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September 2, 2015 McCurdy Email to Drafting Team, cc Chair, Difuntorum, Mohr, Marlaud & Lee:

The State Bar Office of Chief Trial Counsel (OCTC) memo providing comments on Rule 4-200 [1.5] was received and is attached. Please consider these comments prior to the September meeting.

Attached:
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.docx
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.pdf

September 2, 2015 OCTC Memo to Commission:

* * *

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.[5] 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.[6] 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

[5] 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.”]
[6] *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…”].

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 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.

September 14, 2015 McCurdy Email to Commission, Advisers, Liaisons & Staff:

The State Bar's meeting agenda website (http://board.calbar.ca.gov/) has been updated with the agenda materials for item III.G. Rule 4-200 [1.5] Fees for Legal Services. The materials for this rule are also attached.

An updated PDF of the agenda and all materials, including III.G. Rule 4-200 [1.5], is also attached. Note that this document is 316 pages.

Attached:
RRC2 - 09-25 & 9-26-15 Meeting Materials - COMBO - REV2 (09-14-15).pdf
RRC2 - [4-200][1.5] - 09-25 & 09-26-15 Meeting Materials (09-14-15).pdf

September 15, 2015 Rothschild Email to Drafting Team, cc Difuntorum, Mohr & Lee:

Here are my comments on this rule:

1. The last part of the first sentence in (b) is either missing a word or two or is confusing. "because there has been, or…" There has been what? Also, should it say a practical misappropriation, rather than an appropriation?

2. A nit in (e). The word "in" on the second line seems wrong. I don't think it is necessary. I would drop the first "or" and th "in". I think that would be clearer.

3. In (f), the third line should read "complete payment for legal <u>services</u>", not legal fees.

4. Comment 4 – The last phrase is unnecessary, and may be wrong. Sometimes the emergency services are only part of the flat fee arrangement, for example, getting bail set and getting a defendant out of jail. The fee covers that as well as the defense of the charge. The disclosure, etc., should be as soon as practicable, even if the services have not been completed.

September 15, 2015 Martinez Email to Drafting Team, cc Rothschild, Difuntorum, Mohr & Lee:

These look like good catches to me.

1. I believe the words "because there has been" should have been deleted. The prior draft read: "there has been an element of fraud or overreaching by the lawyer in negotiating or setting the fee, or the lawyer has failed to disclose the material facts." Kevin would have a better history of the drafts.

The case law, which we tried to track, uses the term "practical appropriation," not "misappropriation." *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459; *Herrscher v. State Bar* (1935) 4 Cal. 2d 399, 403.

2. I'm ok with deleting "in."

3. Agree it should be legal "services" not "fees".

4. Agree we should delete "after the legal services have been provided".

September 16, 2015 Mohr Email to Drafting Team, cc Rothschild, Difuntorum & Lee:

I agree with points 1 and 3. Those changes will be made in the final (public comment) draft.

2. However, as to 2, I disagree that removing the word "in" resolves the problem, which I think is an awkward syntax created by the use of two different prepositions ("as" and "in"). The way the second clause would now read is a "fee denominated ... similar terms." That is not proper grammar. There has to be a preposition before "similar," and although keeping "in" doesn't sound correct (because the antecedent preposition is "as"), it is proper (if not acceptable) grammar.

What we are trying to say is that a lawyer cannot claim that the fee is the lawyer's property as soon as it is paid by the client by the lawyer stating that the fee is "non-refundable" or "earned on receipt," or by using a similar word or term to describe the fee. That's a lot of words. I'd prefer to keep it as it is with the word "in". Alternatively, consider the following, which adds two words:

> A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or <u>is described</u> 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.

4. Comment [4] should be deleted. Andrew Tuft in Randy's office has pointed out that paragraph (f) does not have specific disclosure or writing requirements (although an earlier version of the paragraph did). Therefore, the comment contradicts the blackletter and so must go. The drafting team already recognized that the comment would not apply to "true retainers" for a lawyer's availability because those kinds of arrangements, involving as they do the lawyer's promise to be available in the future,

Please let me know if you have any questions. Thanks,

September 16, 2015 Martinez Email to Mohr, cc Drafting Team, Difuntorum & Lee:

2. I still don't see a problem with taking out the word "in." However, the sentence uses the word "or" three times (which I assume in some circles is equivalent to a grammatical felony). What about deleting the second "or"?

