

**Draft Opinion 20-0003 – Flat Fees and Termination
Synopsis of Public Comments**

No.	Commenter/Signatory	Comment on Behalf of Group?	Position	Comment	COPRAC Response
1	Moda, Kevin (19465079)	N	AM	The following package: "then the lawyer must determine the appropriate amount to be charged and must refund any advanced unearned funds," must be changed to "then the lawyer must 'come to an agreement with the client on the appropriate amount to be charged through an agreed upon predispute designated ADR process, ADR process, or the courts, and refund any advanced unearned funds.'" This civilization values self-preservation most of all. If someone fails to complete a task, they must be debarred from having the power of deciding whether they should get full payment.	
2	Lononaut Agency (Rafat) (19465523)	Y	D	Analysis should wholly depend on which side terminated agreement. If attorney misjudged scope, why should client suffer? If client wants more than what was specified, why should lawyer refund anything? Perhaps better to say any flat fees for non-discovery work must be done by lawyers with at least 4 years experience.	
3	Migliaccio, Nick (19596675)	N	AM	My name is Nick Migliaccio. I've been a fee arbitrator for over twenty years and had the pleasure of being a former member, vice chair, and chairperson of the State Bar Standing Committee on Mandatory Fee Arbitration. I was also a	

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				<p>State Bar Assistant Presiding Arbitrator, as well as the chairperson of the Long Beach and Beverly Hills Bar Associations MFA programs. I've presided over, or supervised, 100s of fee arbitrations. Most importantly for this task, I've trained thousands of lawyers regarding fee disputes, including flat fees under Rule 1.5 as well as its predecessor rules. I've reviewed the most recent proposed Formal Opinion No. 20-0003 [FO] and respectfully offer the following suggestions. On page 5 of the FO, COPRAC states: "Another option for determining earned fees in connection with flat fee services is the application of an hourly rate to the lawyer's services at the time the representation terminates. However, as a flat fee agreement is not based on providing legal services based on an hourly rate, this approach may not be appropriate as the number of hours spent on the client's case under a flat fee agreement may not be determinative of the reasonable value of the services in relation to the specified flat fee." The FO continues at the end of page 5, beginning of page 6 as follows: "The committee agrees with the San Diego County Bar Association's position and</p>	

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				advises that a lawyer should clearly state when the fee or portion thereof is earned based on milestones." The language preceding this conclusion and conclusion is ambiguous. I cannot tell whether this FO recommends that the milestone approach is the only method an attorney may utilize to calculate a... ... refund when the attorney-client relationship is terminated before the services identified in the flat fee agreement are completed. If this was not COPRACs intent, then I suggest that this language is clarified. However, if that is COPRAC's intent, then I respectfully disagree. In my experience, the milestone approach, inter alia, may ignore economic realities, unduly interfere with the judge's/arbitrator's discretion, and adversely impact the public's access to justice. While I agree that the milestone approach may be the preferred method in cases where the attorney is performing routine services like creating a trust or forming a LLC/corporation, or even DUI defense, it does not translate well in more fluid and sophisticated matters, such as criminal defense, business litigation or administrative matters before federal agencies. Routine services require very little time	

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				<p>commitment and generally cost the client less than \$2000-4,000. Generally, the trust/entity document are standardized and maintained in template form. Such simple matters, including others like DUI defense, are so standardized that experienced attorneys are able to reliably predict their time commitment to meet with the client and complete the required tasks. Additionally, the milestones are easily defined and standardized. In simple trust matters, there's generally a client meeting, then a review of the client's documents/ information, and then the drafting/revisions of the trust documents. Under these circumstances, it is easy to identify milestones and ultimately calculate a refund if the relationship is terminated mid-stream. Also, if a client decides to terminate the relationship prematurely, the affected... .. attorney is not overly burdened to refund the unearned portion of the flat fee because, inter alia, those types of clients are more easily replaceable and very little money is involved. However, the same cannot be said for more sophisticated matters. For instance, in some criminal cases, milestones may not be easily defined or could be very</p>	

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				misleading. Arraignments or bail hearings may be routinely continued or revisited multiple times. Some cases require the attorney to spend considerable time investigating or researching the matter before one of the traditional milestones is passed. Identifying, even generally, the milestones in fee agreements for such fluid/complex cases may be unreliable and may adversely affect an attorney's ability to agree to accept a flat fee. The same is true for civil litigation where a plaintiff's attorney has no control over the scope of an opposing party's strategy. I've personally been involved in cases where multiple demurrers required multiple amended pleadings. Cases where discovery disputes created by the other party devolved into near chaos requiring an extra-ordinary time commitment. In such instances, it is the attorney who primarily bears the financial burden of agreeing to the flat fee arrangement. In my experience, in non-routine cases, an alternate viable [and more accurate] method to determine the earned fee [or conversely, a refund] is an examination of, inter alia, the hours incurred by the attorney and either the attorney's regular hourly rate, an enhanced hourly	

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				<p>rate or a lodestar hourly rate. While I’ve not located case law authority confirming this viewpoint, it is similar to the manner in which our courts have always calculated an... .. appropriate fee in other type of cases where the attorney is terminated before services are completed. <i>Mardirossian & Associates, Inc. v. Ersoff</i>, 153 Cal.App.4th 257, 272-73 (2007) ; see also <i>Serano v. Preist</i>, 20 Cal.3d 25, 48 fn. 23 (1977) “The starting point of every fee award, once it is recognized that the court’s role in equity is to provide just compensation for the attorney, must be a calculation of the attorney’s services in terms of the time he [she] expended on the case.” ; see also <i>Cazares v. Saenz</i>, 208 Cal.App.3d 279-78(1989) (one of the most significant factors in determining a reasonable fee is the amount of time spent). Another economic reality is that some attorneys that agree to flat fee engagements may incur a greater enterprise risk; meaning that unlike preparing standardized trusts, attorneys that agree to represent client in serious/complex cases may be required to forego other lucrative cases in an effort not to stretch themselves too thin. For instance, in an arbitration</p>	

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				<p>I presided over, an attorney was able to sufficiently demonstrate that the flat fee engagement she agreed to required her to actually turn down a number of other lucrative cases so that she could ensure that the flat fee client was properly represented. I submit that this attorney would have not agreed to the flat fee representation had milestone method represented the exclusive approach to calculate her fee in the event she was terminated [hence, impeding her client's access to justice]. I do not handle criminal cases. However my informal discussions with several colleagues that do indicate that a requirement that they sufficiently identify milestones in the fee agreement in all flat fee cases would... ... create too much of an administrative burden requiring them to assess, predict, and articulate the lifeline of the representation based solely on the pre-fee agreement discussions with the potential client or their family. Similarly, I personally would be extremely reluctant to agree to a flat fee engagement in a civil or administrative matter that basically required me to guess as to my opposing party's [or agency's] response [or litigation strategy]. COPRAC and the</p>	

