

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2026-210**

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 after compliance with rule 1.15(b).
 4. If a flat fee agreement is modified "midstream," a lawyer must comply with rule 1.8.1 and must consider ethical 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 billing practices, agreements to charge a flat fee are becoming 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

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.

avoid the uncertainty and potentially negative consequences of paying for legal services on an hourly basis.²

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 common billing disputes. (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 services are fully performed, and thus subject to refund to the client to the extent they may not be completed. (Rule 1.15(b)(1)(ii); see also, *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 can also 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 1.16, 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

² In recent years, the use of flat fee arrangements has expanded beyond traditional settings and is increasingly being adopted by large law firms. This shift is driven in part by the proliferation of advanced legal technologies, which help firms to more accurately predict the scope and complexity of legal work, thereby facilitating the structuring of flat fee agreements even for complex matters.

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

A flat fee rewards efficiency, but an attorney who underestimates the time necessary to perform the specified services might seek to cut corners, giving rise to concerns regarding the duties of diligence and competence. 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 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 modified.

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 client 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 discloses to the client in writing that the client has the right to have the flat fee deposited into an identified 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.³ However, the flat fee is not earned until services have been completed and hence remains the property of the client.

B. Refunds of Unearned Portions When There is an Agreed-Upon Method (e.g., Milestones) in 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 clarifies that a lawyer and client may agree in advance to a method for determining when a flat fee is earned and the amount of an unearned fee that must be refunded if services included under 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

³ 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.

be unconscionable under rule 1.5 and must not adversely affect the client's right to terminate their attorney.

Business and Professions Code section 6148 must be considered when establishing 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 states 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." Except when a flat fee is intended as compensation for a single specific service, the Committee believes that a flat fee that is to be paid in advance may require a provision in the fee agreement that sets forth when the fee is earned and how any refund will be calculated, in accordance with Business and Professions Code section 6148, subdivisions (a) and (b).

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)⁴ 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, at least two 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.⁵ However, milestones that provide for front-loading a lawyer's entitlement to fees will likely be subject to extra scrutiny. In addition, a milestone based solely on the passage of time may be considered unreasonable as it is not specifically tied to the performance of services.

⁴ 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 '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."

⁵ Milestones have been approved by a local California bar association and 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.)

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, similar to an analysis of *quantum meruit*. 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.

Similarly, 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 Bar Association examined refunds based on time and labor (lodestar method) and concluded that the lodestar method may raise unconscionability concerns. Whereas they concluded the milestones approach was consistent with rule 1.5 and thus permissible. This committee agrees with the San Diego County Bar Association. A lawyer should clearly state when the fee or portion thereof is earned based on milestones. Further, this will comply with the requirement of Business and Professions Code section 6148, subdivisions (a) and (b), discussed above.

Given the complexities and variations of flat-fee arrangements, it is difficult to designate one exclusive approach. When both parties enter into the agreement, the lawyer should come to a reasonable understanding with the client in determining how a portion of the flat fee is to be deemed earned if the representation terminates before the services included in the agreement are completed. If the agreement is silent on this issue and a reasonable understanding on determining the earned portion cannot be reached with the client, it may be best left to an arbitrator or a court (through an interpleader) to resolve the dispute.

C. Refunds of Unearned Portions of a Flat Fee in the Absence of an Agreed Upon Method

In the absence of an agreed-upon method, San Diego County Bar Association Ethics Opinion No. 2019-3 concluded that 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 evaluating whether the fee paid to the lawyer represents the reasonable value of the lawyer's services and is not unconscionable. (Rule 1.5(b).) This is further supported by the Mandatory Fee Arbitration Advisory No. 2025-01, which notes that determining the reasonableness of a contested fee is analyzed through former rule 4-200(b) (now rule 1.5(b)) factors.

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 based on *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. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 786 [100 Cal.Rptr. 385].)

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. 2025-01, p.3; *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 [39 Cal.Rptr.2d 506].) As noted in Advisory 2025-01, the factors considered under 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, 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 according to the flat fee agreement.⁶

D. Ethical Concerns Regarding Modification of a Flat Fee Agreement during the Representation

Another issue is whether an attorney can modify 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 this committee's opinion that a lawyer must comply with rule 1.8.1 before negotiating a modification of a fee agreement with an existing client. As such, where the lawyer modifies the flat fee agreement during the representation, it would be prudent for the lawyer to comply with rule 1.8.1.⁷

State Bar of Texas Ethics Opinion No. 679 (2018) considered whether a lawyer may modify 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 modification could have been anticipated at the outset of the representation and the

⁶ The pro rata contract price should control even where it exceeds the otherwise reasonable value of the services, since the parties' agreement is the best evidence of what the reasonable value of the services is. (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287 [256 Cal.Rptr. 209].)

⁷ 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.

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 the original fee amount, including the possibility that the fixed fee might not be adequate to compensate the lawyer when compared to other fee arrangements, and that the lawyer is not simply modifying the amount that, in hindsight, is no longer adequate. 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 modify the terms of a flat fee agreement if, after commencing the representation, the circumstances, scope, or complexity of the matter become materially different and greater from what the lawyer unilaterally contemplated at the commencement of the representation. The committee concluded that modification of a flat fee agreement was not permitted unless the lawyer complied with rule 1.8, paragraph (a) of the Utah Rules of Professional Conduct.⁸ 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.

The committee agrees with the Utah Ethics Opinion that modification 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 modification of a flat fee agreement that requires 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. (*Alderman v. Hamilton* (1988) 205 Cal.App.3d 1033, 1037 [252 Cal.Rptr. 845, 848] (internal citation omitted)).

⁸ 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.

PRACTICAL GUIDANCE

While no required language can provide all the necessary information, the committee believes the following practical guidance may aid attorneys in ensuring clear communications about their fees. Attorneys who offer services under flat fee arrangements should be mindful of the examples provided above to ensure that their fee agreements are clear.

- Define the scope and limitations of the services being undertaken under the flat fee. This will help set expectations and guide the attorney in how to estimate the time involved.
- Explain if any additional services would be available outside of the flat fee, what the charge would be, and how to determine if a client has authorized such work (*i.e.*, in writing).
- Consider setting out milestones that will be met, and how they impact the earning of the fee. For example, once a certain document is filed, 25% of the fee is earned, or once the application is completed, a \$5,000 fee has been earned.
- It may also be helpful to discuss the lawyer's ability to obtain *quantum meruit* if the lawyer is terminated prior to completion of a milestone. A lawyer may benefit from tracking time expended in performing services to help explain the value of services expended in such cases.
- Set clear timelines and goals, including how often the client should expect communications or updates.

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, as is required by Business and Professions Code section 6148. 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, paragraph (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* based on several factors, including fairness and the reasonable expectations of the client.

Where a flat fee agreement is renegotiated during the representation, it is the opinion of the committee that the lawyer must comply with rule 1.8.1. Finally, 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.