

**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
FORMAL OPINION INTERIM NO. 20-0003  
FLAT FEES AND TERMINATION**

**ISSUES:** What are the ethical obligations of attorneys representing clients pursuant to a flat fee agreement where the representation is terminated before the legal services specified in the agreement have been completed or where the scope or complexity of the matter turns out to be greater than the attorney and client contemplated?

- DIGEST:**
1. An attorney may agree to charge a flat fee for legal services but should clearly state what services are covered by the fee and when the fee or portion thereof is earned.
  2. If the flat fee is paid in advance of the services being rendered, the attorney may deposit the fee into the lawyer’s operating account if compliance with rule 1.15(b)<sup>1</sup> is met.
  3. Unearned funds, even if deposited into the operating account, are subject to being refunded if the representation is terminated and any of the services for which the fee has been paid are not completed.
  4. If a flat fee is renegotiated “midstream,” such renegotiation is subject to ethical scrutiny for fairness and reasonableness.

**AUTHORITIES**

**INTERPRETED:** Rules 1.5, 1.15, and 1.16 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6148.

**INTRODUCTION AND SCOPE**

As lawyers and clients explore alternatives to the traditional billable hour, agreements to charge a flat fee have become more common. A lawyer earns a flat fee by performing the services for which the fee was charged, based upon factors independent of the actual number of hours involved in the representation. Clients seeking flat fee agreements typically do so to

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<sup>1</sup> Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

avoid the uncertainty and potentially negative consequences of paying for legal services on an hourly basis.

Flat fee agreements can cover an entire matter or certain specific tasks within a matter based on factors independent of the actual number of hours involved, and is the maximum amount that will be charged for the services to be performed. (Rule 1.5(e).)

Flat fee agreements traditionally have been used in situations where the legal work is routine or the amount of legal work is predictable such as in certain criminal defense and bankruptcy cases, uncontested divorces, estate planning, certain transactional matters such as purchase agreements and the formation of business entities, and the preparation of wills, trusts, and immigration documents. Flat fees also can address other potential issues with hourly billing, including bill padding, multiple attorneys working on the case, and billing for in-house conferences. (See State Bar Mandatory Fee Arbitration Program Arbitration Advisory No. 2016-02.)

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.

Because a flat fee does not depend on the amount of time spent in connection with the legal representation, questions also can 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.

#### **A. Treatment of Flat Fees before Adoption of the Current Rules of Professional Conduct**

The California Rules of Professional Conduct in effect prior to November 1, 2018, did not specifically address flat fees or whether fees paid in advance of services being provided had to be deposited into a client trust account and courts were divided on the issue.<sup>2</sup> Flat fee agreements often stated that the fee paid in advance was fully earned when paid and that it was nonrefundable. Those types of provisions frequently resulted in fee disputes where the lawyer was terminated or did not provide all of the services required under the agreement but then refused to refund any portion of the fee. (See, *In re Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923 [provision in flat fee agreement that the fee was a “fixed, non-refundable retaining fee” was not a true retainer fee, and attorney’s failure to promptly refund

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<sup>2</sup> In *Baranowski v. State Bar* (1979) 24 Cal.3d 153 [154 Cal.Rptr. 752], the Supreme Court declined to resolve the question of whether an advance fee payment had to be deposited into an attorney’s client trust account. In *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1 [56 Cal.Rptr.2d 41], the court held, pursuant to former rule 4-100, that an advance fee must be deposited into an attorney’s trust account, and that the attorney’s failure to segregate the advance fee from the attorney’s general funds constituted a breach of fiduciary duties.

any unearned part of the advanced fee upon the termination of his services was a willful violation of former rule 3–700(D)(2)].)

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

The current rules, effective November 1, 2018, address flat fees and nonrefundable advance payments of fees, and have clarified issues surrounding flat fees in several ways. Rule 1.5(e) provides that a lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. The rule 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.”

Rule 1.5(d) states that a lawyer may not “make an agreement for, charge, or collect a fee that is denominated as ‘earned on receipt’ or ‘nonrefundable, or in similar terms’ unless the fee is a “true retainer.” 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.”

Rule 1.15(a) also makes clear that an advance payment of fees must be deposited into a trust account unless the requirements of rule 1.15(b)(2) are met, including that “(1) the lawyer or 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.” (Rule 1.15(b)(1).) Rule 1.15(b)(2) states that if the flat fee exceeds \$1,000, the client’s agreement to deposit the flat fee in the lawyer’s operating account and the disclosures required by paragraph (b)(1) must be set forth in a writing signed by the client.