> A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt," ~~or~~ "non-refundable," or similar terms…

4. Does Comment [4] relate to Paragraph (e) which does state: “the client agrees in writing after disclosure”? The Comment could be revised to read:

> A lawyer may not be able to comply with the disclosure and writing requirements of paragraph (e) 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 (e) as soon as practicable after the legal services have been provided.

Comment [4] apparently originated in the RRC-1 version of the rule. I believe it was added after our first conference call last month but I don’t recall discussing it during that call.

In any event, this “emergency” concept would apply to any situation where a written fee agreement/disclosure is required. So it’s unclear why this rule gets special treatment of the concept in the first place.

September 16, 2015 Mohr Email to Martinez, cc Drafting Team, Difuntorum, A. Tuft & Lee:

2. I still see a problem with removing "in" but it's the drafting team's decision. What does it mean to denominate a fee "as ... similar terms"? That is what the sentence states w/o a preposition before the phrase "similar terms".

4. The drafting team did specifically discuss comment [4] during the last tel conference on 8/31/15. In the previous draft (Draft 1) that was discussed during that tel conference, the comment had referred to both paragraph (e) and (f). The drafting team recognized that there should be no emergency situations that arise in a true retainer situation because those arrangements involve the lawyer's promise to be available at some time in the future, not immediately (i.e., in an emergency) as in a flat fee situation, e.g., to appear at an arraignment, arrange for bail, be present during an interrogation, etc. The drafting team agreed that the reference to paragraph (e) should be deleted. Following that tel conference, in the draft that appears in the Report & Recommendation (Draft 2), I simply deleted the reference to paragraph (e) and left (f) w/o realizing that paragraph (f) contained no reference to disclosures or writing. That's why I now suggest that comment [4] be deleted in its entirety.

As to why paragraph (e) specifically refers to disclosures and writing, you included the writing requirement when you suggested substituting your proposed paragraphs (e) and (f) for paragraphs (e) and (f) in Draft 1, and during the 8/31/15 tel conference, the drafting team agreed that the rule should include the phrase "after disclosure." See attached for the changes agreed to during the 8/31/15 tel conference. I think you included a specific writing requirement in paragraph (e) because you wanted to remove any ambiguity that the client must in effect give his or her informed written consent to a true retainer arrangement, which consent requires an adequate disclosure. But that is only my inference.

I've attached a clean annotated version of the rule, draft 2, that notes the drafting team's decisions during its telephone conferences, as well as a redline showing the changes to the rule draft 1 following the 8/31/15 tel conference.

Thanks,

Attached:
RRC2 - [4-200][1.5] - Rule - DFT2 (08-31-15) - CLEAN-ANNOT.docx
RRC2 - [4-200][1.5] - Rule - DFT2 (08-31-15) - Cf. to DFT1.docx

September 16, 2015 Martinez Email to Mohr, cc Drafting Team, Difuntorum, A. Tuft & Lee:

We did discuss comment [4] after we added (e) and (f). I agree we can delete Comment [4] (for numerous reasons). The reason for a writing requirement is client protection where the lawyer pockets the fee claiming it was a true retainer and leaves the client with little recourse other than to dispute the terms of an oral agreement—i.e., statute of frauds-type protection.

September 16, 2015 Clinch Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft & Lee:

I agree with the requested changes in points #1 and #3 and deletion of Comment [4] per point #4. I am also in agreement with deletion of "in" and "or" in (e), as suggested by Toby.

September 16, 2015 Eaton Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft & Lee:

Fine with me, too.

September 16, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr & Lee:

1) Regarding proposed paragraph (a), I would like to discuss at the meeting what is meant by an unconscionable internal expense and what authority there is that would give substance to the concept. I see no proposed explanatory Comment and cannot at the moment think of how to write one.