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				<p>State Bar have access to much more definitive data concerning the forgoing. This public comment opportunity is a start, but should not be exclusive or definitive. I think that before this FO is adopted, the sub- committee charged with drafting this FO should reach out to affected stakeholders, including criminal law and civil litigators that accept flat-fee arrangements, to get clarifications regarding the real world implications of only using the milestone approach to address this issue. Lastly, while the FO is not legal authority, it does provide guidance to practitioners, the public and more importantly, the courts. COPRAC's influence cannot be understated. Many judicial officers in California were prior prosecutors, public defenders, and government lawyers that lack exposure to the realities of negotiating or executing a fee agreement with a client. I fear that COPRAC's current FO may prompt an inexperienced judicial officer to create a legal precedent unsupported by real world realities. One that will ultimately affect many lawyers, and more impotently, may impede the public's access to justice. There are simply too many variations of flat-fee arrangements to designate one</p>	

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				<p>exclusive approach to calculate the... .. earned fee or refund in all cases. I believe that the determination of how to best calculate a refund under such circumstances should be left with the trier of fact based on the facts of the individual and varied cases. Attorneys that provide flat fee services should be given some leeway in defining when and how their flat fee is earned. Given the foregoing, I would urge COPRAC to revisit its determination to the contrary. Next, Part D of the FO is confusing. Even before the adoption of Rule 1.5, California law was clear on how an attorney's attempt to renegotiate a flat fee arrangement during the representation was treated. It has long been the law in California that the attorney bears the risk that the compensation agreed upon and stated in the initial fee agreement with the client is adequate for the retention. More than 100 years ago, in Reynolds v. Sorosis Fruit Co. (1901) 133 Cal. 625, 628 [66 P. 21] the California Supreme Court held that: "The fact that the services performed by plaintiff [attorney] were reasonably worth more than the price for which he agreed to perform them cannot be considered. If the services had proven to be much</p>	

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				<p>less than the parties had in mind, and had only been worth ten dollars, the defendant [client] would have been bound by its contract, and would have been liable for the four hundred dollars. The fact that plaintiff [attorney] made a bad bargain, and was compelled to do more than four hundred dollars worth of labor, cannot relieve him of his contract. He is precisely in the same position that any other party would be, who, having made a contract for a certain sum to do a certain thing, finds by experience that the sum is not adequate... .. compensation” The State Bar has previously used the phrase “close scrutiny” in evaluating an attorney’s conduct in seeking a fee modification. See, In re Lindmark (2004) 4 Cal. State Bar Ct. Rptr. 668 (a modification of a fee agreement implicates an attorney’s fiduciary duties to the client such that any modification “beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness”). Additionally, the court in Hawk v. State Bar (1988) 45 Cal.3d 591 [247 Cal.Rptr. 599], held that “all dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with</p>	

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				<p>the utmost strictness for any unfairness.” COPRAC is correct that the Official Discussion to Former Rule 3-300 carved out fee agreements by which the attorney was “retained,” but it left uncertain whether this exclude[d] subsequent modifications after the attorney [was] already “retained.” And even though respected ethics scholars and professional responsibility committees of bar associations across California expressed opinions on both sides of the issue as to whether an attorney must comply with former Rule 3-300 [and now Rule 1.8.1] in connection with modifications to the financial terms of an existing fee agreement, no statutory or case law authority, required it. I suggest that until the Legislature or a competent court does so, COPRAC should refrain from suggesting otherwise because the foregoing [and existing] authorities make clear that in California, unless the scope of the representation changes, any attempt by the attorney to renegotiate an increase of the flat fee midstream may be assessed by the trier of fact under the close scrutiny standard without regard to... .. whether an unwitting client signed away their rights after the attorney’s</p>	

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				<p>Rule 1.8.1 disclosure. One last point, why would a rational client agree to pay an attorney more than required under the fee agreement. Unless the scope of the representation changes, basic economic theory would surmise that a rational client would not. I submit that the proposal that disclosures required by Rule 1.8.1 will somehow protect clients under the circumstance is misplaced because clients of all socio-economic backgrounds do not read their fee agreement before they sign them. The same is true in other matters. When I do training sessions I generally ask the lawyers attending how many of them actually read their entire home loan documents or the car purchase/lease documents before signing them. The vast majority admit that they do not. I submit that requiring Rule 1.8.1 disclosures, as opposed to requiring/allowing the trier of fact to use the “strict scrutiny” test, may simply validate an offending attorney’s attempt to obtain a increased fee after the representation has begun.</p>	
4	California Lawyers Association (Spencer)	Y	SM	<p>Thank you for providing an opportunity to comment on the revised interim opinion. We again commend COPRAC for proposing an opinion that will</p>	

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				<p>provide guidance on the important topic of flat fees and appreciate that COPRAC has responded favorably to comments we previously submitted. We have several comments and suggestions on the revised draft, which seems to still require some edits and reorganization to provide the intended assistance to California lawyers on the use of flat fees: 1. Digest #4 should state unequivocally that a lawyer “must” comply with rule 1.8.1 rather than state a lawyer “should” comply with the rule. “Must” more accurately reflects COPRAC’s conclusion in Part D. See first paragraph on page 8 (“The committee agrees with Utah’s position that renegotiation of a flat fee agreement requires compliance with rule 1.8.1.”) 2. In the third paragraph on page 2 (“However, flat fee agreements ...”), the case name in the citation should be “<i>Dickson v. Mann.</i>” 3. Concerning the fourth paragraph on page 2 (“Because the amount of ...”), we recommend that it be deleted as it appears to have inadvertently been retained. The same paragraph appears in slightly different language as the second paragraph of the Discussion on page 3. Given that it summarizes what issues are to be addressed in the</p>	

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				<p>opinion, it is more appropriately placed in the Discussion rather than the Introduction. 4. Concerning the last paragraph on page 2, we recommend that it either be deleted or put in a footnote. The issue of charging a “non-refundable” or “earned on- receipt” fee is secondary to the opinion’s focus on what portion of a flat fee must be refunded when the work has not been completed or the representation is terminated. In any event, we do not believe it is necessary given the discussion in the first paragraph on page 5 (“Clients have the absolute right ...”) 5. In the second line of the first paragraph on page 3, the citation to “1.15, paragraph (b)(2)” should be to “1.15, paragraph (b).” Paragraph (b)(1) sets forth the disclosures that must be made to the client, regardless of the amount of fee, before a lawyer can deposit the fee in the lawyer’s operating account. Paragraph (b)(2) requires that the disclosures and client’s agreement must be in writing only if the fee exceeds \$1,000. 6. In the first paragraph of the Discussion on page 3, the point being made, presumably that a lawyer who cuts corners may violate rules 1.1 and/or 1.3, would be better emphasized by</p>	