In addition, rule 1.16(e)(2) provides that a lawyer shall promptly refund any part of a fee that is not earned upon termination of the representation. Further, Comment [3] to rule 1.15 states that the option to deposit a flat fee paid in advance into a lawyer or law firm’s operating account does not alter the lawyer’s obligation under rule 1.15(d) or the lawyer’s burden to establish that the fee has been earned. Comment [4] to rule 1.5 cites rule 1.16(e)(2) and states that when the lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. Accordingly, if a lawyer’s services are terminated before the contracted services have been completed, or the lawyer otherwise fails to complete the services, the lawyer must refund any unearned portion of the fee irrespective of whether the advance flat fee has been deposited into the lawyer’s operating account.

## **DISCUSSION**

In any attorney-client relationship, attorneys providing services under a flat fee agreement have duties of competence and diligent representation. (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 giving rise to concerns regarding the duties of diligence and competence.

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, what portion of the fee is refundable if the representation is terminated or the lawyer does not complete the specified services, and under what circumstances the flat fee may be renegotiated.

**A. Disclosure of the Risks of Depositing an Advance Payment of a Flat Fee into the Lawyer's Operating Account**

Where a flat fee is paid in advance of the performance of legal services, the default rule is that the fee must be deposited into the lawyer or law firm's trust account until the fee is earned. (Rule 1.15(a).) However, rule 1.15(b)(1) provides that a flat fee paid in advance may be deposited into the lawyer or law firm's operating account provided the lawyer or law firm disclose to the client in writing that the client has the right to have the flat fee deposited into a trust account until it is earned and 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 have not been completed.

Although rule 1.15(b) allows a flat fee paid in advance to be deposited into the lawyer's operating account when the rule 1.15(b) written disclosures are provided to the client and, if over \$1,000, signed by the client, the flat fee is not earned until services have been completed and hence remains the property of the client. However, implicit in the authorization to deposit a flat fee paid in advance into an operating account is that the lawyer may spend that money even though some or all of the fee may be subject to refund if the representation is terminated or the agreed-upon services have not been completed.

Thus, there is some risk to the client and an ethical concern for the lawyer when the lawyer is terminated before the services are completed and may be unable to timely refund all or a portion of the advance payment either because the funds are spent or may have become unavailable because they may have been attached by the lawyer's creditors. However, rule 1.15(b) is silent as to whether a lawyer or law firm is required to disclose such potential adverse consequences if the flat fee is not deposited into a trust pending completion of the work and the fee is earned.

While rule 1.15(b) does not use the terms "consent" or "informed written consent," implicit in the requirement that the client signs 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 and thus assumes the inherent risks of the attorney not depositing the funds in the trust account until the fee is fully earned. In the absence of disclosure, a client may not understand the potential consequences of depositing a flat fee paid in advance into the lawyer or law firm's

operating account, such as being treated as the property of the attorney issues and that may arise involving the enforceability of the contract or compliance with rule 1.15(b).

## **B. When a Flat Fee is Earned**

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 [100 Cal.Rptr. 385]; *In Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989.) The current rules make it explicit that with the sole exception of a true retainer, all attorney's fees paid in advance 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).) Thus, any fee agreement entered into under the current rules, effective November 1, 2021, that includes a provision stating that a flat fee is nonrefundable or fully earned on receipt violates rule 1.5(d) and may constitute deceit or an intentional misrepresentation under rule 8.4(c).

While the current rules are clear that a flat fee paid in advance is not earned on receipt, the rules do not provide guidance as to when a flat fee, or portion thereof, is earned or how to calculate the amount of an unearned fee which must be refunded if the lawyer's services are terminated or all of the agreed-upon services otherwise are not completed. However, 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 is 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 No. 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 the comparison of the fee charged to the 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 they paid for. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1002 [39 Cal.Rptr.2d 506].) However, a reasonable fee may never exceed the contract fee. (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287 [256 Cal.Rptr. 209].) Thus, in the flat fee scenario, where the representation terminates before all of the services have been completed, the maximum the attorney can recover is the specified flat rate fee.

**C. When and in What Amount Must Any Unearned Portion of a Flat Fee Be Refunded**

Comment [2] to rule 1.15 states: “Subject to rule 1.5, a lawyer or law firm may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.” This comment suggests that a lawyer and client may agree to a method for determining when a flat fee is earned and the amount of an unearned fee that must be refunded if services in the flat fee agreement are not completed before the termination of the lawyer’s services. However, any such provision in a fee agreement must not be unconscionable under rule 1.5, should be proportionate to the reasonable value of the lawyer’s services, and should not adversely impact the client’s right to terminate their attorney.

Business and Professions Code section 6148 should be considered in connection with a provision in a fee agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account. Section 6148, subdivision (a)(1) requires that the fee agreement state the “basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.” Section 6148, subdivision (b) applies to bills and requires that “bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis for calculation, or other method of determination of the attorney’s fees and costs.” When applied to a flat fee agreement which provides that the fee will be paid in advance of services being rendered, with the exception of a flat fee for a single specific service, Business and Professions Code section 6148 subdivisions (a) and (b) may require that the fee agreement set forth when the fee is earned and how any refund will be calculated.

