 1.5(e). Obviously, since no notice that the meeting agenda involving a proposed draft of Rule 1.5(e) that in fact dealt with a ban on non-refundable retainers was distributed to the members of the Bar, no one could appear before the Regulations and Admissions Oversight Committee ("RAC") or the Board of Governors on November 12 through 14, 2009 to raise the host of problems with this novel, wide-ranging version of Rule 1.5(e). The public comment letters sent in the spring of 2008 before it was abandoned in August 2008 could not have addressed the significant changes to Rule 1.5 submitted to the Board of Governors in November of 2009.

Considering the significance of this Proposal to lawyers and their clients throughout California, the controversy surrounding the Commission's prior efforts to abolish the non-refundable retainer, and the fact that public commenters in 2008 complained vigorously about the lack of publicity surrounding the 2008 proposed Rule 1.5(f), I am especially concerned that the Commission sought and received the Board of Governor's endorsement for Paragraph (e) without (1) publicizing, disseminating, or explaining, in a manner that actually informs a cross-section of the bar of its existence and (2) did not permit the membership to meaningfully respond or object before the Board of Governors' tentative approval of revised proposed Rule 1.5(e).

Rule 1.5: Fees For Legal Services
(Clean version of the rule prepared by the Commission at its December meeting.)

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.
- (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. 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.
- (c) Among the factors to be considered, where appropriate, in determining the conscionability of a fee or in-house expense are the following:
- (1) the amount of the fee or in-house expense in proportion to the value of the services performed;
 - (2) the relative sophistication of the lawyer and the client;
 - (3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (d) A lawyer shall not enter into an arrangement 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.
- (e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:
- (5) the amount involved and the results obtained;
 - (6) the time limitations imposed by the client or by the circumstances;
 - (7) the nature and length of the professional relationship with the client;
 - (8) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (9) whether the fee is fixed or contingent;
 - (10) the time and labor required;
 - (11) whether the client gave informed consent to the fee or in-house expense.

(1) a lawyer may charge a true retainer, which 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, in addition to and apart from any compensation for legal services performed. A true retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt.

(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

(f) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

COMMENT

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146j], or when an unlicensed lawyer provides legal services, (e.g., *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]); *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.)

[1B] Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

Basis or Rate of Fee

- [2] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement, and provide consequences for a lawyer's failure to comply with the requirements. (See, e.g., *In re Harney* (1995) 3 Cal. State Bar Ct. Rptr. 266.)

Modifications of Agreements by which a Lawyer is Retained by a Client

- [3] Paragraph (f) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (f). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.

- [3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (f). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (f). A modification that extends the time within which a client is obligated to pay a fee ordinarily is not material and adverse

to a client's interests, particularly when the modification is made in response to a client's adverse financial circumstances.

- [3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. *Seizer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (f). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.g., *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; *Carlson, Collins, Gordon & Bold v. Barducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915].) Depending on the circumstances, other Rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

- [3C] A modification is subject to the requirements of Rule 1.8.1 when the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

Terms of Payment

- [4] A lawyer may require advance payment of a fee but is obliged to return any unearned portion. (See Rule [1.16(e)(2)]) A fee paid in property instead of money may be subject to the requirements of Rule 1.8.1.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.

Prohibited Contingent Fees

[6] Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of balances past due under child or spousal support or other financial orders because such contracts do not implicate the same policy concerns.

Payment of Fees in Advance of Services

[7] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (e)(1) or (e)(2), is subject to Rule 1.5(a) and may not be unconscionable.

[8] Paragraph (e)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (e)(1). The written true retainer

agreement should specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt.

[9] Paragraph (e)(2) describes a fee structure that is known as a "flat fee". A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be treated as an advance for fees. See Rule 1.15.

[10] If a lawyer and a client agree to a true retainer under paragraph (e)(1) or a flat fee under paragraph (e)(2) and the lawyer complies with all applicable requirements, the fee is considered the lawyer's property on receipt and must not be deposited into a client trust account. See Rule 1.15(f). For definitions of the terms "writing" and "signed," see Rule 1.0.1(n).

[11] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule 1.16(e)(2). In the event of a dispute relating to a fee under paragraph (e)(1) or (e)(2) of this Rule, the lawyer must comply with Rule 1.15(d)(2).

Division of Fee

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

EXHIBIT 3