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# Fee Setting

* General Principle: Attorney-Client agreements are strictly construed in the client's favor and against the attorney who wrote the agreement (K principle that any ambiguity is interpreted against the drafter).

## General Principles

* Determining the reasonableness of fees:
  + MR 1.5(a):
* Lawyers may not charge or collect an *unreasonable* fee.
* But instead of providing a test, lists 8 factors to be considered in determining reasonableness:
  + 1. Time and labor required; novelty and difficulty of issues; skills requisite to perform legal services;
    2. Likelihood, as explained to the client, that this representation would preclude other employment,
    3. Customary fees in that locality;
    4. Amount of time involved and results obtained;
    5. Time limitations imposed by the client in those circumstances;
    6. Nature and length of professional relationship with the client;
    7. Experience, reputation and ability of the lawyer;
    8. Whether the fee is fixed or contingent.
  + CRPC 4-200(A)
* Forbids *unconscionable* fees
  + - * *Unconscionability* is determined on the basis of facts and circumstances existing at the time the agreement was entered into. CRPC 4-200(B).
* In determining whether a fee is unconscionable, 4-200(A) accepts the same criteria used in MR 1.5 with two exceptions:
  + 1. Rejects inclusion if “customary fees in the locality”
    2. Adds three additional considerations

Amount of the fee in proportion to the value of the services performed,

The relative sophistication of the lawyer and client,

The informed consent of the client to the fee arrangement.

*Illegal* fees are also prohibited by 4-200(A)

Fee is illegal if it violates a law, a rule of ethics, or public policy.

Fee agreements that are void or unenforceable do not necessarily preclude a quantum meruit recovery.

* Yardstick of consumer protection has emerged from the case law -- the more sophisticated the client (poor individual vs. large corporation), the less the courts will regulate fee setting by the lawyer.
* May a client prove a fee is unconscionable by showing that the law firm made an exorbitant profit? NO
  + *Shaffer (CA)*
    1. Hourly rate at which a staff attorney was compensated is simply a part of a firm's costs and costs/profit are not relevant to the question of whether the client was charged an unconscionable fee by the firm. CRPC Rule 4-200 does not list anything suggesting that profit margin is a relevant factor.
    2. What is relevant to the issue of conscionability is the fee which the client paid for the attorney's services, vis-a-vis the factors listed in Rule 4-200.

### Plagiarism

* *Iowa Supreme Court v. Lane (2003)*
  + Facts: Lane (Attorney) plagiarized all 18 pages of his legal argument in his brief from a treatise article, but claimed it took him 80 hours to write the argument. He sued for attorneys fees associated with writing the brief, even though he copied the entire thing from one source.
  + Rule: Plagiarism itself is unethical – it falls under “conduct involving dishonesty, fraud deceit, or misrepresentation.” MR 8.4(c); CA say same thing about plagiarism.
* “Ghost writing”
  + "ghost writing" = when an attorney prepares legal documents for a pro se litigant who then presents these documents in court.
  + Courts generally have disfavored undisclosed "ghost writing"
  + ABA Formal Opinion: concludes that courts do not have to be informed of the existence of ghostwriting lawyers, unless the court has a rule requiring such disclosure.
    - There is no fraud or dishonesty in violation of MR 8.4(c) because the court would not be misled or know the difference between lawyer and pro se writing.
* CRPC do not state a position on undisclosed ghostwriting
  + - But CA Rule of Court 5.70(a): in family law proceedings, disclosure of ghostwriting is NOT required unless the client seeks a court order for attorney fees for document preparation.

## Retainers

* *Nonrefundable retainer*
  + Paid by client in advance of services performed
  + Lawyer keeps the fee even if client terminates the representation or the lawyer is never asked to do any work
* *Special retainer* – refundable
  + Client consents to pay the attorney a specified fee in exchange for specified services to be rendered, regardless of hourly or percentage, & regardless of whether it is payable in advance or as billed.
  + *Advance*: to attorney against work to be done in the future, but client is entitled to refund for work not done by attorney.
  + *Security*: deposit which remains the property of the client, but is held by attorney in case client can't pay. At the end of the representation, it might be applied to the final fee payment or be fully returned to the client when all other fees and costs have been paid.
* *General retainer* – non-refundable
  + Agreement in which the client agrees to pay a fixed sum to the attorney in exchange for the attorney's promise to be available to perform, at an agreed price, any legal services that arise during a specified period.
  + Charge separate from fees incurred for services actually rendered
  + Earned when paid and thus is the attorney's property when received by client - essentially to guarantee attorney's availability.

