

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

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 must clearly state what services are covered by the fee and should clearly state 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) is met.
 3. If the representation is terminated and any of the services for which the flat fee has been or will be paid are incomplete, then the lawyer must determine the appropriate amount to be charged and must refund any advanced unearned funds, even if deposited into the operating account.
 4. If a flat fee is renegotiated “midstream,” a lawyer should comply with rule 1.8.1 and such renegotiation is subject to ethical scrutiny for fairness and reasonableness.

AUTHORITIES

INTERPRETED: Rules 1.5, 1.8.1, 1.15, and 1.16 of the Rules of Professional Conduct of the State Bar of California.¹

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 are 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 avoid the

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

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. Specifically, a “flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.” (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, formation of business entities, and preparation of wills, trusts, and immigration documents. The use of a flat fee arrangement may also avoid other potential issues with hourly billing, such as bill padding, multiple attorneys working on the case, and billing for in-house conferences. (State Bar Mandatory Fee Arbitration Program Arbitration Advisory No. 2016-02.)

However, flat fee agreements may cause tension in the attorney-client relationship 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, and can lead to fee disputes, possible conflicts, and other ethical concerns. In addition, flat fees paid in advance, whether placed in the attorney’s trust account or operating account, are not earned until the service is or services are fully performed, and thus subject to refund to the client to the extent they may not be completed. (Rule 1.15(b)(ii); see also, *Nicholas Dickson v. Mann* (2024) 103 Cal.App.5th 935, 948 [323 Cal.Rptr.3d 481].)

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

Rule 1.5, paragraph (e) provides that a lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. As noted above, 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, paragraph (d) states that a lawyer may not “make an agreement for, charge, or collect a fee that is denominated as ‘earned on receipt’ or ‘non-refundable,’ or in similar terms” unless the fee is a “true retainer.” Rule 1.5(d) 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, paragraph (a) also makes clear that an advance payment of fees must be deposited into a trust account unless the requirements of rule 1.15, paragraph (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, paragraph (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, paragraph (d) or the lawyer’s burden to establish that the fee has been earned. Comment [3] to rule 1.5 cites rule 1.16, paragraph (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. (Rule 1.5(a) & (b).) Where the flat fee is paid in advance, such 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. Required Disclosures for 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.²

Rule 1.15, paragraph (b) allows a flat fee paid in advance to be deposited into the lawyer's operating account when rule 1.15(b) written disclosures are provided to the client and, if the flat fee is over \$1,000, the disclosures are agreed to by the client in writing. However, the flat fee is not earned until services have been completed and hence remains the property of the client. Further, implicit in the client's authorization to deposit a flat fee paid in advance into an operating account is the risk 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.

B. Refunds of Unearned Portions When There is a Flat Fee Agreement

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 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 that 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.

² If a lawyer is terminated before the services are completed, there is some risk that the lawyer 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, for example, because they may have been attached by the lawyer's creditors. This opinion does not address the disclosure of such risks.

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 the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989.) The 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. (Rules 1.5(d) and 1.16(e)(2).) Thus, any fee agreement entered into 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 rules 8.3, paragraph (a) or 8.4, paragraph (c).

Under a flat fee agreement where the flat fee is paid in advance and representation terminates before all 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.³ 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 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.

San Diego County Bar Association Ethics Opinion No. 2019-3 considered the question of how the amount of the unearned fee due to the client should be calculated where the fee agreement provides for a flat fee paid in advance and the lawyer does not complete all services required under the flat fee agreement. The committee concluded that in the absence of an agreed-upon method, the amount of unearned fee that must be returned will depend on a number of factors similar to the factors used in the evaluation of whether the fee paid to the lawyer represents the reasonable value of the lawyer's services and is not unconscionable. (See rule 1.5(b).) The committee examined refunds based on time and labor (lodestar method) as well as a milestones/benchmark approach. The committee concluded that the lodestar method may raise unconscionability concerns whereas the milestones approach was consistent with rule 1.5 and thus permissible. The committee agrees with the San Diego County Bar

³ Milestones have been approved by ethics opinions and case authorities from other jurisdictions. (San Diego County Bar Ass'n Ethics Opn. No. 2019-03, p.5; *In the Matter of Gilbert* (Colo. 2015) 346 P.3d 1018, 1027; *In re Mance* (D.C. 2009) 980 A.2d 1196, 1204; District of Columbia Bar Ethics Opn. No. 355 (2010); Utah State Bar Ethics Advisory Opn. No. 2012-02.)

Association's position and advises that a lawyer should clearly state when the fee or portion thereof is earned based on milestones.

C. Refunds of Unearned Portions in the Absence of a Flat Fee Agreement

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 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).)

While the 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 occurs when the attorney's services are terminated before all the work is completed. This can arise when a client exercises their right to terminate the lawyer's services, or when 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 unconscionable or illegal 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; *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 [39 Cal.Rptr.2d 506].) 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 agreed in writing to the fee after receiving disclosure (rule 1.5(b)(13)). As described by one court, the question is whether the client got what they paid for. (*Shaffer*, at p. 1002.) However, a fee amount that complies with rule 1.5(a) 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 the services have been completed, the maximum the attorney can recover is the specified flat rate 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 State Bar of California ethics opinions. Nevertheless, it is the committee's position that, where the lawyer obtains a pecuniary interest adverse to the client as a result of the renegotiation, the lawyer must comply with rule 1.8.1.⁴

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 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.

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.⁵ 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.

⁴ 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 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.

⁵ 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.

The committee agrees with Utah's position that renegotiation of a flat fee agreement requires compliance with rule 1.8.1. 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.

CONCLUSION

An attorney may agree to charge a flat fee for legal services but must clearly state what services are covered and should clearly state 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 unearned portion of an advance flat fee 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 agreed-upon amount must be refunded if the task is not performed by the attorney. Where no such agreement is in place, the value of each unperformed task that must be refunded will be determined by quantum meruit and 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 whether the lawyer complies with rule 1.8.1, the foreseeability of the factors upon which the requested renegotiation is made, and whether such renegotiation is fair and reasonable to the client. The flat fee must also not be unconscionable.

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.