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				<p>reversing the two sentences. The second sentence might read: “We note, however, that attorneys providing services under a flat fee agreement still have duties of competence and diligence. (Rules 1.1 (Competence) and 1.3 (Diligence).)” 7. In the second paragraph of the Discussion on page 3, we recommend deleting the phrase “when the fee is earned” in the fourth line. We note that the Committee deleted a section in the previous opinion draft that was entitled “When a Flat Fee is Earned,” presumably because the issue of when a fee is earned and what portion of an unearned fee must be returned are two sides of the same coin. In addition, deleting that phrase will better track the Discussion sections that follow. 8. In the first line on page 4, the word “disclose” should be “discloses” to track the language of rule 1.15(b)(1). 9. The last sentence of the first full paragraph on page 4 should be deleted. We understand that the Committee has pulled back from the previous draft’s conclusion that the disclosures under rule 1.15, paragraph (b) should incorporate the disclosures contemplated under the definition of “informed consent.” In our previous</p>	

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				comment letter at Point #7, we explained why such a conclusion goes beyond what rule 1.15(b) requires. Leaving this sentence in the current draft, however, is confusing. In the previous draft, it was provided context by the “informed written consent” discussion. Because that discussion has been removed, this sentence should also be removed. 10. <i>Introductory Comment regarding Sections B and C of the Discussion.</i> We believe the titles of Sections B and C are misleading. Both sections appear to assume that there is a flat fee agreement but that in one, a method (e.g., milestones or benchmarks) has been included to identify when a fee is earned and in the other, no such method was set out in the fee agreement. As we have read those sections, Section B discusses the situation where the flat fee agreement has provided such a method, and Section C discusses how to resolve what portion of a fee must be returned when no such method has been included in the agreement. Our comments reflect the foregoing assumptions. 11. We recommend that the title of Section B be changed to something along the following lines: “Refunds of Unearned Portions of a Flat	

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				<p>Fee when the Flat Fee Agreement Includes Milestones.” 12. In the third line of the first paragraph of Section B on page 4, we recommend substituting “clarifies” for “suggests.” 13. In the next-to-last line of the same paragraph, we suggest substituting the phrase “included under” for “in” so that the line reads: “refunded if services included under the flat fee agreement are not completed” 14. In the second paragraph of Section B on page 4, we recommend substituting “affect” for “impact.” The Rules use the phrase “adverse effect” in several places but the word “impact” does not appear anywhere in the Rules. 15. In the last paragraph on page 4, we recommend rewriting the last sentence to provide: “Except when a flat fee is intended as compensation for a single specific service, the Committee believes that When when applied to a flat fee agreement that provides that providing the fee will be is to be paid in advance of services being rendered, with the exception of a flat fee for a single specific service, Business and Professions Code section 6148, subdivisions (a) and (b) may require that the fee agreement set forth when the fee is earned and how any refund</p>	

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				<p>will be calculated.” 16. In footnote 3, we recommend the following revision: “Milestones have been approved by a local California bar association and by ethics opinions and case authorities from other jurisdictions. (San Diego County Bar Ass’n Ethics Opn. No. 2019-03, p.5; <i>In the Matter of Gilbert</i> (Colo. 2015) 346 P.3d 1018, 1027; <i>In re Mance</i> (D.C. 2009) 980 A.2d 1196, 1204; District of Columbia Bar Ethics Opn. No. 355 (2010); Utah State Bar Ethics Advisory Opn. No. 2012-02.)” 17. In the second paragraph on page 5, second line, reference is made to “several approaches that may be used to determine the amount of the unearned fee.” However, the opinion only refers to two approaches: milestones/benchmarks and lodestar. We recommend substituting “two” or “at least two” for “several.” In addition, we suggest that you substitute “a lawyer’s entitlement” for “the entitlement” in the seventh line. Also, we do not understand why front-loading a lawyer’s entitlement to fees would likely be subject to scrutiny because “the terms of the agreement must be ... fully explained to the client.” We recommend deleting the phrase “fully explained to the client” so that</p>	

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				<p>the sentence reads: “However, because the terms of the agreement must be reasonable and fully explained to the client, milestones that provide for front-loading the a lawyer’s entitlement to fees are will likely be subject to extra scrutiny.” 18. In the fourth paragraph on page 5, we recommend the deletion of second sentence, which discusses the San Diego Bar Committee’s conclusion that rule 1.5(b) factors be consulted when no method for calculating when a flat fee is earned is included in the agreement (“The committee concluded that in the absence ...”) However, that is the topic of Section C. We believe that including the second sentence here is confusing. The only points from the San Diego Bar opinion that should be included here are that, first, the milestone/landmark method is appropriate (as you conclude in the last sentence of the paragraph) and second, the lodestar method is not. 19. We recommend that the title of Section C be changed to something along the following lines: “Refunds of Unearned Portions of a Flat Fee when the Flat Fee Agreement Does Not Include Milestones.” 20. At the end of the last sentence of the second paragraph of</p>	

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				<p>Section C on page 6, we recommend including a citation that supports the statement made, perhaps a citation to <i>Fracasse v. Brent</i>. 21. The analysis in the third paragraph of Section C on page 6 strikes us as incomplete. You cite to the San Diego Bar Association in Section B for the proposition that the 1.5(b) factors be consulted when no method for calculating when a flat fee is earned is included in the agreement, (see Point #18, above), but do not cite to it here. It would be helpful to the reader if the opinion explicitly explained that the factors should be consulted not just for the purpose of determining whether a fee is unconscionable but also to determine when a flat fee or a portion thereof has been earned. It would also help if the Committee provided fact-based examples of how those factors could be used to make those determinations. However, as presently drafted, the analysis is incomplete and strikes us as not being of particular help to California lawyers who might be inclined to use flat fee agreements in their practices. 22. With respect to the third paragraph of the Conclusion, it does not match part D of the Discussion or the Issues COPRAC</p>	

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				<p>identifies at the beginning of the Opinion. Part D discusses an attorney’s ethical obligations in renegotiating a flat fee agreement and concludes the attorney must comply with 1.81. The third paragraph of the Conclusion, however, speaks in terms of the enforceability of a renegotiated agreement. This is a shift that should require some explanation, Committee on Professional Responsibility and Conduct January 22, 2025 Page 5 preferably in the Discussion. Presumably, the explanation is that when an attorney fails to comply with their ethical obligations, the agreement is unenforceable (or not “fully enforceable.”) We recommend that COPRAC avoid the shift from a lawyer’s ethical obligations as set forth in Discussion part D to enforceability in the third paragraph of the Conclusion, and instead simply summarize a lawyer’s ethical obligations in the Conclusion.</p>	