## Fee Formalities

* Both CA and MR say that a lawyer should reach a clear fee agreement with client so client understands what is going on – if not understood, this could mean an unconscionable fee agreement.
* B&P Code section 6148 lists fee formalities required in all fee arrangements, except contingent fee Ks:
  + Where foreseeable costs are to exceed $1,000, K needs to be in writing and signed by client and attorney.
  + A copy should be given to the client containing following info:
    1. Basis for compensation of any fees, rates, or charges
    2. Nature of legal services to be provided
    3. Respective responsibilities of both parties regarding the K
  + If these conditions are not met, the K is voidable at the option of the client, though attorney will be entitled to quantum meruit.
  + Section 6148 lists 4 situations where its terms don't apply, thus making *oral agreements* permissible:
    1. Emergency rendition of legal services where writing is impractical.
    2. Implied arrangement on the same terms as services previously supplied to, and paid for by, the client.
    3. Client, in writing and after full disclosure of this section, knowingly waives the written agreement.
    4. Client is a corporation.

## Minimum Fee Schedules

* After *Goldfarb*, minimum fee schedules not promulgated by the courts or the legislature have been found to constitute unlawful price-fixing under the Sherman Act, Section 1, if they are mandatory or have the effect of creating uniform fees.
* However, purely advisory fee schedules may be permissible if no sanction for their disobedience exists.

## Contingency Fees

* ABA MR 1.5(c): contingency fee agreements must be in writing, signed by the client, and must state the method by which the fee is to be determined.
* CRPC does not directly address contingency fees, but B&P Code does:
* Section 6147(a): contingent fees must be in writing, w/ a copy presented to the client at the time the K is entered into, and the fee arrangement must be signed by both the client and the lawyer.
* Written K must include: (1) a statement of the contingent fee rate agreed upon; (2) a statement as to how disbursements and costs will affect the contingent fee and the client's recovery; (3) a statement as to any other compensation the client would have to pay the attorney for related matters; (4) a statement that the fee is not set by law, but is negotiable between the client and the attorney; and (5) if Section 6146 applies, a statement that those rates are the maximum limits and that the attorney and client could negotiate for lower rates.
* Violation of 6147 renders the K voidable by the client, who then must pay a reasonable attorney’s fee for services rendered if the client is victorious. B&P Code section 6147(b).
  + Section 6146: limits contingent fees in malpractice cases against health care providers (sets a ceiling on contingent fees)
* Clients can't waive this limit by K, but may negotiate a lower rate.

## Improper Contingency Fee

### Domestic Relations Cases

* ABA MR 1.5(d)(1) prohibits contingency fees in domestic relations cases when payment is contingent upon the securing of a divorce, the amount of alimony or support, or property settlements.
  + Comment 6 states that contingent fees are not prohibited for post-judgment recovery of alimony or support.
* CA courts have traditionally opposed contingent fee contracts in domestic relations cases.
  + Exception: *Coons*
    - * Not every contingent fee agreement in a divorce proceeding is void on its face.
      * Judgment based on a contingent fee K between lawyer and an impoverished husband to defend a divorce suit was upheld.
      * All possibility of reconciliation was extinct and the parties 'had no intention or expectation of resuming marital relations.” – attorney wasn’t seeking to procure a divorce, it was already inevitable.

### Criminal Cases – Prosecutors

* Rule: it is forbidden to hire a prosecutor on a contingent fee basis whereby payment is based on the obtaining of a conviction.

### Criminal Cases - Defense Counsel

* Although no CA case directly addresses contingent fees for defense counsel, such cases are universally prohibited in CA & by ABA MR 1.5(d)(2).
* *People v. Winkler*
  + D was on trial for killing his father. Under terms of fee agreement, if acquitted he would be able to inherit from his father and would pay the attorney an additional $25k.
  + Although fee agreement was unethical, it was not a *per se* violation of the 6th Amdt, which would be grounds for reversal of the conviction. Actual prejudice must be shown before a conviction should be reversed.
* *People v. Meyers*
  + Lawyer was representing D on a burglary charge, but also represented D's wife in a related civil action. Both Ds consented to attorney's representation that the wife's ultimate recovery could be increased if the defendant received a longer sentence.
  + Holding: Found this arrangement to be a clear conflict of interest.

