

SAMPLE WRITTEN FEE AGREEMENTS FORMS
INSTRUCTIONS AND COMMENTS

I. INTRODUCTION

The Committee on Mandatory Fee Arbitration of the State Bar has prepared three sample attorney client fee agreements which the Board of Trustees has approved. They are advisory only, are not required, and are not binding on the Courts, the State Bar of California, the Board of Trustees, any persons or tribunals charged with regulatory responsibility or any members of the State Bar.

The three attached agreements are: (1) an hourly litigation agreement (2) an hourly non-litigation agreement and (3) a contingency fee agreement. There is another document entitled “Optional Clauses and Disclosure Forms” which lists optional provisions and disclosure forms which an attorney may need to consider in certain situations.

II. OVERVIEW

A. Intended Purpose and Limitations

Attorneys who are admitted to practice in California may use the attached sample agreements but should also use their own independent legal and business judgment when creating their attorney-client fee agreement. The samples are prepared in a formal contract style but the provisions can be incorporated into a letter fee agreement if the attorney chooses to use that format. Attorneys are encouraged to modify the samples to fit their needs, provided such modifications do not conflict with Bus. & Prof. Code § 6146 *et. seq.* or the Rules of Professional Conduct.

B. Summary of Statutes and Rules of Professional Conduct

- Non-Contingent Fee Agreements—B&P §6148

Business and Professions Code Section 6148 governs non-contingent fee agreements. It requires attorneys to have a written agreement whenever it is reasonably foreseeable that the client’s total expense, including attorneys’ fees, will exceed \$1,000. A written fee agreement is not required when services are rendered in an emergency to avoid prejudice to the client or where the writing is otherwise impractical, when the client is a corporation, when the client, after full disclosure, makes a written waiver of the benefits of Section 6148, or when the fee agreement is implied in fact by prior services of the same general kind having been rendered to and paid for by the client.

The agreement must state: (a) any basis for compensation including, but not limited to hourly rates, statutory or flat fees and other standard, rates and charges; (b) the general nature of the legal services to be provided; and (c) the responsibilities of attorney and client under the agreement. The attorney is required to provide a fully executed copy of the agreement to the client at the time the contract is signed.

Section 6148(b) also requires attorneys to provide their clients with written bills. A client may request a bill at intervals of 30 days or greater. The attorney must provide the bill within 10 days after the demand. All bills must state the amount, rate and basis for calculation or other method of determining the attorney's fees and costs.

Finally, if an attorney fails to comply with any provision of the statute, the fee agreement becomes voidable at the client's option and the attorney is only entitled to a reasonable fee.

- Contingent Fee Agreements—B&P §6147

Business and Professions Code Section 6147 governs contingent fee agreements. It contains the same requirements as the Non-Contingent fee agreements discussed in the section above, and the following additional requirements:

- (a) A statement of the contingency fee percentage amount.
- (b) A statement as to how disbursements and costs will affect the contingency fee and the client's recovery.
- (c) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee agreement. This may include any amounts collected for the client by the attorney.
- (d) Unless the claim is subject to the provisions of Business and Professions Code Section 6146 (Claim Against Health Care Provider) a statement that the fee is not set by law but is negotiable between the attorney and client.
- (e) If the claim is subject to Section 6146, a statement that the rates set forth for that section are the maximum limits for the contingency fee and that the attorney and client may negotiate a lower rate.

The attorney is required to provide a fully executed copy of the agreement to the client at the time the contract is signed.

Finally, if an attorney fails to comply with any provision of the statute, the fee agreement becomes voidable at the client's option and the attorney is only entitled to a reasonable fee.

- Disclosure Concerning Professional Liability Insurance—CPRC 3-410

California Rule of Professional Conduct (CPRC) 3-410 requires attorneys who know or should know that they do not have professional liability insurance to inform a client in writing at the time the client hires the attorney. The attorney must disclose he/she is not insured whenever it is foreseeable the representation will exceed four hours or when, during the course of representation, the attorney no longer carries professional liability insurance. In the sample agreements, there is a provision to disclose whether you have professional liability insurance or not.

