DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-200

Lead Drafter: Martinez
Co-Drafters: Brown, Clinch, Eaton
Meeting Date: September 25 – 26, 2015

I. CURRENT CALIFORNIA Rule

Rule 4-200 Fees for Legal Services

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

(1) The amount of the fee in proportion to the value of the services performed.

(2) The relative sophistication of the member and the client.

(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.

(5) The amount involved and the results obtained.

(6) The time limitations imposed by the client or by the circumstances.

(7) The nature and length of the professional relationship with the client.

(8) The experience, reputation, and ability of the member or members performing the services.

(9) Whether the fee is fixed or contingent.

(10) The time and labor required.

(11) The informed consent of the client to the fee.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

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III. PROPOSED RULE (CLEAN)

Rule 4-200 [1.5] Fees and Expenses for Legal Services

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal internal expense.

(b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the fee involves an element of fraud or overreaching by the lawyer in negotiating or setting the fee that would amount to a practical appropriation of the client's funds because there has been, or the lawyer has failed to disclose material facts. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.

(c) The factors to be considered in determining the unconscionability of a fee or internal expense include without limitation the following:

(1) the amount of the fee or internal expense in proportion to the value of the services performed;

(2) the relative sophistication of the lawyer and the client;

(3) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(5) the amount involved and the results obtained;

(6) the time limitations imposed by the client or by the circumstances;

(7) the nature and length of the professional relationship with the client;

(8) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(9) whether the fee is fixed or contingent;

(10) the time and labor required;

(11) whether the client gave informed consent to the fee or internal expense.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the

securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing after disclosure that the client may not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not as compensation for legal services performed or to be performed.

(f) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services as long as the lawyer performs the agreed upon services. A flat fee is a fee which constitutes complete payment for legal fees to be performed in the future for a fixed sum 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.

Comment

Unconscionability of Fee

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

Basis or Rate of Fee

[2] In many circumstances, Business and Professions Code, sections 6147 and 6148 govern what a lawyer is required to include in a fee agreement.

Prohibited Contingent Fees

[3] Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under child or spousal support or other financial orders.

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Paragraph (f) Requirement of a Writing in an Emergency

[4] A lawyer may not be able to comply with the disclosure and writing requirements of paragraph (f) before the lawyer renders legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client. In such situations, the lawyer must comply with paragraph (f) as soon as practicable after the legal services have been provided.

Payment of Fees in Advance of Services

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

Division of Fee

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

IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 4-200)

Rule 4-200 [1.5] Fees and Expenses for Legal Services

(~~A~~a) A ~~member~~lawyer shall not ~~enter into~~make an agreement for, charge, or collect an ~~illegal or~~ unconscionable or illegal fee or an unconscionable or illegal internal expense.

(~~B~~b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the fee involves an element of fraud or overreaching by the lawyer in negotiating or setting the fee that would amount to a practical appropriation of the client's funds because there has been, or the lawyer has failed to disclose material facts. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. ~~Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:~~

(c) The factors to be considered in determining the unconscionability of a fee or internal expense include without limitation the following:

(1) ~~The~~the amount of the fee or internal expense in proportion to the value of the services performed~~.~~;

(2) ~~The~~the relative sophistication of the ~~member~~lawyer and the client~~.~~;

(3) ~~The~~the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly~~.~~;

(4) ~~The~~the likelihood, if apparent to the client, that the acceptance of the particular

employment will preclude other employment by the ~~member.~~ lawyer;

(5) ~~The~~the amount involved and the results obtained~~.~~;

(6) ~~The~~the time limitations imposed by the client or by the circumstances~~.~~;

(7) ~~The~~the nature and length of the professional relationship with the client~~.~~;

(8) ~~The~~the experience, reputation, and ability of the ~~member or members~~lawyer or lawyers performing the services~~.~~;

(9) ~~Whether~~whether the fee is fixed or contingent~~.~~;

(10) ~~The~~the time and labor required~~.~~;

(11) ~~The~~whether the client gave informed consent ~~of the client~~ to the fee or internal expense.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing after disclosure that the client may not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not as compensation for legal services performed or to be performed.

(f) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services as long as the lawyer performs the agreed upon services. A flat fee is a fee which constitutes complete payment for legal fees to be performed in the future for a fixed sum 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.

Comment

Unconscionability of Fee

[1] Paragraph (a) requires that lawyers charge fees that are not unconscionable or illegal under the circumstances. An illegal fee can result from a variety of circumstances, including when a lawyer renders services under a fee agreement that is unenforceable as illegal or against public

policy, (e.g., *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] [fee agreement with other lawyer entered under threat of withholding client file]), when a lawyer contracts for or collects a fee that exceeds statutory limits (e.g., *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829; *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 [fees exceeding limits under Bus. & Prof. Code, § 6146]), or when an unlicensed lawyer provides legal services. E.g., *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304]; *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896.

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[3] Paragraph (d)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under child or spousal support or other financial orders.

Paragraph (f) Requirement of a Writing in an Emergency

[4] A lawyer may not be able to comply with the disclosure and writing requirements of paragraph (f) before the lawyer renders legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client. In such situations, the lawyer must comply with paragraph (f) as soon as practicable after the legal services have been provided.

Payment of Fees in Advance of Services

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

Division of Fee

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

V. PUBLIC COMMENTS SUMMARY

- **Susan Lea (May 1, 2015)**

  By way of examples, commenter expressed concern over attorney conduct related to fees, including retaining fees without performing work, refusing to allow fee contract review, advising clients not to pay prior attorney liens, and failing to communicate with prior attorneys regarding fees owed.

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VI. OCTC / STATE BAR COURT COMMENTS

A. Jayne Kim, OCTC, 9/2/2015:

1. California uses the term "unconscionable" in rule 4-200, regarding prohibited legal fees. Most other jurisdictions use the term "unreasonable." California should adopt the "unreasonable" standard. Business and Professions Code, sections 6147 and 6148, also use the term "reasonable fee."

2. The term "unconscionable" is archaic and has been interpreted to permit the charging and collection of a fee that is unreasonable, as long as it is not shockingly so. Case law, however, requires that "[a]ttorney fee agreements ... be fair, reasonable and fully explained to the client." (In the Matter of Kroff (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851.) These requirements are sound and should be incorporated into rule 4-200.

3. OCTC supports amending the rule to prohibit unreasonable expenses. Model Rule 1.5 and many other jurisdictions currently prohibit unreasonable expenses.

4. This rule, or rule 3-700, should explain the meaning of a "true retainer" and prohibit lawyers from charging non-refundable fees. A true retainer is a fee paid to secure a lawyer's availability over time. Such a fee can be non-refundable because the fee is earned by the lawyer making himself or herself available, not by performing legal services. Fees paid in advance for the performance of legal services, however, must be refunded if the legal services are not performed. Flat fees also must be earned by performing services.

5. Modification of fee agreements should require compliance with rule 3-300 regarding adverse interests. A lawyer holds a position of trust and has a fiduciary duty vis-a-vis his or her client. Compliance with rule 3-300 will help prevent lawyers from abusing their position and overreaching when renegotiating a fee agreement.

6. OCTC is not in favor of cross-referencing Business and Professions Code, sections 6147 and 6148. Instead, rule 4-200 should state that a lawyer may be disciplined for failing to have a written fee agreement with the client. Written fee agreements protect the public and are part of a lawyer's duty to communicate significant developments relating to his or her employment.

7. Rule 4-200 would provide greater guidance if it added additional factors to the list of criteria to be analyzed, set forth in subsection (c). Additional factors could include whether the fee involves an element of fraud or overreaching by the lawyer; whether the client consented to or authorized the legal service; whether the lawyer fully explained the fee agreement to the client and/or the client understood the terms of fee agreement; and whether the lawyer charged the client for clerical or non-legal services at the same rate as legal services.