### Expert Witnesses

* MR 3.4(b) & Comment 3 prohibit the use of contingent fees with expert witnesses.
* CRPC 5-310(B) prohibits directly or indirectly paying witnesses contingent upon the content of their testimony or the outcome of the case.

## The Reverse Contingency Fee

* A reverse contingency fee, by contrast is not based on what the client has *recovered*, but rather on what the client has *saved* (the difference between the amount originally demanded and the amount the client is ultimately required to pay).
* ABA Formal Opinion 93-373 does not prohibit reverse contingent fee agreements for the representation of *civil defendants*, provided the amount can be reasonably calculated, the client's consent is fully informed, and the fee is reasonable under the circumstances.

## Contingency Fees and Termination of Relationship

### Client Discharges Counsel

* When an attorney w/ a contingency fee is discharged with or without cause by the client, the contract is void, but the attorney is entitled to recover the reasonable value of the services rendered before his or her discharge. *Fracasse*.
  + Possible exception to rule to recover quantum meruit – "One might postulate an exception for cases where an attorney is fired for unquestionably *unethical conduct*” (like stealing from the client).
* *Attorney sues for fees and the client defends on the grounds that the discharge was with clause (CA Law)*
  + If fault occurs before K, then client may not have to pay any fee.
  + Attorney who provides substantial services on a valid K of representation is entitled to a quantum meruit recovery based on those services performed before the breach.
  + However, the quantum meruit fee will be reduced by the amount of the client’s damages as result of the breach. If the client’s damages exceed the quantum meruit fee, the attorney receives nothing.
* *Attorney is successfully sued by the client for malpractice and the issue is whether attorney may deduct from the client’s judgment the fee that the attorney would have received (CA Law)*
  + Attorney is not entitled to deduct the fee because this would reward malpractice + attorney has to pay for 2nd attorney’s fees in the malpractice action.

### Counsel Withdraws From Representing Client

* Depends on the reason for the lawyer dropping out of the case
  + Withdraw because of good faith belief that the case lacks merit – lawyer gets nothing.
  + Ethically compelled to withdraw from a case which the attorney believes has merit

May get quantum meruit, if attorney can show

* + - * 1. The withdrawal was mandatory, not merely permissive;
        2. The overwhelming and primary motivation for withdrawal was the obligation to adhere to the ethics rules;
        3. The underlying action had been brought in good faith;
        4. The client ultimately obtained recovery; and
        5. The attorney’s work contributed in some measureable degree towards the client’s ultimate recovery.
  + If ethics rules makes withdrawal *permissive*, not *mandatory*.

May get quantum meruit, because it doesn’t require you to withdraw.

Exercising heightened scrutiny in regard to the five factors, may in its discretion determine whether counsel’s withdrawal was justified.

### Client Refuses to Execute the Settlement

* Client’s exercise of the right to reject a settlement is not cause for withdrawal by the attorney.
  + No breach of a contingent fee agreement merely by refusing to settle.
* Exceptions:
  + Client should be required to make restitution to the attorney, under an unjust enrichment, if the client subsequently accepts settlement terms substantially similar to those negotiated by the attorney prior to his or her withdrawal.
  + Lawyer may sue for breach of the covenant of good faith and fair dealing inherent in every K.

## Contingency Fees and Litigation Support Services

* *Ojeda v. Sharp Cabrillo Hospital (1992)*
  + Facts: Ojeda sues Hospital, on behalf of daughter, for birth defects. Ojeda enters into to K with a litigation support service (Foundation). Attorney for Ojeda promised to pay the Foundation 20% of any recovery Ojeda received. Ojeda settles for $1.1 million and Foundation wants its 20%.
  + Holding:
* Foundation did not engage in the unauthorized practice of law, because it assisted the attorneys as would any other consulting expert and attorneys retained complete control of the litigation.
* The experts used in the case were not paid on a contingent fee basis, they were paid separately by Ojeda.
* Foundation locating the witnesses does not constitute a violation of the rules of professional conduct.
  + While the experts may be tempted to skew testimony toward client because they want repeat business from the Foundation, it is no different from an expert being retained repeatedly by an attorney.
* NO Champerty – Foundation doesn’t advance money to law firm or to client.
* NO Solicitation – Lawyers retained by client before Foundation was retained.
* NO Fee Sharing with Non-Lawyers
* Foundation must give consent for any expert used – Court ducks this issue (no authority one way or another)

## Contingency Fees and Structured Settlements

* Lawyers can only be paid when the client is paid
* Lawyers like to front-load – get paid first, then whatever is left, client gets paid in structured amounts (e.g., monthly basis) – this is NOT unethical.