III. INSTRUCTIONS FOR USE OF FORMS

A. Form No. 1: Hourly Litigation

- Conditions (Par. 1) and Effective Date (Par. 17)

Paragraph 1 (Conditions) and paragraph 17 (Effective Date) work together and outline various conditions which must be met before the fee agreement is binding on the parties. If the conditions are not met, the agreement may not take effect but the attorney may still be entitled to recover a reasonable fee. (B&P 6148(a), 6148(c))

- Scope of Services and Attorney's Duties (Par. 2) and Client's Duties (Par. 3)

The attorney should fill in a detailed description of the services to be provided. This may be a statutory requirement. (B&P 6148(a)(2)) This paragraph excludes representation in an appeal, collection proceedings after judgment or proceedings regarding renewal of a judgment. It also provides that a separate written agreement is required for these services and any other services not provided in the description. Paragraph 3 lists all the duties the client must fulfill during the attorney-client relationship, which may be a statutory requirement. (B&P 6148(a)(3))

- Deposit (Par. 4)

Although a deposit is not required, if the attorney chooses to require a deposit, he or she should keep this clause in the agreement and fill in the amount of the initial deposit and the date it must be paid. Since an attorney cannot withdraw funds from the trust account without the client's authorization, an authorization is included in this paragraph. There is also a recitation that the deposit is not an estimate of the total fees and costs to be charged.

When the initial deposit is exhausted, the provision permits the attorney to require a further deposit and the attorney should fill in the amount. Finally, in the "Optional Clauses" document there is a provision for a "Replenishing Deposit" which permits the attorney to require the client replenish the deposit each month.

- Legal Fees (Par. 5)

Since Business & Professions Code Section 6148(a)(1) requires the attorney to list hourly rates, the attorney should fill in the rates for each attorney and the attorney's personnel. The provision also states that rates are subject to change on 30 days written notice to the client. The attorney may withdraw from the representation if the client declines to pay the increased rate and if permitted under the California Rules of Professional Conduct. The paragraph also contains a list of various tasks for which an attorney may charge the client. The agreement provides for a minimum charge of one-tenth of an hour. This list may be modified.

- Costs and Other Charges (Par. 6); Other Fees and Costs (Par. 7)

In paragraph 6 there is a list of common costs and expenses in a litigation matter. The attorney can add to or delete from the list and should fill in the rates for certain charges to comply with

the statute. (If applicable, B&P 6148(b)) The provision also allows the attorney to hire experts and consultants and to obtain the client's consent before a certain amount is incurred. The attorney should fill in the amount in subparagraph (d).

Paragraph 7 describes the situation where the Court awards attorney's fees and costs to another party after trial or arbitration and states it is the obligation of the client to pay these fees and costs. It also recites the client understands that any award for attorney's fees to the client does not affect the amount of fees and costs the client owes the attorney under the fee agreement.

- Bills (Par. 8)

Paragraph 8 complies with the statute regarding billing requirements. (B&P 6148(b)) The attorney should fill in when payment is due. It also highlights the client's obligation to review each bill and communicate any objections, questions or concerns so the issue can be resolved promptly.

- Client Approval for Settlement (Par. 9)

Paragraph 9 recites the client has the absolute right to accept or reject settlement and the attorney will not settle or compromise the client's claim without the client's consent.

- Discharge and Withdrawal (Par. 10)

California Rule of Professional Conduct 3-700 recites the circumstances in which an attorney can or must withdraw from the representation. Paragraph 10 lists these circumstances and whether the attorney may recover attorney fees and costs after withdrawal.

- Conclusion of Services (Par. 11)

This paragraph states that final payment is due on completion of the attorney services, when an attorney is discharged or withdraws. It also contains a description concerning return of the client's original file under CPRC 3-700(D)(1) and whether the file will be maintained or disposed of when the client does not request its return. The attorney should fill in the period the attorney will keep the file. If the client wants the file to be retained for a different period of time, the provision requires that agreement to be in writing and specify who will bear the cost of storage.

- Disclaimer of Guarantee (Par. 12)

This paragraph states the attorney makes no guarantee about the outcome of the client's matter and any statements the attorney makes should not be construed as a guarantee. It also provides that any client deposit or attorney statements about fees and costs are not a limitation on fees or any guarantee they will not exceed the deposit or estimate. Since this is an important provision, the attorney and client should initial it acknowledging their understanding and agreement.

