

## ATTORNEY FEES AND FEE AGREEMENTS

**Scope Note:** This Chapter discusses:

- Negotiation of fee agreements (§5:1 ff.);
- Types of fees and fee arrangements (§5:50 ff.);
- Fee sharing (§5:445 ff.);
- Statutory and other limitations on attorney fees and fee agreements (§5:360 ff.);
- Financing legal fees (§5:321 ff.);
- “Costs” (§5:545 ff.);
- Formalizing fee agreements (§5:600 ff.);
- Billing methods (§5:915 ff.); and
- Enforcing fee agreements (§5:1010 ff.).

*Cross-refer—fee awards:* This Practice Guide does not discuss statutory and contractual attorney fee awards that may be obtained against the opposing party in civil litigation. For a detailed treatment of that topic, see Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 1; Wegner, Fairbank, Wegner, Wegner & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 17; Wegner, Jones, Rosen, Jones, Wegner & Wegner, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 19; Haning, Flahavan, Cheng & Wright, *Cal. Prac. Guide: Personal Injury* (TRG), Ch. 3; and Hogoboom & King, *Cal. Prac. Guide: Family Law* (TRG), Chs. 5 & 14 (family law attorney fee awards).

### A. RULES GOVERNING FEE NEGOTIATIONS WITH CLIENT

[5:1] Subject to certain exceptions, attorneys may negotiate “at arm’s length” with prospective clients on the subject of attorney fees: “[I]n general, the negotiation of a fee agreement is an *arms-length transaction* . . .” [*Ramirez v. Sturdevant* (1994) 21 CA4th 904, 913, 26 CR2d 554, 558 (emphasis added); *Setzer v. Robinson* (1962) 57 C2d 213, 217, 18 CR 524, 526; Los Angeles County Bar Ass’n Form.Opn. 526 (2015)]

1. [5:2] **Negotiating Initial Fee Agreement:** Attorneys are entitled to negotiate as they choose the terms on which they will accept employment and, “absent issues of duress, unconscionability, or the like, [Client] has no cause to complain that the terms [Attorney] negotiated were favorable to him.” [*Ramirez v. Sturdevant* (1994) 21 CA4th 904, 913, 26 CR2d 554, 558]

[5:3 — 5:17]

- a. [5:3] **Rule against business transactions/interests adverse to client generally not applicable:** CRPC 1.8.1 (formerly CRPC 3-300) prohibits lawyers from entering into business transactions or acquiring ownership, possessory, security or other pecuniary interests adverse to the client unless several conditions are met (*see* ¶5:17 *ff.*). But this Rule does not apply to the *initial* fee agreement *unless* the attorney also obtains a security or other pecuniary interest adverse to the client (*see* ¶5:17 *ff.*). [CRPC 1.8.1, Comment [5] (formerly CRPC 3-300, Discussion); *see also* Cal. State Bar Form.Opn. 1989-116 (decided under former rule); Bar Ass’n of San Francisco Form.Opn. 1997-1 (decided under former rule); Los Angeles County Bar Ass’n Form.Opn. 496 (1998) (decided under former rule)]

➡ [5:4] **PRACTICE POINTER:** To avoid any question as to when your obligation to perform professional services for a new client begins, consider adding a clause to your fee agreement making clear you have no obligation to render professional services *until* the client has executed the written fee agreement.

- b. [5:4.1] **No presumption of undue influence:** *See discussion at* ¶5:31 *ff.*

[5:5-14] *Reserved.*

c. **Limitations**

- (1) [5:15] **“Unconscionable” or “illegal” fees:** The absence of fiduciary restrictions on fee negotiations with prospective clients is not a license for attorneys to take advantage of them by exacting agreements to pay fees that are exorbitant and grossly disproportionate to the work involved or that violate statutory limits. The CRPC prohibition on making an agreement for, charging or collecting unconscionable or illegal fees (CRPC 1.5(a) (formerly CRPC 4-200(A))) applies to dealings with prospective as well as existing clients (*see* ¶5:395 *ff.*).
- (2) [5:16] **Statutory form and content requirements:** In order to ensure fee agreements are fair and understood by clients, several statutes delineate the form of fee agreements and matters to be included therein. [*Alderman v. Hamilton* (1988) 205 CA3d 1033, 1038, 252 CR 845, 848; Los Angeles County Bar Ass’n Form.Opn. 526 (2015); *see detailed discussion at* ¶5:600 *ff.*]
- (3) [5:17] **Agreements conferring “pecuniary interest adverse to client”:** The rule that attorneys may negotiate with prospective clients “at arm’s length” is limited by the requirements of CRPC 1.8.1 where the lawyer obtains “an ownership, possessory, security or other pecuniary interest adverse to the client.” [CRPC 1.8.1, Comment [5]]

*Cross-refer:* CRPC 1.8.1 requirements for obtaining a security interest in client property are discussed at ¶5:841 ff.