2) There seems to be something missing from the following portion of paragraph (b): "... because there has been, or the lawyer has failed to disclose material facts." Because there has been ... what? Am I misreading this?

3) An alternative to editing that phrase would be to remove it: "...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." If it is thought necessary to explain how a fee might fit within the Herrscher kind of unconscionability, that explanation could be placed in an explanatory Comment. I am not persuaded that an explanation is needed as I think that "fraud or overreaching" is a sufficient statement.

4) As a matter of drafting clarity, and whether or not the Commission accepts my prior suggestion, I recommend editing paragraph (b) by inserting sub-numbering along the following lines so as to more clearly set out the distinct elements of that paragraph: "A fee is unconscionable under this Rule: (1) if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or (2) 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."

5) Regarding proposed paragraph (e):

a. I am concerned about "that the client may not be entitled to a refund of all or part of the fee charged." Why is this stated conditionally? The concept of a true retainer is that it is fully earned on receipt and will not be returned if the lawyer is not later hired to

perform legal services. I think the only exception to this would be that the lawyer is not later available to provide the described services during an agreed period of time, resulting in a failure of consideration, and it might be worthwhile to add a Comment to this effect.

b. There is an ambiguity ("... but not as compensation for legal services performed or to be performed.") if a lawyer contracts for a fee in part to assure the lawyer's availability and in part as compensation for possible future services. I would insert: "... not to any extent ...." I have seen this problem come up and do not think the Rule should permit any misunderstanding on this point. I believe the fee agreement should make a clear distinction between the availability retainer, which is earned on receipt and is not refundable, and an advance payment of future fees, which is refundable to the extent not earned by the later performance of work.

6) There are two interplays with Rule 1.16 that I would like to discuss at the meeting.

a. Should the definition of a true retainer be in this Rule or left where it currently is in rule 3-700 [1.16]? Thought needs to be given to whether there should be discipline for entering into an agreement for, charging, or collecting a nonfundable retainer that is not a true retainer and a second discipline for failing to refund the full amount collected. Our current Rules have only the latter as a possible disciplinary charge. I have mixed feelings on this question and would like to hear the thoughts of others at the meeting.

b. The second interplay is where the discussion of flat fees should be placed. My current thought is that there should be no disciplinary charge for unless a lawyer fails to refund any unearned fee. Proposed paragraph (f) would result in double discipline, one for the flat fee agreement and another under Rule 1.16 for failing to refund the part that is not earned.

i. Whatever the Commission decides on this, note that paragraph (f) would create discipline for entering into a flat fee agreement and then failing to do the agreed work even if the lawyer never is paid; this would create discipline for flat fee agreements that would not apply to a lawyer who abandons a client under a contingent or hourly fee arrangement.

ii. Also, why would a lawyer be subject to professional discipline merely for charging a flat fee that the client doesn't pay? (the lawyer might not do the work b/c the client refused to pay, but the lawyer nevertheless would be subject to discipline under proposed paragraph (f)).

7) I have mixed feelings about including Comment [2], and I expect this will be discussed at our next meeting. However, this proposed Comment is not written precisely. Sections 6147 and 6148 do not mandate the content of fee agreement but rather say that in certain circumstances a lawyer can enforce a fee agreement only if it contains certain elements. In addition, if the Commission were to decide to retain Comment [2] in any form, it is not a complete reference to related statutory provisions. Another is Civ. C. §1632: "(b) Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into any of the following, shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, which includes a translation of every term and condition in that contract or agreement: ... (6) A contract or agreement, containing a statement of fees or charges, entered into for the purpose of obtaining legal services, when the person who is engaged in business is currently licensed to practice law pursuant to ... the Business and Professions Code ...."

8) I don't understand proposed Comment [4] as paragraph (f) contains no requirement that a flat fee agreement be in writing (I'm not suggesting there should be such a requirement). Paragraph 14 on p. 18 repeats this error.

9) There is a typo in the last line of p. 13: the date of the opinion in Herrscher is 1935.