# Fee Splitting

* CA allows pure referral fees
  + MR does not allow referrals

## With Lawyers in the Firm

* NO rule
* How lawyers divide fees within a firm is up to them – contractual agreement

## With Lawyers Not in the Firm

* MR:
  + Prohibits referral fees
  + Rule 1.5(e) permits division of fees if three conditions are met:
    1. The division is in proportion to the services performed by each lawyer *or* if each lawyer assumes joint ethical and financial responsibility for the entire representation;
    2. The client agrees in writing to the arrangement, including the share each lawyer will receive; and
    3. The total fee is reasonable.
* CA:
  + Allows referral fees
  + CRPC Rule 2-200(A) permits fee splitting with other lawyers provided the client consents in writing after full disclosure has been made in writing. The client must be informed of the terms of the fee split, that the total fee is not increased solely by reason of the division of fees, and that the total fee is not unconscionable under CRPC 4-200.

### Referring Attorney Sues

* + Situation: Lawyer 2 brings case to successful conclusion and then refuses to pay lawyer.
  + If no written consent by client, then the division of fees agreement is unenforceable. CRPC Rule 2-200.
* Means that lawyer 2 could lie and say that he got consent from client and never does (seems to encourage lying).
* Client can sign such consent after work has been completed and still would be valid – as long as done before the division of fees is completed. CRPC Rule 2-200.
* Although the K itself is unenforceable, there is an opportunity for lawyer 1 to make a claim in quantum meruit, if lawyer 1 actually has performed services + incurred costs (if a pure referral, he wouldn’t).

### Referred Attorney Sues

* + Since Lawyer 2 is likely to do the work, loss to Lawyer 2 would be pretty substantial.
  + Rule 2-200 (consent by client must be in writing) applies to all divisions of fees, not just pure referral situations.
  + Rule 2-200 applies to all lawyers not in the same firm (neither co-counsel nor lawyers who share an office fall under exception – only partners, shareholders or associates are exceptions).
  + Even though 2-200 writing requirement may render a K unenforceable, quantum meruit may still be available.

# Collecting the Fee

* Observation: if you sue client for fees, you will always be counter-sued by client (i.e., unconscionable fee, client abandonment, malpractice).

## Security Interests

* Interest in property owned by client as part of the fee agreement?
  + Issue: Client’s property is like money, but it’s not money because it has to be converted into money.
  + Yes, you can negotiate a security interest in the client’s property, but this means you have acquired an interest “adverse to the client” - Lawyer has to follow CRPC Rule 3-300:
    1. Terms are writing in language the client can understand,
    2. Terms are fair and reasonable,
    3. Client is informed in writing that the client is advised to seek advice of independent counsel on his own (in deciding whether the terms are fair);
       - Note: It is not necessary for client to actually get independent counsel, but just that he is informed of that option.
    4. Client consented in writing after having the opportunity to seek independent counsel.
  + MR 1.8(a) adds additional requirement that the writing signed by the client indicate “the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.”
* Security interest in the *subject matter* of the litigation?
  + MR 1.8(i) prohibits these arrangements
  + CA probably prohibits by case law, but not through a particular ethics rule.

## Attorneys’ Liens

### Charging Liens

* + Equitable security interest for the lawyer in the proceeds of the prospective recovery (settlement or judgment) by the client.
* This interest has priority over a lien from a subsequent judgment creditor.
* In the K with the client, the word “lien” does not have to be used, but the writing must indicate an intent that the lawyer look to the judgment or settlement as security for the fee.
  + A charging lien is an “interest adverse to the client,” triggering CRPC 3-300 requirements above (among other things, requires the client’s informed written consent).
* Does not apply to *contingency fee* agreements with a charging lien – NOT adverse to client.
  + *Weiss v. Marcus*: the court held that the lien survives the discharge of the attorney. However, if a contingent fee is involved, the lien survives only to the extent of the reasonable value of the legal services performed. If the former client is unsuccessful, there is nothing for the lien to operate on, so the discharged attorney gets nothing.