Public Comment - 20-0003 [60day]

Reference #	19596675
Status	Complete
Name	Nick Migliaccio
Attorney or Public Member?	Attorney Member
Representing an Organization?	No
From the choices below, we ask that you indicate your position.	Agree if Modified
Email address	nm22@georgetown.edu
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>My name is Nick Migliaccio. I've been a fee arbitrator for over twenty years and had the pleasure of being a former member, vice chair, and chairperson of the State Bar Standing Committee on Mandatary Fee Arbitration. I was also a State Bar Assistant Presiding Arbitrator, as well as the chairperson of the Long Beach and Beverly Hills Bar Associations MFA programs. I've presided over, or supervised, 100s of fee arbitrations. Most importantly for this task, I've trained thousands of lawyers regarding fee disputes, including flat fees under Rule 1.5 as well as its predecessor rules.</p> <p>I've reviewed the most recent proposed Formal Opinion No. 20-0003 [FO] and respectfully offer the following suggestions.</p> <p>On page 5 of the FO, COPRAC states: "Another option for determining earned fees in connection with flat fee services is the application of an hourly rate to the lawyer's services at the time the representation terminates. However, as a flat fee agreement is not based on providing legal</p>

services based on an hourly rate, this approach may not be appropriate as the number of hours spent on the client's case under a flat fee agreement may not be determinative of the reasonable value of the services in relation to the specified flat fee."

The FO continues at the end of page 5, beginning of page 6 as follows: "The committee agrees with the San Diego County Bar Association's position and advises that a lawyer should clearly state when the fee or portion thereof is earned based on milestones."

The language preceding this conclusion and conclusion is ambiguous. I cannot tell whether this FO recommends that the milestone approach is the only method an attorney may utilize to calculate a...

... refund when the attorney-client relationship is terminated before the services identified in the flat fee agreement are completed. If this was not COPRACs intent, then I suggest that this language is clarified. However, if that is COPRAC's intent, then I respectfully disagree. In my experience, the milestone approach, inter alia, may ignore economic realities, unduly interfere with the judge's/arbitrator's discretion, and adversely impact the public's access to justice.

While I agree that the milestone approach may be the preferred method in cases where the attorney is performing routine services like creating a trust or forming a LLC/corporation, or even DUI defense, it does not translate well in more fluid and sophisticated matters, such as criminal defense, business litigation or

administrative matters before federal agencies.

Routine services require very little time commitment and generally cost the client less than \$2000-4,000. Generally, the trust/entity document are standardized and maintained in template form. Such simple matters, including others like DUI defense, are so standardized that experienced attorneys are able to reliably predict their time commitment to meet with the client and complete the required tasks. Additionally, the milestones are easily defined and standardized. In simple trust matters, there's generally a client meeting, then a review of the client's documents/information, and then the drafting/revisions of the trust documents. Under these circumstances, it is easy to identify milestones and ultimately calculate a refund if the relationship is terminated mid-stream. Also, if a client decides to terminate the relationship pre-maturely, the affected...

... attorney is not overly burdened to refund the unearned portion of the flat fee because, inter alia, those types of clients are more easily replaceable and very little money is involved. However, the same cannot be said for more sophisticated matters.

For instance, in some criminal cases, milestones may not be easily defined or could be very misleading. Arraignments or bail hearings may be routinely continued or revisited multiple times. Some cases require the attorney to spend considerable time investigating or researching the matter before one of the traditional milestones is passed. Identifying, even generally, the milestones in fee agreements for such fluid/complex cases may be unreliable and may adversely affect an attorney's ability to

agree to accept a flat fee.

The same is true for civil litigation where a plaintiff's attorney has no control over the scope of an opposing party's strategy. I've personally been involved in cases where multiple demurrers required multiple amended pleadings. Cases where discovery disputes created by the other party devolved into near chaos requiring an extra-ordinary time commitment. In such instances, it is the attorney who primarily bears the financial burden of agreeing to the flat fee arrangement.

In my experience, in non-routine cases, an alternate viable [and more accurate] method to determine the earned fee [or conversely, a refund] is an examination of, inter alia, the hours incurred by the attorney and either the attorney's regular hourly rate, an enhanced hourly rate or a lodestar hourly rate. While I've not located case law authority confirming this viewpoint, it is similar to the manner in which our courts have always calculated an...

... appropriate fee in other type of cases where the attorney is terminated before services are completed. *Mardirossian & Associates, Inc. v. Ersoff*, 153 Cal.App.4th 257, 272-73 (2007) ; see also *Serano v. Preist*, 20 Cal.3d 25, 48 fn. 23 (1977) "The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he [she] expended on the case." ; see also *Cazares v. Saenz*, 208 Cal.App.3d 279-78(1989) (one of the most significant factors in determining a reasonable fee is the amount of time spent).

Another economic reality is that some attorneys that agree to flat fee engagements may incur a greater enterprise risk; meaning that unlike preparing standardized trusts, attorneys that agree to represent client in serious/complex cases may be required to forego other lucrative cases in an effort not to stretch themselves too thin. For instance, in an arbitration I presided over, an attorney was able to sufficiently demonstrate that the flat fee engagement she agreed to required her to actually turn down a number of other lucrative cases so that she could ensure that the flat fee client was properly represented. I submit that this attorney would have not agreed to the flat fee representation had milestone method represented the exclusive approach to calculate her fee in the event she was terminated [hence, impeding her client's access to justice].

I do not handle criminal cases. However my informal discussions with several colleagues that do indicate that a requirement that they sufficiently identify milestones in the fee agreement in all flat fee cases would...

... create too much of an administrative burden requiring them to assess, predict, and articulate the lifeline of the representation based solely on the pre-fee agreement discussions with the potential client or their family. Similarly, I personally would be extremely reluctant to agree to a flat fee engagement in a civil or administrative matter that basically required me to guess as to my opposing party's [or agency's] response [or litigation strategy].

COPRAC and the State Bar have access to

much more definitive data concerning the foregoing. This public comment opportunity is a start, but should not be exclusive or definitive. I think that before this FO is adopted, the sub-committee charged with drafting this FO should reach out to affected stakeholders, including criminal law and civil litigators that accept flat-fee arrangements, to get clarifications regarding the real world implications of only using the milestone approach to address this issue.