B. RUSSELL WEINER, OCTC, 6/15/2010:

Rule 1.5 Fees for Legal Services

1. Unconscionable Fees. OCTC still prefers the ABA's language for this rule. Further, OCTC remains opposed to any attempt to specifically define the term "unconscionability" in subsection (b) of proposed rule 1.5. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (In the Matter of Berg (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by a list of facts set forth in subsection (c) of proposed rule 1.5.

2. However, we urge the Commission to consider adding additional factors to the list set forth in subsection (c). Those additional factors are (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see Herrscher v. State Bar (1935) 4 Cal.2d 399, 403; In the Matter of Van Sickle (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see Herrscher v. State Bar, supra, 4 Cal.2d at 403); (3) whether the client consented or authorized the legal service (see In the Matter of Connor (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 93, 104); (4) whether the attorney fully explained the fee agreement to the client and/or the client understood the terms of fee agreement (see In the Matter of Kroff(Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851; In the Matter of Van Sickle (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980); and (5) whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging the same fee for these non-legal services at the legal services rate. (See e.g. In re Green (Co. 2000) 11 P.3d 1078 [charging lawyer's rate for faxing documents, etc]; Prof'! Ethics & Conduct of Iowa State Bar v. Zimmerman (Iowa 1991) 465 N.W.2d 288 [lawyer charged full hourly rate for attending ward's birthday party and discussing toiletry needs]; Cincinnati Bar Ass 'n v. Alsfelder (Ohio 2004) 816 N.E.2d 218 [charging for discussions and advice about boyfriends, vehicles, and restaurants].)

3. The Commission may want to state in the rule that the factors set forth in subsection (c) are not exclusive. At least one appellate court has expressed some uncertainty on this issue. (See *Shaffer v. Superior Court* (1995) 33 Cal.App.41 h 993, 1003.) Although this is stated in Comment 1B, OCTC believes it is more appropriately stated in the rule itself.

4. We believe that the proposed definition of an "unconscionable fee" as currently drafted is inconsistent with case law. The proposed definition in subparagraph (b) states in pertinent part, that a fee is unconscionable if the lawyer "has engaged in fraudulent conduct or overreaching." Proposed rule 1.0.1 (d) states "fraud or fraudulent means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive." This suggests that all the elements of civil fraud must be present to constitute unconsionability.

However, under the case law, it is sufficient that the negotiation, setting or charging of the fee "involves an element of fraud or overreaching, which may not require proof of all of the elements of civil fraud. (See Herrscher v. State Bar, supra, 4 Cal.2d at 403; In the Matter of Van Sickle, supra, 4 Cal. State Bar Ct. Rptr. at 989.)

5. OCTC supports the concept proposed in subparagraph (e) regarding true retainers, nonrefundable fees, and flat fees. Proposed paragraph (e) is nothing more than a reiteration of current law regarding true retainers, non-refundable fees, and flat fees. Several of the commentators opposed to subparagraph (e) appear to be under a misunderstanding of current law. It is well established that only a true retainer to secure an attorney's availability over time is non-refundable. This is because it is considered earned when paid. Advanced fees, however, no matter how the attorney characterizes them, must be refunded if not earned. A failure to do is disciplinable. (See In the Matter of La is (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907; In the Matter of Phillips (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315; In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752; Matthew v. State Bar (1989) 49 Cal.3d 984.) Flat fees also must be earned by performance of services. Any attempt to deal with the issue of creditor rights and government forfeiture rules as proposed by some of the other commentators is beyond the scope of the Rules of Professional Conduct.

6. The one change subparagraph (e) does add to the rule is the requirement for written fee agreements. Given the unusual nature of these agreements and the need to make sure the clients are aware of and understand them, it is good public policy to require that they be in writing and places California closer to what is required in other jurisdictions.

C. MIKE NISPEROS, OCTC, 9/27/2001:

OCTC's recommends bringing California's rule in line with the ABA's Model Rule and the rules in other jurisdictions. The use of the term "unconscionable" is replaced with "unreasonable." OCTC also recommends that costs be brought within the rule.

Revise the rule as follows:

(A) A member or law firm shall not enter into an agreement for, charge, or collect an illegal or ~~unconscionable~~ unreasonable fee or an unreasonable amount for expenses.

(B) ~~Unconscionability~~ Unreasonableness of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the ~~conscionability~~ reasonableness of a fee are the following:

. . .

(C) Before a member enters into or charges a contingency fee, the attorney will first provide adequate disclosure of the conditions, the risks and benefits of such an arrangement, and

offer an alternative fee arrangement, and the fee must not violate paragraph A of this rule.

(D) A member shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent

(2) There is no interference with the member's independent professional judgment or with the lawyer-client relationship; and

(3) Information relating to representation of the client is protected as required by these rules or other applicable law.

Discussion

A fee paid in property or anything other than money, the granting of an interest in the subject matter of the representation or the extinguishment of a client's interest in property is subject to rule 3-300, as well as this rule. (See In the Matter of Silverton (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. .) Similarly, a fee secured by a trust deed must also comply with rule 3-300 (see Hawk v. State Bar (1988) 45 Cal3. 589) and an attorney may not secure his or her fee with a confession of judgment. (Hulland v. State Bar (1972) 8 Cal.3d 44.)

OCTC COMMENTS:

OCTC recommends that this rule be amended to make it consist with the ABA and other states' rules. They require that a fee be reasonable. While case law in California also requires that the fee be unreasonable, discipline here requires more - that the fee be unconscionable. Thus, establishing a violation of this rule as it currently exists often, but not always, requires a showing of fraud or overreaching. While great deference should be given to lawyer fees there is no reason that our rules should be more restrictive than elsewhere. If fees must be reasonable, than wilfully entering into fee agreements that are not reasonable should be disciplinable, as they are elsewhere in this country. The deference necessary is already there due to the requirement the State Bar bears the burden of demonstrating the unreasonableness of the fee by clear and convincing evidence, and all benefit of the doubt will go to the attorney.

OCTC has also added, as the ABA suggests in proposed Model Rule 1.15, that expenses be reasonable. An attorney should not be able to charge unreasonable expenses any more than he or she should be able to charge unreasonable fees.

The factors for reasonableness are the same as for unconscionability. An attorney's fees must still be proportional to the services rendered. Paragraph C codifies an ABA ethics opinion requirement that before a contingency fee is entered into, the attorney provide all relevant information to the client and the client is given an alternative fee arrangement.

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- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **South Dakota Rule 1.5** is identical to Model Rule 1.5:

SOUTH DAKOTA RULE 1.5 FEES

A lawyer shall not make an agreement for, charge, or collect an unreasonable amount for fees or expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of potential expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a

written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

The ABA State Adoption Chart for the ABA Model Rule 1.5, which is the counterpart to current rule 4-200, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.pdf
- Four states have adopted Model Rule 1.5 verbatim.[1] Eighteen jurisdictions have adopted a slightly modified version of Model Rule 1.5.[2] Twenty-nine states have adopted a version of the rule that is substantially different to Model Rule 1.5."[3]
- However, as discussed in Section VIII.A.4, below, only four jurisdictions besides California have rejected the Model Rule's "unreasonable" standard.

[1] The four states are: New Mexico, Rhode Island, South Dakota, and Utah.

[2] The eighteen jurisdictions are: Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maryland, Mississippi, Missouri, Montana, Nebraska, New Jersey, Oklahoma, Tennessee, Vermont, West Virginia, and Wyoming.

[3] The twenty-nine states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin.

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VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California, (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

2. Substitute the term "lawyer" for "member".
   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

3. Title: Change title to include "expenses" as well as fees. Drafting team consensus.
   - Pros: Changed title will more accurately describe the recommended scope of the rule, i.e., to include a prohibition on making an agreement for, charging or collecting an unconscionable fee or internal expense. (See paragraph 5, below.)
   - Cons: None identified. (But see paragraph 5, Cons, below.)