- (a) [5:18] **Applies to security interest in client property:** An agreement giving the lawyer an interest in the client's property to secure payment of fees (e.g., a trust deed on client's house) is an "adverse pecuniary interest" triggering the requirements of CRPC 1.8.1. [See CRPC 1.8.1, Comment [5]]

[5:19] *Reserved.*

- (b) [5:20] **Applies to attorney's charging lien for hourly fees on client's recovery:** An attorney's lien against a client's future recovery to secure hourly legal fees is an "adverse interest" requiring compliance with CRPC 1.8.1. *See discussion at ¶5:769 ff.*

- (c) [5:21] **Includes loan to attorney in lieu of fee payment:** The CRPC 1.8.1 limitations (¶5:841) also apply when a fee agreement calls for a client to *loan* money to the attorney in lieu of paying fees, in whole or in part. The loan creates a "pecuniary interest adverse to the client," thus invoking the CRPC 1.8.1 (formerly CRPC 3-300) requirements. [*Sugarman v. State Bar* (1990) 51 C3d 609, 616, 274 CR 246, 250—attorney disciplined under former rule for accepting loan from corporate client's principal in lieu of attorney fees without giving client opportunity to consult independent counsel; *McKnight v. State Bar* (1991) 53 C3d 1025, 1031-1032, 281 CR 766, 769—attorney disciplined under former rule for (among other things) accepting "blank check" personal loan from corporate dissolution client without complying with CRPC prerequisites]

- (d) [5:21.1] **Applies to ownership interest in client in lieu of fee:** CRPC 1.8.1 applies to agreements giving the attorney an ownership interest in the client (e.g., stock in a corporate client) in lieu of a monetary fee. *See discussion at ¶5:898 ff.*

- (e) [5:21.2] **Compare—right under initial fee agreement to retain proceeds from medical lien reductions:** In personal injury cases, an initial fee agreement whereby an attorney obtains the exclusive right to retain the proceeds of any settlement of the client's medical bills is *not* subject to the requirements of CRPC 1.8.1 (formerly CRPC 3-300). However, CRPC 1.8.1 *does apply* where the attorney obtains the right to negotiate the client's medical bills *after* the initial fee agreement is executed. [CRPC 1.8.1, Comment [5]; *In re Silverton* (2005) 36 C4th

[5:21.3 — 5:32]

81, 84-87, 89, 29 CR3d 766, 768-771, 772 (decided under former rule)]

Moreover, even where a medical fee negotiation clause is included in the initial fee agreement, it is subject to review for *unconscionability* (§5:395 ff.). [*In re Silverton*, supra, 36 C4th at 88-89, 29 CR3d at 771-772—provision permitting attorney to keep 100% of negotiated savings from medical bills yielded unconscionable fee]

[5:21.3-21.4] *Reserved.*

(f) [5:21.5] **Applies to statutory fee assignments:** Fee agreements whereby clients agree to *assign* their statutory attorney fee recovery rights to their lawyer are subject to CRPC 1.8.1. *See discussion at §5:342 ff.*

(4) [5:23] **Paralegals prohibited from establishing client fees:** A paralegal cannot directly establish the fees charged clients for paralegal services. [See Bus. & Prof.C. §6450(b)(8)]

This prohibition does not apply, however, to fees charged by a paralegal in a contract to provide paralegal services to an attorney, law firm, corporation, governmental agency or other entity. [Bus. & Prof.C. §6450(b)(8)]

[5:24-30] *Reserved.*

## 2. Fee Negotiations During Existing Relationship

a. [5:31] **No presumption of undue influence:** Transactions between attorney and client in which the attorney obtains an advantage are presumptively tainted by the attorney's exercise of undue influence and subject to setaside on that basis. The presumption is based on a statute applicable to trustees (Prob.C. §16004), "generally understood" to apply to the attorney-client relationship. [*Ramirez v. Sturdevant* (1994) 21 CA4th 904, 917, 26 CR2d 554, 560; *see discussion at §4:313.15 ff.*]

The presumption of undue influence, however, does *not* apply to attorney-client fee agreements. [*Ramirez v. Sturdevant*, supra, 21 CA4th at 917, 26 CR2d at 560-561]

(1) [5:32] **Statutory authority:** Prob.C. §16004 expressly provides that the presumption of undue influence "*does not apply* to the provisions of an agreement between a trustee and a beneficiary relating to the *hiring or compensation* of the trustee." [Prob.C. §16004(c) (emphasis added)]

This statutory language is not restricted to the original fee agreement between attorney and client. It renders

the presumption of undue influence inapplicable to all attorney-client fee agreements—even if made or modified during representation of the client. [*Walton v. Broglio* (1975) 52 CA3d 400, 404, 125 CR 123, 125—“We hold that [Prob.C. §16004(c)] prevents the application of the presumption to any agreement relating to fees, even where there is a pre-existing attorney-client relationship”; see also *Matter of Kroff* (Rev.Dept. 1998) 3 Cal. State Bar Ct.Rptr. 838, 852—§16004 presumption of undue influence not applicable to any agreement whereby client retains attorney]

[5:33] *Reserved.*

- (2) [5:33.1] **Compare—applying fee agreement arbitration provision to attorney-client business transaction disputes:** On the other hand, the presumption *does* apply where the attorney seeks to apply a fee agreement arbitration provision to a dispute involving a business transaction between the attorney and client unrelated to the attorney’s provision of legal services. [See *Mayhew v. Benninghoff* (1997) 53 CA4th 1365, 1370, 62 CR2d 27, 30]
- (3) [5:33.2] **Compare—unconscionability/illegality limitations:** Quite apart from the question of undue influence, a fee agreement renegotiated to “strike a better deal” (i.e., to increase attorney fees midstream) may be unenforceable as *unconscionable* or *illegal*. See discussion at ¶15:395 ff.