Lastly, while the FO is not legal authority, it does provide guidance to practitioners, the public and more importantly, the courts. COPRAC's influence cannot be understated. Many judicial officers in California were prior prosecutors, public defenders, and government lawyers that lack exposure to the realities of negotiating or executing a fee agreement with a client. I fear that COPRAC's current FO may prompt an inexperienced judicial officer to create a legal precedent unsupported by real world realities. One that will ultimately affect many lawyers, and more impotently, may impede the public's access to justice.

There are simply too many variations of flat-fee arrangements to designate one exclusive approach to calculate the...

... earned fee or refund in all cases. I believe that the determination of how to best calculate a refund under such circumstances should be left with the trier of fact based on the facts of the individual and varied cases. Attorneys that provide flat fee services should be given some leeway in defining when and how their flat fee is earned. Given the foregoing, I would urge COPRAC to revisit its determination to the

contrary.

Next, Part D of the FO is confusing. Even before the adoption of Rule 1.5, California law was clear on how an attorney's attempt to renegotiate a flat fee arrangement during the representation was treated. It has long been the law in California that the attorney bears the risk that the compensation agreed upon and stated in the initial fee agreement with the client is adequate for the retention. More than 100 years ago, in *Reynolds v. Sorosis Fruit Co.* (1901) 133 Cal. 625, 628 [66 P. 21] the California Supreme Court held that:

"The fact that the services performed by plaintiff [attorney] were reasonably worth more than the price for which he agreed to perform them cannot be considered. If the services had proven to be much less than the parties had in mind, and had only been worth ten dollars, the defendant [client] would have been bound by its contract, and would have been liable for the four hundred dollars. The fact that plaintiff [attorney] made a bad bargain, and was compelled to do more than four hundred dollars worth of labor, cannot relieve him of his contract. He is precisely in the same position that any other party would be, who, having made a contract for a certain sum to do a certain thing, finds by experience that the sum is not adequate...

... compensation"

The State Bar has previously used the phrase "close scrutiny" in evaluating an attorney's conduct in seeking a fee modification. See, *In re Lindmark* (2004) 4 Cal. State Bar Ct. Rptr. 668 (a modification of a fee agreement implicates an

attorney's fiduciary duties to the client such that any modification "beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness"). Additionally, the court in *Hawk v. State Bar* (1988) 45 Cal.3d 591 [247 Cal.Rptr. 599], held that "all dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness."

COPRAC is correct that the Official Discussion to Former Rule 3-300 carved out fee agreements by which the attorney was "retained," but it left uncertain whether this excluded subsequent modifications after the attorney [was] already "retained." And even though respected ethics scholars and professional responsibility committees of bar associations across California expressed opinions on both sides of the issue as to whether an attorney must comply with former Rule 3-300 [and now Rule 1.8.1] in connection with modifications to the financial terms of an existing fee agreement, no statutory or case law authority, required it. I suggest that until the Legislature or a competent court does so, COPRAC should refrain from suggesting otherwise because the foregoing [and existing] authorities make clear that in California, unless the scope of the representation changes, any attempt by the attorney to renegotiate an increase of the flat fee midstream may be assessed by the trier of fact under the close scrutiny standard without regard to...

... whether an unwitting client signed away their rights after the attorney's Rule 1.8.1 disclosure.

One last point, why would a rational client agree to pay an attorney more than required under the

fee agreement. Unless the scope of the representation changes, basic economic theory would surmise that a rational client would not. I submit that the proposal that disclosures required by Rule 1.8.1 will somehow protect clients under the circumstance is misplaced because clients of all socio-economic backgrounds do not read their fee agreement before they sign them. The same is true in other matters. When I do training sessions I generally ask the lawyers attending how many of them actually read their entire home loan documents or the car purchase/lease documents before signing them. The vast majority admit that they do not. I submit that requiring Rule 1.8.1 disclosures, as opposed to requiring/allowing the trier of fact to use the “strict scrutiny” test, may simply validate an offending attorney’s attempt to obtain a increased fee after the representation has begun.

Thank you for your consideration, and your service to the public and our profession.

Last Update	2024-12-18 11:03:53
Start Time	2024-12-18 10:59:16
Finish Time	2024-12-18 11:03:53
IP	Anonymous
Browser	Other
Device	Other
Referrer	N/A

Public Comment - 20-0003 [60day]

Reference #	19465079
Status	Complete
Name	kevin moda
Attorney or Public Member?	Public Member
Representing an Organization?	No
From the choices below, we ask that you indicate your position.	Agree if Modified
Email address	moda@msn.com
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>The following package: "then the lawyer must determine the appropriate amount to be charged and must refund any advanced unearned funds," must be changed to "then the lawyer must 'come to an agreement with the client on the appropriate amount to be charged through an agreed upon predispute designated ADR process, ADR process, or the courts, and refund any advanced unearned funds."</p> <p>This civilization values self-preservation most of all. If someone fails to complete a task, they must be debarred from having the power of deciding whether they should get full payment.</p>
Last Update	2024-11-07 16:03:36
Start Time	2024-11-07 14:43:15
Finish Time	2024-11-07 16:03:36
IP	Anonymous
Browser	Other
Device	Other
Referrer	N/A

Public Comment - 20-0003 [60day]

Reference #	19465523
Status	Complete
Name	Matthew Rafat
Attorney or Public Member?	Attorney Member
Representing an Organization?	Yes
Professional Affiliation	Lononaut Agency
From the choices below, we ask that you indicate your position.	Disagree
Email address	willworkforjustice@yahoo.com
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Analysis should wholly depend on which side terminated agreement. If attorney misjudged scope, why should client suffer? If client wants more than what was specified, why should lawyer refund anything? Perhaps better to say any flat fees for non-discovery work must be done by lawyers with at least 4 years experience.
Last Update	2024-11-07 18:54:43
Start Time	2024-11-07 18:50:31
Finish Time	2024-11-07 18:54:43
IP	Anonymous
Browser	Other
Device	Other
Referrer	N/A

January 22, 2025

Committee on Professional Responsibility and Conduct (COPRAC)
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Revised Formal Opinion Interim No. 20-0003 (Flat Fees and Termination)

Dear COPRAC members:

Thank you for providing an opportunity to comment on the revised interim opinion. We again commend COPRAC for proposing an opinion that will provide guidance on the important topic of flat fees and appreciate that COPRAC has responded favorably to comments we previously submitted. We have several comments and suggestions on the revised draft, which seems to still require some edits and reorganization to provide the intended assistance to California lawyers on the use of flat fees:

1. Digest #4 should state unequivocally that a lawyer “must” comply with rule 1.8.1 rather than state a lawyer “should” comply with the rule. “Must” more accurately reflects COPRAC’s conclusion in Part D. See first paragraph on page 8 (“The committee agrees with Utah’s position that renegotiation of a flat fee agreement requires compliance with rule 1.8.1.”)
2. In the third paragraph on page 2 (“However, flat fee agreements ...”), the case name in the citation should be “*Dickson v. Mann*.”
3. Concerning the fourth paragraph on page 2 (“Because the amount of ...”), we recommend that it be deleted as it appears to have inadvertently been retained. The same paragraph appears in slightly different language as the second paragraph of the Discussion on page 3. Given that it summarizes what issues are to be addressed in the opinion, it is more appropriately placed in the Discussion rather than the Introduction.
4. Concerning the last paragraph on page 2, we recommend that it either be deleted or put in a footnote. The issue of charging a “non-refundable” or “earned-on-receipt” fee is secondary to the opinion’s focus on what portion of a flat fee must be refunded when the work has not been completed or the representation is

terminated. In any event, we do not believe it is necessary given the discussion in the first paragraph on page 5 (“Clients have the absolute right ...”)