4. Retain the standard in current rule 4-200, i.e., unconscionability as opposed to Model Rule 1.5's "unreasonable" standard. Drafting team consensus.
   - Pros: First, retaining the unconscionability standard will carry forward the public policy rationale stated over 80 years ago by the Supreme Court in *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402-403 [49 P.2d 832]:

> "In the few cases where discipline has been enforced against an attorney for charging excessive fees, there has usually been present some element of fraud or overreaching on the attorney's part, or failure on the attorney's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees.
>
> Generally speaking, neither the Board of Governors nor this court can, or should, attempt to evaluate an attorney's services in a quasi-criminal proceeding such as this, where there has been no failure to disclose to the client the true facts or no overreaching or fraud on the part of the attorney. *It is our opinion that the disciplinary machinery of the bar should not be put into operation merely on the complaint of a client that a fee charged is excessive, unless the other elements above mentioned are present*." (Emphasis added) (Citations omitted).
>
> Second, the public is provided sufficient protection against avaricious lawyers who charge "unreasonable" fees through the civil court system and California's unique system of mandatory fee arbitration. (See Bus. & Prof. Code § 6200 et seq. Put another way, rather than bog down the discipline system with ordinary fee disputes, the law provides a client with other forums, in particular mandatory fee arbitration, to contest an unreasonable fee. In any event, in extreme cases such as those described above, the public is further protected through imposing discipline on lawyers who charge, contract for or collect an unconscionable fee.

- Cons: The reasonableness standard has been adopted in nearly every jurisdiction.[4] Rejecting an unreasonable standard, which has been adopted in every jurisdiction except California, Massachusetts and Texas, and retaining a unconscionability standard falls short of the Commission's charge to protect the public and promote confidence in the legal profession and administration. It sends a message that the profession tolerates its members charging an unreasonable fee. This is an area where the Commission should reassess the continued viability of *Herrscher*. The concerns the Supreme Court expressed 75 years ago about the efficacy of inquiring into the reasonableness of fees should not control the debate for a self-regulating profession in this sensitive area of lawyer-client relations.

5. Include a prohibition on charging an unconscionable "internal expense". Drafting team consensus.
   - Pros: The amount of expenses charged a client can constitute a large part of the

[4] Only California, Massachusetts, New York, North Carolina and Texas have not adopted the Model Rules' standard, the latter four having adopted (or more accurately continued from the ABA Code of Professional Responsibility) an "excessive" or "clearly excessive" standard. Michigan, Ohio and Oregon have also carried forward the "excessive" standard but define "excessive" as in excess of reasonable, so they effectively have adopted a reasonable standard.

client's total monetary obligations to a lawyer. A prohibition on charging an unconscionable expense adds language that clarifies the lawyer's obligation. It should both educate lawyers as to their duties and facilitate the imposition of discipline, where applicable. RRC1 recommended adding a similar prohibition.
The "internal" limitation has been added because the drafting team was concerned that some expenses incurred, for example from retaining consultants and experts, might be viewed as unconscionable. However, the cost of such expenses are often beyond the ability of a lawyer to control. RRC1 recommended a similar limitation.
The concept of expenses was added to the Model Rules as part of the Ethics 2000 revisions. Only Kansas and Texas do not include an express prohibition on charging unreasonable or excessive expenses.

- Cons: The concept of an unconscionable internal expense would be new and potentially confusing. Conceptually, if a lawyer's internal expense effectively functions as a hidden profit center, then that conduct would fit the existing rubric of an unconscionable fee charged without the client's consent. Compare the existing State Bar Court approach in *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, at pp. 851-852 [finding that a lawyer's practice of charging a flat periodic fee or lump sum to cover disbursements is not a violation of Rule 4-200 or an act of moral turpitude provided the client consents and the amount at issue is not unconscionable].

6. Include an express definition of unconscionable in paragraph (b). Drafting team consensus.
   - Pros: Paragraph (b) provides a succinct explanation of what is meant by the term "unconscionable fee. The language of the definition is taken from California decisional law, including two Supreme Court cases. See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513]. Paragraph (b) can be used in conjunction with the factors set forth in paragraph (c) as an analytical framework for determining whether a fee is unconscionable. The last sentence, carried forward from current rule 4-200(A), specifies the time at which the unconscionability of a fee is to be determined.
   - Cons: A definition of "unconscionable fee" is unnecessary. The phrase "unconscionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague.

7. In paragraph (c), retain the 11 factors for determining unconscionability that are found in current rule 4-200(B) and include in the introduction of paragraph (c) an express statement that the factors are to be considered without limitation. Drafting team consensus.
   - Pros: There is no evidence that the factors, which have been included in the rule since 1975, have been a problem in determining the unconscionability of a fee. The statement that the factors to be considered are without limitation conforms to

an OCTC comment. (See VI.B.3, above.) With respect to the similarity of the factors to those used in the Model Rule for determining the reasonableness of a fee, the additional three factors unique to the California rule all relate to unconscionability, (see "Cons"). Further, the consideration of other factors, such as those identified in paragraph (b), will further distinguish the provision from the Model Rule.

- Cons: There is some confusion whether the factors can be used to determine unconscionability as they are nearly identical to those stated in Model Rule 1.5 for determining the reasonableness of the fee. The only different factors are: (1) the amount of the fee in proportion to the value of the services performed; (2) the relative sophistication of the client; and (3) the informed consent of the client to the fee.

8. Add new paragraph (d), derived from Model Rule 1.5(d), which identifies two types of contingent fee arrangements that are prohibited: certain family law matters and criminal matters. Drafting team consensus.
   - Pros: Although there are other kinds of contingent fee cases that might be prohibited, the two kinds of cases regulated under Model Rule 1.5(d) have traditionally been viewed as implicating important Constitutional rights or public policy. See, e.g., Restatement (3d) Law of Lawyers § 35, comments f.(i), f.(ii) and g.
     In the family law matters, California has a strong public policy of promoting reconciliation and maintaining the family unit. Because a lawyer who is being paid on a contingent basis would recover a fee only if the marriage is dissolved and property apportioned, permitting contingent fees in these cases would undermine the California policy.
     In criminal cases, a lawyer who is being paid on a contingent basis would recover a fee only if the client is found not guilty. That would create a conflict for a lawyer if the best interests of the client, in light of the evidence, warrant the client entering a plea.
     Focusing on these two types of cases where public policy strongly opposes contingent fees should not permit the inference that any other kind of contingent fee matter is permitted.
   - Cons: Limiting the prohibition on contingent fees to two kinds of legal matters implies that contingent fees are permitted in any other kind of legal matter, which may not be true.

9. Add new paragraph (e), which prohibits denominating a fee as "earned on receipt" or "nonrefundable" except in the case of a true retainer, i.e., where the fee is paid to assure the availability of the lawyer. Drafting team consensus.
   - Pros: Paragraph (e) is an attempt to balance a number of competing interests: a lawyer's interest, on the on hand, of being assured of payment when relinquishing an opportunity for other employment and a client's interest in not forfeiting an advance fee payment in the event the client changes his or her mind

and wants to discharge the lawyer. At bottom, paragraph (e) recognizes that except under specific circumstances, a fee is not earned until services have been provided. Paragraph (e) states the nonrefundable/ earned on receipt fee arrangement that traditionally has been recognized in the profession and is already found in current rule 3-700(D)(2).

- Cons: This language includes a description of what constitutes a "true retainer." This language differs from the longstanding language used in Rule 3-700(D)(2) which simply states that a true retainer is a "fee paid solely for the purpose of ensuring the availability of the member for the matter." There does not appear to be any disciplinary data indicating that this language should be changed.

10. Add new paragraph (f) that expressly provides that a flat fee is permissible only if the lawyer provides the agreed upon services. Drafting team consensus.
    - Pros: Expressly states a basic concept in contract law: except for true retainers, an advance fee is not earned unless the lawyer provides the services for which he or she was retained.
    - Cons: Many lawyers, e.g., those in criminal law practice, typically have fee arrangements with clients that are denominated as non-refundable or earned-on-receipt. The fee can be placed in the lawyer's operating account and be protected from forfeiture proceedings.