### Retaining Liens

* + Applies to papers and property coming into the hands of the attorney *as an attorney* for the client.
* Papers/property that enter lawyer’s possession in a non-lawyer role are not subject to the lien.
  + Purpose of the retaining lien is to permit the attorney to continue to hold the client’s papers and property until the client pays the attorney’s fees and costs.
  + MR says that retaining liens are governed by local law, and CA cases recognize the validity of retaining liens.
* But see *Academy of CA Optometrists (CA)*: where the subject matter of an attorney’s retaining lien is of “no economic value to him,” but is used only to extort disputed fees from his client, the retaining lien is void.
* Also see CRPC 3-700(D): requires attorneys to return all client papers and property at the client’s request “whether the client has paid for them or not.” – conflicts with the idea of a retaining lien (but lawyer and client would contract around this rule).

# Duty to Safeguard a Client’s Property and Funds

* ABA MR 1.15(a) and CRPC Rule 4-100 instruct attorneys on how to safeguard property, including money, belonging to the client or the case.
  + It is essential that such property be carefully labeled, handled, stored, and protected, and that it be kept separate from the lawyer's own property.
  + Complete records must be kept, and a full accounting must be provide to the client.
  + The attorney in this role is a bailee owning a fiduciary responsibility to handle the property with the utmost care.
* CRPC 4-100(B)(3) requires preservation of records of property and funds for at least *five* years "after final appropriate distribution of such funds or properties."
* CRPC 4-100(C) sets specific standards for maintaining records under Rule 4-100(B)(3), even if the attorney is acting gratuitously:
  + Attorney shall use ordinary care for preservation of the document;
  + Shall hold the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.
* CRPC 3-700(D) addresses the handling of papers, property, and fees upon termination of the employment.
  + Once employment has ended, the attorney must promptly refund any part of the fee paid in advance that has not been earned, and must release to the client, at the client's request, all of the client's papers and property, including "items reasonably necessary to the client's representation, whether the client has paid for them or not."
* Protective orders or non-disclosure agreements override this section.

## Commingling

* Funds belong to the client may not be mixed (commingled) with funds belong to the attorney.
* Violation of the commingling rules is a *per se* offense, therefore, negligence or intent need not be shown.
  + A violation occurs any time a client's money and the attorney's money become mingled, or any time a client's account dips below the money to which the client is entitled.
  + It is no defense that the attorney did not profit or that the client did not suffer a loss.
* The mismanagement of the funds, not the profit or loss, is the essence of the offense.
* There are several rules dealing with how money from clients or third parties to pay fees and expenses should be handled to avoid commingling.
  + Funds belonging to the client should be kept in a separate client trust account;
  + The funds of several clients may be joined, but records must be kept for each individual client;
  + An attorney is permitted to keep his or her own funds in the client's trust account only to the extent necessary to pay the banks' service charges on the account;
  + Any advance payments for fees or expenses by the client must be placed in the client trust account until earned or incurred by the attorney;
  + As soon as part of a fee is earned, it must be immediately removed from the client trust account;
  + However, no amount may be withdrawn if the client disputes that part of the fee until the dispute is resolved.
* The attorney should disburse the uncontested amounts, keep the disputed property separate and in trust, seek a quick resolution of the dispute, and render a full accounting to the client.
* When are retainers "earned" for the purpose of obeying the commingling rules?
  + An *advance retainer* should be placed in the client trust account until earned;
  + Whereas, *true retainers*, which are paid to guarantee the availability of the lawyer, are earned when paid and must be deposited in the attorney's account and need not be returned when the representation is terminated.

## Retention and Destruction of Client Files

* Client papers and property belong to the client, not to the attorney, even if the client has not paid the full fee for the representation.
* The original representation agreement should have a provision concerning return or destruction of the files when the representation ends.
* If it does not, Cal. State Bar Formal Opinion 2001-157 offers the following guidance on retention or destruction of property and files after the representation has concluded:
  + *Original papers and property*
* Must be held by the attorney pursuant to the law of bailments - attorney remains responsible for the safe keeping of the property at all times and has no right to destroy them.
  + *Other client papers and property*
* Attorney must use reasonable means to notify the client of his or her intention to the destroy the property;
* In general, an attorney may destroy a particular item from a former client's file if there is no reason to believe at the time that it will be reasonably necessary to the client's case or representation.
  + *Files in criminal cases*
* May not be destroyed without the former client's express consent while the former client is alive