5. In the second line of the first paragraph on page 3, the citation to “1.15, paragraph (b)(2)” should be to “1.15, paragraph (b).” Paragraph (b)(1) sets forth the disclosures that must be made to the client, regardless of the amount of fee, before a lawyer can deposit the fee in the lawyer’s operating account. Paragraph (b)(2) requires that the disclosures and client’s agreement must be in writing only if the fee exceeds \$1,000.
6. In the first paragraph of the Discussion on page 3, the point being made, presumably that a lawyer who cuts corners may violate rules 1.1 and/or 1.3, would be better emphasized by reversing the two sentences. The second sentence might read: “We note, however, that attorneys providing services under a flat fee agreement still have duties of competence and diligence. (Rules 1.1 (Competence) and 1.3 (Diligence).)”
7. In the second paragraph of the Discussion on page 3, we recommend deleting the phrase “when the fee is earned” in the fourth line. We note that the Committee deleted a section in the previous opinion draft that was entitled “When a Flat Fee is Earned,” presumably because the issue of when a fee is earned and what portion of an unearned fee must be returned are two sides of the same coin. In addition, deleting that phrase will better track the Discussion sections that follow.
8. In the first line on page 4, the word “disclose” should be “discloses” to track the language of rule 1.15(b)(1).
9. The last sentence of the first full paragraph on page 4 should be deleted. We understand that the Committee has pulled back from the previous draft’s conclusion that the disclosures under rule 1.15, paragraph (b) should incorporate the disclosures contemplated under the definition of “informed consent.” In our previous comment letter at Point #7, we explained why such a conclusion goes beyond what rule 1.15(b) requires. Leaving this sentence in the current draft, however, is confusing. In the previous draft, it was provided context by the “informed written consent” discussion. Because that discussion has been removed, this sentence should also be removed.
10. *Introductory Comment regarding Sections B and C of the Discussion.* We believe the titles of Sections B and C are misleading. Both sections appear to assume that there is a flat fee agreement but that in one, a method (e.g., milestones or benchmarks) has been included to identify when a fee is earned and in the other, no such method was set out in the fee agreement. As we have read those

sections, Section B discusses the situation where the flat fee agreement has provided such a method, and Section C discusses how to resolve what portion of a fee must be returned when no such method has been included in the agreement. Our comments reflect the foregoing assumptions.

11. We recommend that the title of Section B be changed to something along the following lines: “Refunds of Unearned Portions of a Flat Fee when the Flat Fee Agreement Includes Milestones.”
12. In the third line of the first paragraph of Section B on page 4, we recommend substituting “clarifies” for “suggests.”
13. In the next-to-last line of the same paragraph, we suggest substituting the phrase “included under” for “in” so that the line reads: “refunded if services included under the flat fee agreement are not completed”
14. In the second paragraph of Section B on page 4, we recommend substituting “affect” for “impact.” The Rules use the phrase “adverse effect” in several places but the word “impact” does not appear anywhere in the Rules.
15. In the last paragraph on page 4, we recommend rewriting the last sentence to provide: “Except when a flat fee is intended as compensation for a single specific service, the Committee believes that ~~When when~~ applied to a flat fee agreement ~~that provides that providing the fee will be is to be~~ paid in advance of services being rendered, with the exception of a flat fee for a single specific service, Business and Professions Code section 6148, subdivisions (a) and (b) may require that the fee agreement set forth when the fee is earned and how any refund will be calculated.”
16. In footnote 3, we recommend the following revision: “Milestones have been approved by a local California bar association and by ethics opinions and case authorities from other jurisdictions. (San Diego County Bar Ass’n Ethics Opn. No. 2019-03, p.5; *In the Matter of Gilbert* (Colo. 2015) 346 P.3d 1018, 1027; *In re Mance* (D.C. 2009) 980 A.2d 1196, 1204; District of Columbia Bar Ethics Opn. No. 355 (2010); Utah State Bar Ethics Advisory Opn. No. 2012-02.)”
17. In the second paragraph on page 5, second line, reference is made to “several approaches that may be used to determine the amount of the unearned fee.” However, the opinion only refers to two approaches: milestones/benchmarks and lodestar. We recommend substituting “two” or “at least two” for “several.” In addition, we suggest that you substitute “a lawyer’s entitlement” for “the entitlement” in the seventh line. Also, we do not understand why front-loading a lawyer’s entitlement to fees would likely be subject to scrutiny because “the terms

of the agreement must be ... fully explained to the client.” We recommend deleting the phrase “fully explained to the client” so that the sentence reads: “However, because the terms of the agreement must be reasonable ~~and fully explained to the client~~, milestones that provide for front-loading ~~the~~ a lawyer’s entitlement to fees are will likely be subject to extra scrutiny.”

18. In the fourth paragraph on page 5, we recommend the deletion of second sentence, which discusses the San Diego Bar Committee’s conclusion that rule 1.5(b) factors be consulted when no method for calculating when a flat fee is earned is included in the agreement (“The committee concluded that in the absence ...”) However, that is the topic of Section C. We believe that including the second sentence here is confusing. The only points from the San Diego Bar opinion that should be included here are that, first, the milestone/landmark method is appropriate (as you conclude in the last sentence of the paragraph) and second, the lodestar method is not.
19. We recommend that the title of Section C be changed to something along the following lines: “Refunds of Unearned Portions of a Flat Fee when the Flat Fee Agreement Does Not Include Milestones.”
20. At the end of the last sentence of the second paragraph of Section C on page 6, we recommend including a citation that supports the statement made, perhaps a citation to *Fracasse v. Brent*.
21. The analysis in the third paragraph of Section C on page 6 strikes us as incomplete. You cite to the San Diego Bar Association in Section B for the proposition that the 1.5(b) factors be consulted when no method for calculating when a flat fee is earned is included in the agreement, (see Point #18, above), but do not cite to it here. It would be helpful to the reader if the opinion explicitly explained that the factors should be consulted not just for the purpose of determining whether a fee is unconscionable but also to determine when a flat fee or a portion thereof has been earned. It would also help if the Committee provided fact-based examples of how those factors could be used to make those determinations. However, as presently drafted, the analysis is incomplete and strikes us as not being of particular help to California lawyers who might be inclined to use flat fee agreements in their practices.
22. With respect to the third paragraph of the Conclusion, it does not match part D of the Discussion or the Issues COPRAC identifies at the beginning of the Opinion. Part D discusses an attorney’s ethical obligations in renegotiating a flat fee agreement and concludes the attorney must comply with 1.81. The third paragraph of the Conclusion, however, speaks in terms of the enforceability of a renegotiated agreement. This is a shift that should require some explanation,