11. Add new comment [1], which provides examples of illegal fees. Drafting team consensus.
    - Pros: Unlike "unconscionable fee," the concept of an illegal fee is not susceptible to a black letter definition and is better described by providing examples in a comment. Although the concept might be found in case law, including an explanation of the concept in a comment will provide important guidance on the types of fee arrangements that are illegal and can subject a lawyer to discipline.
    - Cons: None identified.

12. Add new comment [2], which cross-references Bus. & Prof. Code §§ 6147 and 6148. Drafting team consensus.
    - Pros: In Model Rule 1.5, paragraphs (b) and (c) set forth the requirements for written fee arrangements in general and contingent fee arrangements, respectively. In California, those requirements are addressed in §§ 6148 and 6147, respectively. Under those statutes, the client already has a remedy for a lawyer's violation of the statute: having the contract voided. Sections 6147(b), 6148(c). The drafting team has placed the reference in a comment; it does not believe that a violation of either section should subject a lawyer to discipline under this Rule in addition to the remedy provided in the statute. RRC1 made a similar recommendation.
    - Cons: See discussion below in section VIII.B.3 of a concept rejected relating to OCTC's September 2, 2015 memorandum in which OCTC states: "OCTC is not in favor of cross-referencing Business and Professions Code, sections 6147 and

6148. Instead, rule 4-200 should state that a lawyer may be disciplined for failing to have a written fee agreement with the client. Written fee agreements protect the public and are part of a lawyer's duty to communicate significant developments relating to his or her employment."

13. Add new comment [3], derived from Model Rule 1.5, cmt. [6], which explains that some contingent fee arrangements related to family law are permitted. Drafting team consensus.
    - Pros: Recognizes certain post-judgment contingent fee arrangements in family law that permitted because they do not implicate the policies underlying the prohibition. RRC1 made a similar recommendation.
    - Cons: None identified.

14. Add new comment [4] which recognizes that a lawyer may not be able to comply with paragraph (f)'s writing requirement in an emergency. Drafting team consensus.
    - Pros: This is an important qualification on the writing requirement for flat fee arrangements. These arrangements are often used in a criminal law practice, where lawyers are often retained on short notice, making the execution of a written agreement impracticable initially.
    - Cons: This comment arguably authorizes an oral contract that would create a lawyer-client relationship, at least until such time that a subsequent written agreement is entered into by the parties. Technically, the State Bar Act's requirement for a written fee agreement (for services where the total expense to a client will exceed $1,000) has no comparable exception. Can a Rule of Professional Conduct establish an exception to a public protection statutory scheme governing contracts for legal services?

15. Add new comment [5] which provides cross-references to the rules concerning termination and trust accounts. Drafting team consensus.
    - Pros: The cross-references provide important information on the rules that would govern in the event there are unearned fees upon termination or there is a fee dispute, common occurrences in practice.
    - Cons: None identified.

16. Add new comment [6] which provides a cross-reference to the fee splitting rule. Drafting team consensus.
    - Pros: In nearly every other jurisdiction, the provision that governs fee divisions among lawyers is in the jurisdiction's counterpart to Model Rule 1.5. In California, the fee division provision is a separate rule. Providing a cross-reference to California's separate rule is appropriate.
    - Cons: None identified.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-200

Lead Drafter: Martinez
Co-Drafters: Brown, Clinch, Eaton
Meeting Date: September 25 – 26, 2015

B. Concepts Rejected (Pros and Cons):

1. Include a provision that addresses modification of fee agreements.
   - Pros: A rule that governs fee arrangements is the logical place for such a provision. In fact, RRC1 drafted such a provision at the request of the Board and included it in its proposed Rule 1.5.[5] In addition, in OCTC's September 2, 2015

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[5] RRC1's proposed rule paragraph provided:

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

The rule paragraph was accompanied by several comments:

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

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

[3B] In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms length transaction. Setzer v. Robinson (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement that are in addition to the requirements in Paragraph (g). Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. See, e.g., Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144];

memorandum providing comments on Rule 4-200, OCTC states: "Modification of fee agreements should require compliance with rule 3-300 regarding adverse interests. A lawyer holds a position of trust and has a fiduciary duty vis-a-vis his or her client. Compliance with rule 3-300 will help prevent lawyers from abusing their position and overreaching when renegotiating a fee agreement."
- Cons: The negotiations by which a lawyer and client enter a fee agreement is an arms-length transaction. Current rule 3-300, Discussion ¶. 1, provides that rule 3-300 "is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client." Only under the latter described circumstances should special conditions be imposed on a fee modification. Those conditions are already provided in rule 3-300, which is the appropriate place to address the issue.

2. Include in the rule the general analytical framework for determining the unconscionability of a contract, an inquiry into the procedural and substantive unconscionability of a contract. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83 [99 Cal.Rptr.2d 745]; Cotchett, Pitre & McCarthy v. Universal Paragon Corp. (2010) 187 Cal.App.4th 1405, 114 Cal.Rptr.3d 781.)
   - Pros: Would bring the unconscionability inquiry in lawyer fee contracts in line with general contract law.
   - Cons: Including such a framework is unnecessary as there is no indication that the current analytical framework involving the consideration of a number of non-exclusive factors, does not provide an effective means for determining unconscionability of a fee.

3. Include a provision in the rule that would subject a lawyer to discipline for failure to comply with the writing and other requirements in Bus. & Prof. Code §§ 6147 and 6148. (See 9/2/15 OCTC Memo to Chair & Commission, at pp. 3-4.)
   - Pros: Written fee agreements protect the public and are part of a lawyer's duty to communicate significant developments relating to his or her employment. A lawyer should be subject to discipline for failing to comply with those duties.
   - Cons: There is no reason to add a discipline element to the sanctions for

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Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915]. Depending on the circumstances, other rules and statutes also may apply to the modification of an agreement by which a lawyer is retained by a client, including, without limitation, Rule 1.4 (Communication), Rule 1.7 (Conflicts of Interest), and Business and Professions Code section 6106.

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

noncompliance provided under §§ 6147 and 6148. Voiding the agreement and limiting the lawyer to recovery of the reasonable value of his or her services is a sufficient disincentive to a lawyer's noncompliance with the statutes' written and other requirements, so the public should be protected.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Added prohibition on contracting for, charging or collecting an unconscionable or illegal internal expense. (See Section VIIIA.5, above.)
2. Adding an express prohibition in paragraph (d) of certain types of contingent fee agreements. (See Section VIIIA.8, above.)
3. In paragraph (e), expressly permitting a lawyer to denominate a fee as "earned-on-receipt" or "nonrefundable" only if it is a true retainer. (See Section VIIIA.9, above.)
4. In paragraph (f), expressly permitting a lawyer to contract for, charge or collect a flat fee, which is paid in advance, only so long as the lawyer provides the agreed upon services. (See Section VIIIA.10, above.)

D. Non-Substantive Changes to the Current Rule:

1. Include definition of "unconscionable fee" in paragraph (b). (See Section VIIIA.6, above.)

E. Alternatives Considered:

1. Instead of recommending proposed paragraphs (e) and (f) concerning true retainers and flat fees, respectively, take the same approach recommended by RRC1 (but which was ultimately rejected by the Board).[6]

[6] The first Commission addressed true retainers and flat fees in two separate paragraphs, which provided:

> (e) When permitted by paragraph (f), a lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, but only if the client is advised in writing that the client nevertheless may discharge the lawyer at any time and may or may not be entitled to a refund of all or part of the fees charged, and the client agrees to the arrangement in a writing signed by the client.
>
> (f) A lawyer is permitted to denominate a fee as "earned on receipt" or "nonrefundable" only in making an agreement for the following types of fee arrangements:
>
> (1) a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not as compensation for legal services performed or to be performed.
>
> (2) a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services.