- No Tax Advice (Par. 14)

Since many documents an attorney prepares may have significant tax implications, this paragraph provides the attorney has not been retained to give tax advice and the client should consult with tax advisors regarding the matter. This paragraph should be deleted when the client hires the attorney to provide tax advice.

- Construction Clauses (Par. 15-18)

Paragraphs 15-18 are standard provisions concerning the construction of the agreement.

B. Form No. 2: Hourly Non-Litigation

The Instructions and Comments concerning the Hourly Litigation Sample Agreement apply to the Hourly Non-Litigation Sample with the following exceptions:

- Scope of Services (Par. 2)
The references to litigation services are deleted.
- Client's Duties (Par. 3)
The references to legal proceedings are deleted.
- Deposit (Par. 4)
The references to trial and arbitration are deleted.
- Legal Fees (Par. 5)
The references to litigation fees are deleted.
- Costs and Other Charges (Par. 6)
The references to litigation costs are deleted.
- Other Costs and Fees (Par. 7)
The paragraph entitled "Other Costs and Fees" is deleted.

C. Form No. 3: Contingency

The Instructions and Comments concerning the Hourly Litigation Sample Agreement apply to the Contingent Fee Agreement with the following exceptions:

- Scope of Services (Par. 2)

This paragraph excludes the defense of the client in any matter and the representation of the client on a cross-complaint or cross-claim.

- Legal Fees (Par. 4)

This paragraph complies with the statutory requirements of Business and Professions Code Section 6147, which governs contingent fee agreements. It also recites the attorney fee is based on the net recovery depending on the stage at which the settlement or judgment is reached. Since the amount of the fee is subject to negotiation, this provision can be changed. The optional clauses document contains other arrangements. The paragraph also addresses the situation where the Court orders another party to pay the client's attorney's fees and costs. It recites that the award is considered part of the client's recovery. Finally, the paragraph lists eleven (11) factors from Rule of Professional Conduct 4-200 that are considered when determining whether an attorney is entitled to a fee when the attorney fails to comply with the requirements of Section 6147, when the attorney is discharged or when the attorneys withdraws with justifiable cause.

- Negotiability of Legal Fees (Par. 5)

Business and Professions Code Section 6147 requires this provision.

- Costs and Litigation Expenses (Par. 6)

This paragraph requires the client to pay for the costs of litigation and lists various costs which can be charged. It also states that any award of fees and costs as a discovery or other sanction or under a contract or statute shall belong to the attorney. If the Court assesses monetary sanctions against the client for bad faith, this provision states the client must pay the sanction.

- Lien (Par. 10)

This paragraph provides the attorney has a lien on all claims that are the subject of the attorney's representation. While under current law an attorney's lien in a contingency fee agreement (in contrast to an hourly engagement or a combination of hourly and contingency) is not an adverse interest as defined in Rule of Professional Conduct 3-300, it is recommended that the paragraph

recite the client may wish to seek the advice of an independent attorney before agreeing to this provision. It is also recommended that both client and attorney should initial this paragraph to acknowledge their understanding.

IV. OPTIONAL CLAUSES AND DISCLOSURE FORMS

A. Optional Clauses

There are many additional clauses an attorney may include in the fee agreement. Below is a compilation of additional clauses which are all optional. In addition, there are several disclosure forms an attorney may need to consider included in this section.

1. Arbitration Clause

An attorney may want to consult the firm's malpractice insurance carrier regarding its position on arbitration and particular arbitration provisions, including any award of attorney's fees.

The suggested clause is appropriate for binding arbitration of all claims other than fee disputes which are subject to non-binding arbitration under Business and Professions Code Sections 6200, *et seq.* The agreement provides for full disclosure to the client of the ramifications of those choices and the comparative advantages and disadvantages of other alternatives. This clause advises the client of the right to have an independent attorney review.

2. Mediation Clause

This is an optional clause. Under Business and Professions Code Section 6200, a mediation option may be offered to the parties after the attorney or client files a request for fee arbitration with some local bar association or the State Bar fee arbitration programs.

The attorney may want to consider this in determining whether to include a pre-filing mediation clause such as the suggested clause.