preferably in the Discussion. Presumably, the explanation is that when an attorney fails to comply with their ethical obligations, the agreement is unenforceable (or not “fully enforceable.”) We recommend that COPRAC avoid the shift from a lawyer’s ethical obligations as set forth in Discussion part D to enforceability in the third paragraph of the Conclusion, and instead simply summarize a lawyer’s ethical obligations in the Conclusion.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Suzanne", written in dark ink.

Suzanne Burke Spencer, Chair
California Lawyers Association Ethics
Committee

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

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

DIGEST:

1. An attorney may agree to charge a flat fee for legal services but must clearly state what services are covered by the fee and should clearly state when the fee or portion thereof is earned.
2. If the flat fee is paid in advance of the services being rendered, the attorney may deposit the fee into the lawyer's operating account if compliance with rule 1.15(b) is met.
3. If the representation is terminated and any of the services for which the flat fee has been or will be paid are incomplete, then the lawyer must determine the appropriate amount to be charged and must refund any advanced unearned funds, even if deposited into the operating account.
4. If a flat fee is renegotiated "midstream," a lawyer should comply with rule 1.8.1 and such renegotiation is subject to ethical scrutiny for fairness and reasonableness.

AUTHORITIES

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

Business and Professions Code section 6148.

INTRODUCTION AND SCOPE

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

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

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

Flat fee agreements can cover an entire matter or certain specific tasks within a matter based on factors independent of the actual number of hours involved. Specifically, a “flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.” (Rule 1.5(e).)

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

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

Because the amount of a flat fee does not depend on the amount of time spent in connection with the legal representation, the following ethical questions also can arise when the fee is earned, and how to determine the portion of the fee which must be refunded to the client where the fee is paid in advance and the attorney does not complete the services specified in the agreement.

Rule 1.5, paragraph (e) provides that a lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. As noted above, the rule defines a flat fee as “a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved.” Rule 1.5(e) further provides that a flat fee “may be paid in whole or in part in advance of the lawyer providing those services.”

Rule 1.5, paragraph (d) states that a lawyer may not “make an agreement for, charge, or collect a fee that is denominated as ‘earned on receipt’ or ‘non-refundable,’ or in similar terms” unless the fee is a “true retainer.” Rule 1.5(d) defines a true retainer as “a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.”

Rule 1.15, paragraph (a) also makes clear that an advance payment of fees must be deposited into a trust account unless the requirements of rule 1.15, paragraph (b)(2) are met, including that “(1) the lawyer or law firm discloses to the client in writing (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed.” (Rule 1.15(b)(1).) Rule 1.15(b)(2) states that if the flat fee exceeds \$1,000, the client’s agreement to deposit the flat fee in the lawyer’s operating account and the disclosures required by paragraph (b)(1) must be set forth in a writing signed by the client.

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

DISCUSSION

In any attorney-client relationship, attorneys providing services under a flat fee agreement have duties of competence and diligent representation. (Rules 1.1 (Competence) and 1.3 (Diligence).) A flat fee rewards efficiency, but an attorney who underestimates the time necessary to perform the specified services may seek to cut corners giving rise to concerns regarding the duties of diligence and competence.

A flat fee must be earned by performing the specified services and, like any fee agreement, a flat fee is subject to review for unconscionability. (Rule 1.5(a) & (b).) Where the flat fee is paid in advance, such fee agreements give rise to ethical considerations as to where the fee must be deposited, when the fee is earned, what portion of the fee is refundable if the representation is terminated or the lawyer does not complete the specified services, and under what circumstances the flat fee may be renegotiated.

A. Required Disclosures for Depositing an Advance Payment of a Flat Fee into the Lawyer’s Operating Account

Where a flat fee is paid in advance of the performance of legal services, the default rule is that the fee must be deposited into the lawyer or law firm’s trust account until the fee is earned. (Rule 1.15(a).) However, rule 1.15(b)(1) provides that a flat fee paid in advance may be deposited into the lawyer or law firm’s operating account, provided the lawyer or law firm

disclose to the client in writing that the client has the right to have the flat fee deposited into a trust account until it is earned and that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services have not been completed.²

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

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

Comment [2] to rule 1.15 states: "Subject to rule 1.5, a lawyer or law firm may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account." This comment suggests that a lawyer and client may agree to a method for determining when a flat fee is earned and the amount of an unearned fee that must be refunded if services in the flat fee agreement are not completed before the termination of the lawyer's services.

However, any such provision in a fee agreement must not be unconscionable under rule 1.5 and should not adversely impact the client's right to terminate their attorney.

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

² If a lawyer is terminated before the services are completed, there is some risk that the lawyer may be unable to timely refund all or a portion of the advance payment, either because the funds are spent or may have become unavailable, for example, because they may have been attached by the lawyer's creditors. This opinion does not address the disclosure of such risks.

Clients have the absolute right to terminate their lawyer's services at any time with or without cause. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [100 Cal.Rptr. 385]; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989.) The rules make it explicit that, with the sole exception of a true retainer, all attorney's fees paid in advance are refundable if the lawyer does not complete the legal services or the representation is terminated before the work is done. (Rules 1.5(d) and 1.16(e)(2).) Thus, any fee agreement entered into that includes a provision stating that a flat fee is nonrefundable or fully earned on receipt violates rule 1.5(d) and may constitute deceit or an intentional misrepresentation under rules 8.3, paragraph (a) or 8.4, paragraph (c).

Under a flat fee agreement where the flat fee is paid in advance and representation terminates before all the services have been completed, several approaches may be used to determine the amount of an unearned fee, including benchmarks or milestones that specify when a portion of the fee is earned. Under this approach, the fee agreement may include milestones based on the completion of specified tasks or other mutually agreed-upon factors.³ However, because the terms of the agreement must be reasonable and fully explained to the client, milestones that provide for front-loading the entitlement to fees are subject to scrutiny. In addition, a milestone based solely on the passage of time may be unreasonable as it is not specifically tied to the performance of services.