The provisions were accompanied by several comments:

> [6A] Paragraph (e) prohibits the designation of a fee as "earned on receipt," or as "nonrefundable," or in similar terms unless the required disclosures concerning the client's right to discharge the lawyer and the potential for a refund are made. The unconscionability requirement of paragraph (a) and the application of the factors in paragraph (c) may mean that a client is entitled to a refund of an advance fee payment even though it might have been denominated as "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (e) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund, nor does it determine how any refund should be calculated, but merely requires that the client be advised of the possibility of the entitlement to a refund. In addition to a determination that a fee is unconscionable, a client's entitlement to a refund might be based upon: (1) a determination that all or a portion of the fees paid have not been earned; or (2) some other failure of consideration, such as a natural disaster that destroys the lawyer's law office making it impossible for the lawyer to render the agreed upon legal services. The foregoing examples are not intended to be a comprehensive statement of all possible bases for a client's entitlement to a refund. Although there is always a potential for a refund because of subsequent events, paragraph (e) does not prohibit a lawyer from making an agreement for a fee which is earned upon receipt so long as the required disclosures are made in a writing signed by the client. As indicated by case law, however, a client may be entitled to a refund notwithstanding how the fees paid might have been characterized. See, e.g., Matthew v. State Bar (1989) 49 Cal.3d 784 [263 Cal.Rptr. 660]; In re Matter of Lais (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907. While discipline may result from a failure to refund fees, a primary forum for the resolution of fee dispute issues is mandatory fee arbitration under the State Bar Act. See Business and Professions Code sections 6200 et. seq. Nothing in this Rule is intended to prejudge the outcome of fee arbitration proceedings as this Rule, like any law, must be applied to the facts of a particular matter.
>
> * * *
>
> [7] Every fee agreed to, charged, or collected, including a fee under paragraph (f)(1) or (f)(2), is subject to paragraph (a) and may not be unconscionable.
>
> [8] Paragraph (f)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (f)(1). In addition to the statements required under paragraph (e), the written true retainer agreement should specify the time period or purpose of the lawyer's availability and that the client will be separately charged for any services provided. Concerning the lawyer's obligations with respect to the deposit of a true retainer in a trust account, see Rule 1.15, Comments [8] and [9].
>
> [9] Paragraph (f)(2) describes a fee structure that is known as a "flat fee". A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-200

Lead Drafter: Martinez
Co-Drafters: Brown, Clinch, Eaton
Meeting Date: September 25 – 26, 2015

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. Whether to include a provision that would govern a modification of a fee agreement. (See Section VIII.B.1, above.)

2. If such a provision should not be included in this Rule, should consideration of the issue be referred to the rule 3-300 drafting team for possible inclusion in that rule?

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Martinez
- [Date]: Email Comment
- [Date]: Email Comment

Brown
- [Date]: Email Comment
- [Date]: Email Comment

Clinch
- [Date]: Email Comment
- [Date]: Email Comment

Eaton
- [Date]: Email Comment
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

RECOMMENDATION:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 4-200 [1.5] in the form attached to this report and recommendation.

PROPOSED RESOLUTION:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 4-200 [1.5] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4-200

Lead Drafter: Martinez
Co-Drafters: Brown, Clinch, Eaton
Meeting Date: September 25 – 26, 2015

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

THE STATE BAR
OF CALIFORNIA

Date: September 2, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for September 2015 meeting

CONTENTS

I.

OPENING COMMENT

The following comments address the rules to be considered at the Commission's September 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

II.

POINTS FOR CONSIDERATION

[TEXT OMITTED]

D. Rule 4-200: Fees for Legal Services [Model Rules 1.5]

California uses the term "unconscionable" in rule 4-200, regarding prohibited legal fees. Most other jurisdictions use the term "unreasonable." California should adopt the "unreasonable" standard. Business and Professions Code, sections 6147 and 6148, also use the term "reasonable fee."

The term "unconscionable" is archaic and has been interpreted to permit the charging and collection of a fee that is unreasonable, as long as it is not shockingly so.[1] Case law, however, requires that "[a]ttorney fee agreements ... be fair, reasonable and fully explained to the client." (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851.) These requirements are sound and should be incorporated into rule 4-200.

OCTC supports amending the rule to prohibit unreasonable expenses. Model Rule 1.5 and many other jurisdictions currently prohibit unreasonable expenses.

This rule, or rule 3-700, should explain the meaning of a "true retainer" and prohibit lawyers from charging non-refundable fees. A true retainer is a fee paid to secure a lawyer's availability over time. Such a fee can be non-refundable because the fee is earned by the lawyer making himself or herself available, not by performing legal services. Fees paid in advance for the performance of legal services, however, must be refunded if the legal services are not performed. Flat fees also must be earned by performing services.

Modification of fee agreements should require compliance with rule 3-300 regarding adverse interests.[2] A lawyer holds a position of trust and has a fiduciary duty *vis-a-vis* his or her client. Compliance with rule 3-300 will help prevent lawyers from abusing their position and overreaching when renegotiating a fee agreement.

OCTC is not in favor of cross-referencing Business and Professions Code, sections 6147 and 6148. Instead, rule 4-200 should state that a lawyer may be disciplined for failing to have a written fee agreement with the client. Written fee agreements protect the public and are part of a lawyer's duty to communicate significant developments relating to his or her employment.

Rule 4-200 would provide greater guidance if it added additional factors to the list of criteria to be analyzed, set forth in subsection (c). Additional factors could include whether the fee involves an element of fraud or overreaching by the lawyer; whether the client consented to or authorized the legal

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[1] See Vapneck, Tuft, Peck & Weiner, *Cal. Prac. Guide: Professional Responsibility*, section 5:403 ["'Unconscionability' and 'unreasonableness' are two different standards. Although the same factors may be considered (below), California lawyers may not be disciplined simply for charging an "unreasonable" fee; the fee must be unconscionable."]

[2] *In the Matter of Mark B. Scott* (Review Dept. 2007) Slip Op. p. 19, fn. 22, unpublished ["But contingency fee agreements renegotiated at the time of settlement may be governed by rule 3-300…"].

service; whether the lawyer fully explained the fee agreement to the client and/or the client understood the terms of fee agreement; and whether the lawyer charged the client for clerical or non-legal services at the same rate as legal services.

[TEXT OMITTED]

III.

CLOSING COMMENT

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

Initial Public Comments
[Rule 4-200 – Fees for Legal Services]

No.	Commenter	Comment on Behalf of Group?	Rule	Comment	RRC Response
2015-004	Lea, Susan	No	4-200	By way of examples, commenter expressed concern over attorney conduct related to fees, including retaining fees without performing work, refusing to allow fee contract review, advising clients not to pay prior attorney liens, and failing to communicate with prior attorneys regarding fees owed.	
2015-007	Wilbur, Lisa	No	4-200	Suggests the term "unconscionable" be replaced with "unreasonable" and that the rule should expressly state that no quantum meruit recovery where the Rules were violated.	
2015-048p	Law Professors	Yes	4-200	Concerned that "unconscionable" difficult to define, lawyer-protective, and differs from the standards in the Bus. & Prof. Code. Recommend replacing it with "unreasonable."	

FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 4-200

From: Susan Lea

Date: May 1, 2015

Re: Rule 4-200

Two points:

1. I made a complaint a few years ago against a Sacramento lawyer who refused to allow a new client to read the fee agreement, or have it read by another attorney, and the said fee agreement provided that the required advance payment was earned in full at the time of execution, whether the lawyer ever did any work. That stinks.

2. I've had a few problems with other lawyers who have taken over litigation from me, who have advised the client that he/she doesn't have to pay me for all the work previously done despite the existence of a lien, and have taken future fees without communicating at all with me in an effort to "cut me out" entirely. When I've been in that position, I did not do that as it seems totally illegal and unethical.

From: Richard Zitrin, Multiple Law Professors

Date: March 3, 2014

Re: Rule 1.5

V. Rules related to lawyers' financial interests

1. Rule 1. 5- Use of the term "unconscionable"

The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the propriety of fees and - even more puzzlingly – some expenses. The ABA uses the far more intelligible word "unreasonable." Moreover, California's own Business & Professions Code, in evaluating fee recoveries without written contracts, *also* uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer- rather than client-protective.

Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation *and* at the same time perpetuates two California standards - one under the ethics rules and one under the State Bar Act.

This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with "unreasonable."

From: Lisa Wilbur

Date: May 4, 2015

Re: Rule 4-200

Rule 4-200 Fees for Legal Services. Delete unconscionable and replace with reasonable. Spell it out regarding false advertising on the web site, in the contract, or type of law firm and who are the managing partners.

CURRENT CALIFORNIA RULE 4-200
"Fees for Legal Services"

I. Text of Current Rule:

(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.

(B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following:

(1) The amount of the fee in proportion to the value of the services performed.

(2) The relative sophistication of the member and the client.

(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.

(5) The amount involved and the results obtained.

(6) The time limitations imposed by the client or by the circumstances.

(7) The nature and length of the professional relationship with the client.

(8) The experience, reputation, and ability of the member or members performing the services.

(9) Whether the fee is fixed or contingent.

(10) The time and labor required.

(11) The informed consent of the client to the fee.

II. Background/Purpose:

Current Rule 4-200 became operative on September 14, 1992. The Model Rule counterpart is ABA Model Rule 1.5. The rule regulates fee arrangements between lawyers and their clients.[1]

[1] Fee arrangements are also regulated by: rule 2-200 [1.5.1] concerning agreements to divide fees among lawyers who are not in the same law firm; rule 3-300 [1.8.1] concerning agreements between a lawyer and a client that confer on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to a client; and Business and Professions Code §§ 6147 and

The predecessor to current Rule 4-200, former Rule 2-107, was originally approved and became operative on January 1, 1975, under the same title "Fees for Legal Services." That rule was based on Disciplinary Rule (DR) 2-106 of the ABA Model Code of Professional Responsibility. DR 2-106 had three subparagraphs. DR 2-106(A) prohibited a lawyer from entering into an agreement for, charging or collecting an "illegal" or "clearly excessive" fee. DR 2-106(B) stated a fee is "clearly excessive" when a lawyer of ordinary prudence had a "definite and firm conviction that the fee is ***in excess of a reasonable fee***." (Emphasis added). DR 2-106(B) also provided eight factors to be considered in determining the "reasonableness" of a fee.[2] DR 2-106(C) prohibited a lawyer from entering into an agreement for, charging, or collecting a contingent fee for representing a defendant in a criminal case.

Although former Rule 2-107 was derived from the ABA Code, section (B) of the ABA Code provision was revised by the State Bar Special Committee to Study the ABA Code of Professional Responsibility to reflect California Supreme Court case law that had previously rejected a "reasonable fee" standard in discipline cases. In *Herrscher v. State Bar* (1934) 4 Cal.2d 399, a case seeking disbarment of an attorney for, in part, charging his client exorbitant fees, the California Supreme Court stated:

> We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action.

4 Cal.2d at 402. The *Herrscher* court noted, however, that in some cases a gross overcharge may constitute an offense warranting discipline. In fact, an earlier California Supreme Court decision stated the rule as follows:

6148 concerning the minimum requirements necessary for a contingency fee or other fee contract (hourly, flat fee, etc.), respectively.

[2] The eight factors were:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

> Although we are of the opinion that usually the fees charged for professional services may with propriety be left to the discretion and judgment of the attorney performing the services, we are of the opinion that if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court.

Goldstone v. State Bar (1931) 214 Cal. 490, 498.

In light of the foregoing Supreme Court precedent, the Special Committee substituted and unconscionability standard for the ABA Code's "clearly excessive [of a reasonable fee]" standard. Paragraph (B) stated a fee "is unconscionable when it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of lawyers of ordinary prudence practicing in the same community." Curiously, there was a disjunction between the first and the second and third sentences of paragraph (B), i.e., despite the substitution of the unconscionability standard, paragraph (B) also listed factors to be considered when determining the "reasonableness of a fee."[3]

The Special Committee declined to recommend paragraph (C) of DR 2-107, which provided: "A lawyer shall not enter into, charge, or collect a contingent fee for representing a defendant in a criminal case."

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[3] The second and third sentences of paragraph (B) provided:

> *Reasonableness* shall be determined on the basis of circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the *reasonableness* of a fee are the following:
>
> (1) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The amount involved and the results obtained.
>
> (4) The time limitations imposed by the client or by the circumstances.
>
> (5) The nature and length of the professional relationship with the client.
>
> (6) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (7) Whether the fee is fixed or contingent.
>
> (8) The time and labor required.
>
> (9) The informed consent of the client to the fee agreement. (Emphasis added).

The Special Committee did delete the ABA Code factor, "the fee customarily charged in the locality for similar legal services," which traditionally is an indicator of whether a fee is *reasonable*, but it is not apparent why the "reasonableness" standard was retained in the second sentence of the rule 2-107(B).

Former Rule 2-107 was amended in 1989 as part of the comprehensive study and revision of the Rules of Professional Conduct. The amendments included changing the numbering of the rule from 2-107 to 4-200 and deleting the references to "reasonableness" that had been retained in former Rule 2-107(B). The change was implemented because of Rule 2-107(B)'s aforementioned conflict in containing two inconsistent standards, unconscionability and unreasonableness:.

1. The unconscionability standard reflects existing California Supreme Court decisions to the effect that the State Bar has no power to regulate the amount of the fees charged by its members unless such fees are so "outlandish" as to merit discipline or the conduct the attorney in negotiating for or attempting to collect a fee merit discipline. (See Code. Civ. Proc., § 1021.)

2. A fee structure based upon "reasonableness" necessarily implies both the existence and knowledge of a standard against which particular fees can be judged. Such a standard could not be developed or communicated without violating federal antitrust laws.

3. At the present time, a client having a fee dispute with a member may require the member to submit the dispute to arbitration under California's Fee Arbitration Program. (See Bus. & Prof. Code, § 6200 et seq.) The arbitration procedure does not, per se, involve a threat or risk of disciplinary proceedings. If clients were able to use the threat of disciplinary action simply by alleging that the member's fees were "unreasonable," members of the State Bar would be placed in an unwarranted disadvantage in fee dispute resolution.

(See Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Supplemental Memorandum and Supporting Documents in Explanation, Supreme Court Case No. Bar. Misc. 5626, pp. 43-44 (September 1988) ("1998 Report")).

In addition to removing the word "reasonableness," subparagraphs (B)(1) and (2) were added as factors because it was believed they were important factors to be considered in determining the conscionability of a fee.[4]

Rule 4-200 was amended again in 1992. The amendments included removing the word "agreement" from paragraph (B) and subparagraph (B)(11). These amendments were intended to: (1) clarify that paragraph (B) addressed the broad issue of the unconscionability of the fee obtained as opposed to the narrower issue of the

[4] The two added factors to be considered in determining whether a fee is "unconscionable" were:

(1) The amount of the fee in proportion to the value of the services performed.

(2) The relative sophistication of the member and the client.

unconscionability of the fee agreement itself; and (2) conform paragraph (B) and subparagraph (B)(11) to the text of paragraph (A) which refers to the amount of the fee, not the fee agreement. (Supreme Court Case No. SO24408 p. 18).

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. **Jayne Kim (OCTC), _____, 2015**:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. **Russell Weiner (OCTC), June 15, 2010**:

Rule 1.5 Fees for Legal Services

1. Unconscionable Fees. OCTC still prefers the ABA's language for this rule. Further, OCTC remains opposed to any attempt to specifically define the term "unconsionability" in subsection (b) of proposed rule 1.5. The phrase "unconsionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by a list of facts set forth in subsection (c) of proposed rule 1.5.