3. Interest Clause

It is legally and ethically proper to charge interest on fees. If the attorney elects to do so, this clause provides appropriate language. Please keep in mind that interest, if charged, must be reasonable so as not to violate either the prohibition against unconscionable fees nor the usury provisions of the California Constitution. A periodic interest rate that does not exceed 10% per annum simple interest should not violate California's usury law. Generally, interest should begin running only after a certain specified period, i.e., thirty, sixty or ninety days after the billing invoice is rendered, if not paid within that time.

4. Replenishing Deposit

This is an alternative to Par. 4 in Forms 1 and 2, and provides for an automatically replenishing deposit.

5. Attorneys' Fees

An attorneys' fees clause is permitted, except that attorneys' fees are not recoverable in fee arbitrations under Business and Professions Code Sections 6200, *et seq.* Further, an attorney may not usually recover fees for representing him or herself. If this clause and an arbitration clause are both used, the attorney's fee provisions should be the same. Inclusion of this clause should be cleared with the attorney's malpractice insurance carrier.

6. Other Payor—Insurance

This clause may be used when an insurance company pays for some or all of the client's attorney fees. It also provides that if the insurance company refuses to pay the fees or only pays some of the fees, the client is still responsible for payment.

7. Flat Fee

This clause is a suggested alternative to Paragraph 5 (Legal Fees and Billing Practices) where the work is being performed on a fixed fee basis.

8. Division of Contingency Fees

This clause is required under California Rules of Professional Conduct 2-200 if the attorney wants to associate another attorney who is not a member of his or her firm and will split the contingency fee with the other attorney. The associated attorney should sign the fee agreement or other writing acknowledging the fee division.

9. "Other Attorney"—Hourly

This clause is required under California Rules of Professional Conduct Rule 2-200. This clause may be appropriate where the attorney contemplates working with another attorney who is not a partner, associate or shareholder of the attorney. Charging associate counsel fees as a cost in an hourly fee case is appropriate, but is a suspect practice in contingency fee litigation. Separate sample clauses are therefore offered for hourly and contingency fee cases.

10. Payment of Referral

This clause is required under California Rules of Professional Conduct 2-200 and provides that the payment of the referral fee to the referring attorney will not increase the client's legal fees.

11. Lien—Hourly Fee Agreement

This clause satisfies the requirements set forth in the Supreme Court case, *Fletcher v. Davis* (2004) 33 Cal. 4th 61. In that case the court held an attorney who wishes to secure payment of

hourly legal fees and costs with a lien must comply with California Rules of Professional Conduct 3-300. That rule requires the attorney must advise the client in writing of the adverse consequences of the lien and advise the client of his or her right to obtain an independent attorney to review the lien provision before the client signs the fee agreement.

The attorney should have the client initial this clause.

12. Excluded Services

An attorney may limit or exclude certain services in the fee agreement and this clause provides for the exclusion. Under *Nichols v. Keller* (1993) 15 Cal. App. 4th 1672 the attorney must alert the client of the possible need to employ other counsel to handle the excluded services. Pursuant to *Meighan v. Shore* (1995) 34 CA 4th 1025, an attorney also must alert the client's spouse of a possible claim for loss of consortium and whether the attorney will be handling the loss of consortium claim.

13. Contingency Language Options

There are a variety of ways an attorney can represent a client in a contingent fee. These various clauses describe the various options including how the fee is paid, whether the client or the attorney advances cost and how it affects the client's recovery.

14. Consent to Use of E-mail and Cloud Services

This clause informs the client that attorney will communicate with e-mail and store electronic documents using cloud computing services.

B. Disclosure Forms

1. Third Party Payor Forms

A Third Party Payor agreement is appended. It can be used when someone other than the client pays the client's attorney's fees and costs. There is a selection to be made when completing the form. One selection allows an attorney to share information regarding the representation with the Third Party payor and the other selection prohibits sharing information.

2. Joint/Multiple Client Disclosure and Consent Form

This form may be appropriate for use when an attorney represents more than one individual/entity and wants to disclose potential conflicts of interest and obtain waivers.

V. CONCLUSION

These forms are disseminated in the hope that they will be useful to attorneys in their practice. Attorneys are urged to make alterations to these forms so that they conform to the attorney's practice and the needs and requirements of the attorney and clients, subject always to satisfying the statutory requirements for fee agreements and the Rules of Professional Conduct.