Another option for determining earned fees in connection with flat fee services is the application of an hourly rate to the lawyer's services at the time the representation terminates. However, as a flat fee agreement is not based on providing legal services based on an hourly rate, this approach may not be appropriate as the number of hours spent on the client's case under a flat fee agreement may not be determinative of the reasonable value of the services in relation to the specified flat fee.

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

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

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

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

In the absence of an agreed-upon method, the amount of the unearned fee that must be returned if the representation terminates before the legal services are completed will depend on several factors similar to the factors used in the evaluation of whether the fee paid to the lawyer represents the reasonable value of the lawyer's services and is not unconscionable. (Rule 1.5(b).)

While the rules are clear that a flat fee paid in advance is not earned on receipt, the rules do not provide guidance as to when a flat fee, or portion thereof, is earned or how to calculate the amount of an unearned fee which must be refunded if the lawyer's services are terminated or all of the agreed-upon services otherwise are not completed. However, one of the most common situations giving rise to attorney-client disputes regarding flat fees occurs when the attorney's services are terminated before all the work is completed. This can arise when a client exercises their right to terminate the lawyer's services, or when the lawyer withdraws from the representation before the agreed-upon work is fully performed. Because a discharged attorney may recover in quantum meruit for the reasonable value of services rendered in either situation, a determination will have to be made regarding the reasonable value of the services performed by the attorney before the representation is terminated.

Whether a fee is unconscionable or illegal is often a matter of degree and involves the assessment of a multiplicity of factors. (State Bar Mandatory Fee Arbitration Program Arbitration Advisory No. 1998-03, p. 3; *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 [39 Cal.Rptr.2d 506].) As noted in Advisory 1998-03, the factors considered under former rule 4-200(B) (current rule 1.5(b)) for determining an unconscionable fee are generally identical to the factors considered in analyzing the reasonableness of a fee. Those factors include the comparison of the fee charged to the value received (rule 1.5(b)(3)), whether the fee is fixed or contingent (rule 1.5(b)(11)), and whether the client agreed in writing to the fee after receiving disclosure (rule 1.5(b)(13)). As described by one court, the question is whether the client got what they paid for. (*Shaffer*, at p. 1002.) However, a fee amount that complies with rule 1.5(a) may never exceed the contract fee. (*Cazares v. Saenz* (1989) 208 Cal.App.3d 279, 287 [256 Cal.Rptr. 209].) Thus, in the flat fee scenario, where the representation terminates before all the services have been completed, the maximum the attorney can recover is the specified flat rate fee.

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

Another issue is whether an attorney can renegotiate a flat fee where the attorney miscalculated the complexity of the matter and the amount of time required to perform the agreed-upon services. It is unsettled in California whether a lawyer must comply with rule 1.8.1 before negotiating a modification of a fee agreement with an existing client. Whether former

rule 3-300 or current rule 1.8.1 applies to the renegotiation of a fee agreement during the representation in general, and a flat fee agreement in particular, has not specifically been addressed in prior State Bar of California ethics opinions. Nevertheless, it is the committee's position that, where the lawyer obtains a pecuniary interest adverse to the client as a result of the renegotiation, the lawyer must comply with rule 1.8.1.⁴

State Bar of Texas Ethics Opinion No. 679 (2018) considered whether a lawyer may renegotiate a flat fee for representing a client in litigation after the litigation is underway if the matter turns out to be greater in scope and complexity than the lawyer and client contemplated. The State Bar of Texas ethics committee concluded that a lawyer may renegotiate a flat fee in a litigation matter after the litigation is underway if modification of the fee agreement is fair under the circumstances. The committee concluded that it is the lawyer's burden to prove fairness and depends upon factors such as the length of the lawyer-client relationship, whether the reason for the renegotiation could have been anticipated at the outset of the representation, and the client's level of sophistication. The committee concluded that before seeking to renegotiate a fixed fee, the lawyer should be mindful of the risks that the lawyer voluntarily assumed when proposing or agreeing to that fee—including the possibility that the fixed fee might not be adequate to compensate the lawyer when compared to other fee arrangements. The committee further concluded that its version of the rule regarding business transactions with a client did not apply to renegotiating a flat fee agreement but noted the general principle that all transactions between a lawyer and client should be fair and reasonable to the client.

Utah State Bar Ethics Advisory Opinion No. 20-01 (2000) addressed whether a lawyer may permissibly renegotiate the terms of a flat fee agreement if, after commencing the representation, the circumstances, scope, or complexity of the matter becomes materially different and greater from what the lawyer unilaterally contemplated at the commencement of the representation. The committee concluded that renegotiation of a flat fee agreement was not permitted unless the lawyer complied with rule 1.8(a) of the Utah Rules of Professional Conduct.⁵ However, the committee stated that its opinion would be different if the scope of the engagement was enlarged by the client, or was not reasonably foreseeable or contemplated by the lawyer and the client as included in the original scope of work agreed upon by the parties in the original fee agreement. The committee also noted that its opinion would be altered where the client misrepresented the facts or issues or there was a mutual mistake of fact.

⁴ Rule 1.8.1 provides that a lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to the client unless the terms are fair and reasonable to the client and fully disclosed to the client in writing in a manner that should reasonably have been understood by the client, the client is advised in writing to seek the advice of an independent lawyer of the client's choice, and the client provides informed written consent to the terms of the transaction.

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

The committee agrees with Utah's position that renegotiation of a flat fee agreement requires compliance with rule 1.8.1. Unlike hourly or contingent fee agreements, a flat fee agreement contemplates full payment for all of the specified services regardless of the amount of the work ultimately performed. As a result, a midstream renegotiation of a flat fee agreement which requires that the client pay more than under the terms of the original agreement presents different considerations. In most cases, the attorney will be in a better position to estimate the time required to perform services under a flat fee agreement when the parties are negotiating the terms of the original agreement.

If the attorney seeks to increase the flat fee, the client may not want to change representation and feel compelled to agree to the higher fee and is, therefore, at a disadvantage in negotiating with their attorney. In addition, if the attorney threatens to withdraw because the client does not agree to the increase, depending upon the reasons for the requested increase, the foreseeability of those reasons, the amount requested, and the sophistication and relative bargaining strengths of the parties involved, among other factors, such a threat may subject the attorney to ethical scrutiny under rule 1.16.

CONCLUSION

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

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

Where a flat fee agreement is renegotiated during the representation, whether and to what extent the requested midstream increase will be fully enforceable will depend upon several factors including whether the lawyer complies with rule 1.8.1, the foreseeability of the factors upon which the requested renegotiation is made, and whether such renegotiation is fair and reasonable to the client. The flat fee must also not be unconscionable.

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