2. However, we urge the Commission to consider adding additional factors to the list set forth in subsection (c). Those additional factors are (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see Herrscher v. State Bar (1935) 4 Cal.2d 399, 403; In the Matter of Van Sickle (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see Herrscher v. State Bar, supra, 4 Cal.2d at 403); (3) whether the client consented or authorized the legal service (see In the Matter of Connor (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 93, 104); (4) whether the attorney fully explained the fee agreement to the client and/or the client understood the terms of fee agreement (see In the Matter ofKroff(Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851; In the Matter of Van Sickle (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980); and (5) whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging the same fee for these non-legal services at the legal services rate. (See e.g. In re Green (Co. 2000) 11 P.3d 1078 [charging lawyer's rate for faxing documents, etc]; Prof'! Ethics & Conduct of Iowa State Bar v. Zimmerman (Iowa 1991) 465 N.W.2d 288 [lawyer charged full hourly rate for attending ward's birthday party and

discussing toiletry needs]; Cincinnati Bar Ass 'n v. Alsfelder (Ohio 2004) 816 N.E.2d 218 [charging for discussions and advice about boyfriends, vehicles, and restaurants].)

3. The Commission may want to state in the rule that the factors set forth in subsection (c) are not exclusive. At least one appellate court has expressed some uncertainty on this issue. (See *Shaffer v. Superior Court* (1995) 33 Cal.App.41 h 993, 1003.) Although this is stated in Comment 1B, OCTC believes it is more appropriately stated in the rule itself.

4. We believe that the proposed definition of an "unconscionable fee" as currently drafted is inconsistent with case law. The proposed definition in subparagraph (b) states in pertinent part, that a fee is unconscionable if the lawyer "has engaged in fraudulent conduct or overreaching." Proposed rule 1.0.1 (d) states "fraud or fraudulent means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive." This suggests that all the elements of civil fraud must be present to constitute unconsionability. However, under the case law, it is sufficient that the negotiation, setting or charging of the fee "involves an element of fraud or overreaching, which may not require proof of all of the elements of civil fraud. (See *Herrscher v. State Bar, supra*, 4 Cal.2d at 403; In the Matter of Van Sickle, supra, 4 Cal. State Bar Ct. Rptr. at 989.)

5. OCTC supports the concept proposed in subparagraph (e) regarding true retainers, nonrefundable fees, and flat fees. Proposed paragraph (e) is nothing more than a reiteration of current law regarding true retainers, non-refundable fees, and flat fees. Several of the commentators opposed to subparagraph (e) appear to be under a misunderstanding of current law. It is well established that only a true retainer to secure an attorney's availability over time is non-refundable. This is because it is considered earned when paid. Advanced fees, however, no matter how the attorney characterizes them, must be refunded if not earned. A failure to do is disciplinable. (See In the Matter of La is (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907; In the Matter of Phillips (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315; In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752; Matthew v. State Bar (1989) 49 Cal.3d 984.) Flat fees also must be earned by performance of services. Any attempt to deal with the issue of creditor rights and government forfeiture rules as proposed by some of the other commentators is beyond the scope of the Rules of Professional Conduct.

6. The one change subparagraph (e) does add to the rule is the requirement for written fee agreements. Given the unusual nature of these agreements and the need to make sure the clients are aware of and understand them, it is good public policy to require that they be in writing and places California closer to what is required in other jurisdictions.

C. **Mike Nisperos (OCTC), September 27, 2001**:

OCTC's recommends bringing California's rule in line with the ABA's Model Rule and the rules in other jurisdictions. The use of the term "unconscionable" is replaced with "unreasonable." OCTC also recommends that costs be brought within the rule.

Revise the rule as follows:

(A) A member or law firm shall not enter into an agreement for, charge, or collect an illegal or ~~unconscionable~~ unreasonable fee or an unreasonable amount for expenses.

(B) ~~Unconscionability~~Unreasonableness of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the ~~conscionability~~reasonableness of a fee are the following:

. . .

(C) Before a member enters into or charges a contingency fee, the attorney will first provide adequate disclosure of the conditions, the risks and benefits of such an arrangement, and offer an alternative fee arrangement, and the fee must not violate paragraph A of this rule.

(D) A member shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent

(2) There is no interference with the member's independent professional judgment or with the lawyer-client relationship; and

(3) Information relating to representation of the client is protected as required by these rules or other applicable law.

Discussion

A fee paid in property or anything other than money, the granting of an interest in the subject matter of the representation or the extinguishment of a client's interest in property is subject to rule 3-300, as well as this rule. (See In the Matter of Silverton (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. ___.) Similarly, a fee secured by a trust deed must also comply with rule 3-300 (see Hawk v. State Bar (1988) 45 Cal3. 589) and an attorney may not secure his or her fee with a confession of judgment. (Hulland v. State Bar (1972) 8 Cal.3d 44.)

OCTC COMMENTS:

OCTC recommends that this rule be amended to make it consist with the ABA and other states' rules. They require that a fee be reasonable. While case law in California also requires that the fee be unreasonable, discipline here requires more - that the fee be unconscionable. Thus, establishing a violation of this rule as it currently exists often, but not always, requires a showing of fraud or overreaching. While great deference should be given to lawyer fees there is no reason that our rules should be more restrictive than elsewhere. If fees must be reasonable, than wilfully entering into fee agreements that are not reasonable should be disciplinable, as they are elsewhere in this country. The deference necessary is already there due to the requirement the State Bar bears the burden of demonstrating the unreasonableness of the fee by clear and convincing evidence, and all benefit of the doubt will go to the attorney.

OCTC has also added, as the ABA suggests in proposed Model Rule 1.15, that expenses be reasonable. An attorney should not be able to charge unreasonable expenses any more than he or she should be able to charge unreasonable fees.

The factors for reasonableness are the same as for unconscionability. An attorney's fees must still be proportional to the services rendered. Paragraph C codifies an ABA ethics opinion requirement that before a contingency fee is entered into, the attorney provide all relevant information to the client and the client is given an alternative fee arrangement.

IV. Potential Deficiencies in the Current Rule:

A. See above input from OCTC. Deficiencies in the rule observed by OCTC include the following:

1. Use of an unconscionability standard rather than a reasonableness standard. (See III.B.1 ["OCTC still prefers the ABA's language for this rule."] and III.C. [substituting "unreasonableness" for "unconscionability" in proposed blackline of rule].) NOTE: At time of drafting this Rules Assignment, staff had not yet received OCTC's 2015 comments. OCTC might not still hold the same position on the applicable standard.

2. Factors in current rule 4-200(B) should be described as non-exclusive. (See III.B.3.)

3. Factors in current rule 4-200(B) should be supplemented with other suggested factors, such as "whether the fee involves an element of fraud or overreaching on the attorney's part." (See III.B.2.)

4. The rule should contain a provision that specifically prohibits treating advance fees as earned upon receipt unless they are "true retainers". (See III.B.5. See also possible issue at VIII.5.)

5. The rule should require that true retainers and flat fee arrangements be in writing. (See III.B.6. See also possible issue at VIII.5.)

6. The rule should require that a lawyer make specific disclosures about a proposed contingent fee arrangement and offer the client an alternative to a contingent fee. (See III.C.)

B. Other possible deficiencies:

1. Current rule 4-200 does not define or describe what is meant by an unconscionable fee. Although the rule sets forth 12 factors to consider in determining unconscionability, those factors are nearly identical to the factors employed in Model Rule 1.5 to determine the reasonableness of a fee.

2. Current rule 4-200 does not address how a lawyer should treat agreements for a "true retainer." (See VIII.5.)

3. Current rule 4-200 does not address whether a lawyer may enter into a contingent fee arrangement in a criminal or family law matter. (Compare Model Rule 1.5(d).)

4. The rule regulating fees in nearly every jurisdiction includes requirements concerning what must be disclosed to the client about a fee arrangement in general, (see Model Rule 1.5(b)) and a contingent fee arrangement specifically, (see Model Rule 1.5(c)). Although these matters are addressed in Business and Professions Code §§ 6148 and 6147, respectively, the rule might be amended to include a cross-reference to those statutory sections. (See VIII.8, below.)

5. Similarly, the rule regulating fees in nearly every jurisdiction includes a provision governing fee divisions among lawyers. (See Model Rule 1.5(e).) Although California addresses such fee division arrangements in a standalone rule, rule 2-200, rule 4-200 might be amended to include a cross-reference to that rule. (See VIII.9, below.)