In the absence of an agreed-upon method, the amount of the unearned fee that must be returned if the representation terminates before the legal services are completed will depend on a several 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 1.5(b).)

Under a flat fee agreement where the representation terminates before all of the services have been completed, several approaches may be used to determine the amount of an unearned fee, including benchmarks or milestones that specify when a portion of the fee is earned. Under this approach, the fee agreement may include milestones based on the completion of specified tasks, or other mutually agreed-upon factors.<sup>3</sup> However, because the terms of the agreement must be reasonable and fully explained to the client, milestones that provide for front-loading the entitlement to fees are subject to scrutiny. In addition, a milestone-based solely on the

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<sup>3</sup> Milestones have been approved by ethics opinions and case authorities from other jurisdictions. See San Diego County Bar Association Ethics Opinion No. 2019-03, p.5; *In the Matter of Gilbert* (2015 Colo. Supreme Court) 346 P.3d 1018, 1027; *In re Mance* (2009 Dist. of Columbia) 980 A.2d 1196, 1204; District of Columbia Bar Ethics Opinion No. 355 (2010); Utah State Bar Ethics Opinion No. 2012-02.

passage of time may be unreasonable 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.

**D. Ethical Concerns regarding Renegotiation of a Flat Fee Agreement during 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 a lawyer must comply with rule 1.8.1 before negotiating a modification of a fee agreement with an existing client. Whether former rule 3-300 or current rule 1.8.1 applies to the renegotiation of a fee agreement during the representation in general, and a flat fee agreement in particular, has not specifically been addressed in prior California State Bar ethics opinions. In 2008, the Committee on Professional Responsibility and Conduct issued a proposed opinion regarding the ethical ramifications associated with modification of an attorney fee agreement (Proposed Formal Opinion Interim No. 05-0001). The committee concluded that rule 3-300 would not apply to a modification of a fee agreement unless the agreement conferred 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 would be subject to close scrutiny and must be fair, reasonable, and fully explained to the client. However, the Board of Trustees Committee on Regulations, Admissions, and Discipline did not approve the proposed opinion. Nevertheless, 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>4</sup>

State Bar of Texas Ethics Opinion No. 679 (2018) considered 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 State Bar of Texas 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 committee concluded that it is the lawyer's burden to prove fairness and

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<sup>4</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.

depends 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 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 committee further concluded that its version of the rule regarding business transactions with a client did not apply to renegotiating a flat fee agreement but noted the general principle that all transactions between a lawyer and client should be fair and reasonable to the client.

Similarly, Utah State Bar Ethics Advisory Opinion No. 20-01 (2000) addressed 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 committee concluded that renegotiation of a flat fee agreement was not permitted unless the lawyer complied with rule 1.8(a) of the Utah Rules of Professional Conduct.<sup>5</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 foreseeable or contemplated by the lawyer and the client as included in the original scope of work agreed upon by the parties in the original fee agreement. The committee also noted that its opinion would be altered where the client misrepresented the facts or issues or there was a mutual mistake of fact.

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 midstream renegotiation of a flat fee agreement which requires that the client pay more than under the terms of the original agreement presents different considerations. In most cases, the attorney will be in a 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 seeks to increase the flat fee, the client may not want to change representation and feel compelled to agree to the higher fee and is, therefore, at a disadvantage in negotiating with their attorney. In addition, if the attorney threatens to withdraw because the client does not agree to the increase, depending upon the reasons for the requested increase, the foreseeability of those reasons, the amount requested, and the sophistication and relative bargaining strengths of the parties involved, among other factors, such a threat may subject the attorney to ethical scrutiny under rule 1.16.

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<sup>5</sup> Utah Rule 1.8(a) is substantively the same as California's rule 1.8.1, which governs business transactions with a client and pecuniary interests adverse to a client.



## CONCLUSION

An attorney may agree to charge a flat fee for legal services but should clearly state what services are covered and when the fee or portion thereof is earned. If the flat fee is paid in advance of the services being performed, the attorney may deposit the fee into the lawyer's operating account if the requirements of rule 1.15(b) are met.

If all or any portion of the services are not performed by the attorney, any portion of an advance payment for those unperformed services must be refunded to the client. Where the value of each discrete task is agreed upon between the attorney and the client, the amount agreed upon must be refunded if the task is unperformed by the attorney. Where no such agreement is in place, the value of each unperformed task that must be refunded will be determined by several factors, including fairness and the reasonable expectations of the client.

Where a flat fee agreement is renegotiated during the representation, whether and to what extent the requested midstream increase will be fully enforceable will depend upon several factors including the foreseeability of the factors upon which the requested renegotiation is made and whether such renegotiation is fair and reasonable to the client.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.