V. California Context:

A. California's statutory mandatory fee arbitration program. Although case law has generally found, as a policy matter, that issues concerning the amount of fees charged for legal services are not matters that ordinarily should give rise to a disciplinary proceeding, the State Bar does regulate fee issues through the administration of a robust fee arbitration program mandated by statute (Article 13 of the State Bar Act, Business and Professions Code sections 6200 et. seq.). This program makes arbitration of fee disputes mandatory for attorneys if requested by a client. Clients and attorneys can agree to make the arbitration binding. An attorney who fails to comply with a final binding fee arbitration award is subject to being enrolled as an inactive member. All "unconscionable fees" are unreasonable but the reverse is not true. The combination of current rule 4-200

as a disciplinary standard and the mandatory fee arbitration program works as a two-pronged system for managing client protection in the area of fee disputes. When an attorney charges a fee that is unconscionable, discipline is appropriate. If a fee is not unconscionable but may be unreasonable, then there is an effective mandatory fee arbitration system that protects clients. If the California rule were changed to an "unreasonable fee" standard, then that might have a destabilizing impact of funneling fee arbitration matters into the discipline system. The discipline system is not well-equipped to render fee arbitration services and should not be the forum for resolving common fee disputes.

B. Authorities that identify illegal fees. Rule 4-200 prohibits illegal fees and both case law and statutes in California identify illegal fees. Examples of case law include: *In re Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403 (fee collected in excess of MICRA limitations); *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896 (fee collected while engaged in the unauthorized practice of law); and *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315 (fee collected without court approval where approval is required). Examples of statutory law include: Business and Professions Code section 6106.3 (prohibition against advanced fees for loan modification services); and Business and Professions Code section 6242 (prohibition against advanced fees for immigration reform services prior to the enactment of an immigration reform act).

VI. Approach In Other Jurisdictions (National Backdrop):

A. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.5: Fees," revised May 13, 2015, is available at::

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.pdf

- Although every fee rule, including California's, is based to some extent on the structure of Model Rule 1.5 (itself derived from ABA Code of Professional Responsibility, DR 2-106, there is a substantial amount of variation among the jurisdictions. For example, although the Model Rule provides only that a non-contingent fee agreement should be "preferably in writing," (Model Rule 1.5(b)), many jurisdictions require a writing. (See, e.g., Arizona Rule 1.5(b)) or at least that certain fee agreements must be written. (See, e.g., Arkansas Rule 1.5(b) ("If a fee will exceed $1000," there must be written fee agreement.) All jurisdictions require that a contingent fee arrangement be reduced to writing. (Compare Model Rule 1.5(c).)

- In any event, only four jurisdictions have adopted Model Rule 1.5 verbatim.[5] Eighteen jurisdictions have adopted a slightly modified version of Model Rule

[5] The four jurisdictions are: New Mexico, Rhode Island, South Dakota, and Utah.

1.5.[6] Twenty-nine jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.5."[7]

VII. Public Comment Received by the First Commission:

The clean text of a proposed new rule 1.5 drafted by the first Commission and adopted by the Board to replace rule 4-200 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 4-200, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 4-200 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above,

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[6] The eighteen jurisdictions are: Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maryland, Mississippi, Missouri, Montana, Nebraska, New Jersey, Oklahoma, Tennessee, Vermont, West Virginia, and Wyoming.

[7] The twenty-nine jurisdictions are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin.

such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

1. Whether the rule should be revised to substitute a new standard that prohibits "unreasonable" fees in place of the current California standard prohibiting unconscionable fees. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402; *Goldstone v. State Bar* (1931) 214 Cal. 490, 498.) (Compare Modle Rule 1.5(a).)

2. Notwithstanding the list of 11 factors in current rule 4-200(B) intended to be considered in determining whether a fee is unconscionable, if the unconscionable standard is retained, whether an explanation ("definition") of when a fee is "unconscionable" should be included in the rule. (Compare first Commission's proposed Rule 1.5(b) in public comment materials.) Note that the factors in rule 4-200(B) are nearly identical to the factors in Model Rule 1.5(a) for determining whether a fee is "reasonable."

3. If the unconscionable standard is retained, whether the rule should include the analytical framework, i.e., procedural and substantive unconscionability, as is applied generally to contracts in California case law. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 [99 Cal.Rptr.2d 745]; *Cotchett, Pitre & McCarthy v. Universal Paragon Corp*. (2010) 187 Cal.App.4th 1405, 114 Cal.Rptr.3d 781

4. Whether the scope of the rule should be expanded to cover expenses as well as fees that are billed to a client. (Compare Model Rule 1.5(a).)

5. Whether the rule should be revised to impose special requirements on certain fee arrangements, including arrangements for a flat fee paid in advance or a "true retainer fee." (See first Commission Rule 1.5(e), Draft # 11 (2/10/10).[8] Compare Washington Rule 1.5(f), available at

[8] The provision provided:

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

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

(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc1.05)

6. Whether the rule should be revised to specifically prohibit: a contingent fee for representing a defendant in a criminal matter; and/or any fee in a family law matter where payment is contingent upon the securing of a dissolution/nullity of marriage or upon the amount of support payments. (Compare Model Rule 1.5(d).)

7. Whether the rule should be revised to impose special requirements on a lawyer's modification of a fee arrangement with an existing client. (Compare first Commission's proposed Rule 1.5(e) in public comment materials.)

8. Given that nearly every jurisdiction includes requirements for what must be included in fee agreements generally and contingent agreements specifically in their counterparts to Model Rules 1.5(b) and (c), respectively, whether the rule should be revised to include cross-references to Business and Professions Code §§ 6147 (Contingent Fee Agreements) and 6148 (Fee Agreements In Excess of $1,000). (Compare Colorado Rule 1.5(c).[9]) Please note that only a cross-reference pointing a lawyer to his or her responsibilities under the statutes should be included. A lawyer should not be subject to discipline for failure to comply with the requirements of the statutes as the statutes themselves already direct the appropriate sanction, i.e., the agreement is rendered unenforceable and the fee forfeited, though the lawyer may still be able to recover under a quantum meruit theory. (See §§ 6147(b); 6148(c).) (See *In the Matter of Harney* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280, finding that "sections 6147 and 6148, should not be considered disciplinable offences under section 6068(a)" but may be a factor in aggravation in determining the level of discipline.)

9. Given that nearly every jurisdiction includes its provision regulating fee division among lawyers in its counterpart to Model Rule 1.5, whether the rule should be revised to include a cross-reference to current California Rule 2-200, which is a standalone rule that concerns fee splitting among lawyers.

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the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

[9] That provision provides:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

The first Commission carried forward rule 2-200 as a standalone rule, renumbered 1.5.1.

IX. Research Resources:

- Business and Professions Code § 6147 (Contingent Fee Agreements)
- Business and Professions Code § 6148 (Fee Agreements In Excess of $1,000)
- *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 950-951 [203 Cal.Rptr. 879] (fee agreement with other lawyer entered under threat of withholding client file)
- *In re Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829 (fees exceeding limits under Bus. & Prof. Code, § 6146)
- *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 (feesexceeding limits under Bus. & Prof. Code, § 6146)
- *Birbrower, Montalbano, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119, 136 [70 Cal.Rptr.2d 304] (illegal fee when unlicensed lawyer provides legal services)
- *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832] (unconscionable fees)
- *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513] (unconscionable fees)
- *In re Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 (basis or rate of fee)
- *Setzer v. Robinson* (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524] (negotiation of agreement is arms length transaction)
- *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554] (modification of fee agreements)
- *Berk v. Twentynine Palms Ranchos, Inc.* (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144] (modification of fee agreements)
- *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212 [64 Cal.Rptr.915] (modification of fee agreements)
- *In re Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896 (illegal fee when unlicensed lawyer provides legal services)
- *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838 (discipline imposed for unconscionable fee)
- CAL 2007-172 (Credit Card Payments)
- CAL 1996-147 (Billing for Working on 2 or matters)