- b. [5:34] **Renegotiation of fee agreement with existing client:** Just as with the negotiation of an initial attorney fee agreement (¶15:17 ff.), renegotiating a fee agreement during the existence of the attorney-client relationship requires compliance with CRPC 1.8.1 where the lawyer *obtains a pecuniary interest adverse to the client* as a result of the renegotiation. [See *In re Silverton* (2005) 36 C4th 81, 84-87, 89, 29 CR3d 766, 768-771, 772—former CRPC 3-300 compliance required for agreement authorizing attorney to compromise medical bills executed after fee agreement; State Bar Ethics Alert (June 2009) (available on the State Bar website, [www.calbar.ca.gov](http://www.calbar.ca.gov)); see also ABA Form.Opn. 11-458]

In any event, the burden is on the attorney to prove the fairness of the arrangement. [*Ramirez v. Sturdevant* (1994) 21 CA4th 904, 917, 26 CR2d 554, 560-561; see also *In re Silverton*, supra, 36 C4th at 85-86, 29 CR3d at 769; ABA Form.Opn. 11-458]

On the other hand, where no conflict of interest is implicated (i.e., the lawyer does not thereby obtain a pecuniary interest adverse to the client), a fee agreement for supplemental services made during representation may not be struck down simply

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because the attorney did not advise the client to seek independent counsel to negotiate with the attorney. [*Ramirez v. Sturdevant*, supra, 21 CA4th at 917, 26 CR2d at 560-561]

- (1) [5:35] **Caution—potential issues re fee modification:** A controversial and unsettled ethics issue is whether a lawyer must comply with CRPC 1.8.1 (formerly CRPC 3-300) before negotiating or entering into a modified fee agreement with an existing client. CRPC 1.8.1 is silent on the issue (as was former CRPC 3-300). However, the State Bar’s Ethics Hotline (available on the State Bar website, [www.calbar.ca.gov](http://www.calbar.ca.gov)) suggests compliance with the Rule for any modifications of fee agreements with existing clients, as a matter of risk management.

In addition, a pending California State Bar Opinion concludes that compliance with CRPC 1.8.1 is required when a flat fee is renegotiated “midstream” and that the renegotiation is subject to scrutiny for fairness and reasonableness. [Cal. State Bar Interim Opn. 20-0003]

[5:36] *Reserved.*

- c. [5:37] **Compare—negotiating fee agreement on new matter with existing client:** The undue influence presumption does not apply to negotiations for fee agreements relating to *new matters with existing clients* (§5:31). Similarly, the provisions of CRPC 1.8.1 (formerly CRPC 3-300) do not apply, *unless* the attorney obtains “an ownership, possessory, security or other pecuniary interest adverse to a client.” See §5:17 ff.
- d. [5:38] **Unilateral fee increase prohibited:** Absent prior notice to the client, an attorney cannot unilaterally increase the rates charged for legal services specified in the fee agreement. See §5:636 ff.
- e. [5:38.1] **Compare—agreements to arbitrate business transaction disputes:** Compliance with CRPC 1.8.1 (formerly CRPC 3-300) is required for agreements to arbitrate attorney-client business transaction disputes. Arbitration clauses in the attorney’s fee agreement do not apply to unrelated business transactions *unless* specified in the fee agreement and the client has been advised of the right to consult independent counsel under CRPC 1.8.1 (formerly CRPC 3-300). [*Mayhew v. Benninghoff* (1997) 53 CA4th 1365, 1370, 62 CR2d 27, 30 (decided under former rule)]
- f. [5:38.2] **Compare—offer to discount fees as inducement to settle case:** A lawyer’s offer to discount the lawyer’s fee to induce a reluctant client to accept a settlement offer does *not* require compliance with CRPC 1.8.1 (formerly CRPC 3-300); see §4:285.1.
3. [5:39] **Impact of Statutory Regulation:** In certain cases, fee negotiations may be impacted by statutes limiting the amount of

fees that may be charged. E.g., Bus. & Prof.C. §6146 limits the contingent fee percentages in medical malpractice cases; see ¶5:361 *ff.*

Other statutes regulate the *form* of fee agreements and matters to be included therein. See *detailed discussion at* ¶5:600 *ff.*

4. [5:40] **Waiving Fees—“Pro Bono” Legal Services:** Performing legal services for charity without charging a fee is permissible and encouraged. [Cal. State Bar Form.Opn. 1982-65 (donated legal services auctioned by nonprofit organization as fundraising device permissible); Los Angeles County Bar Ass’n Form.Opn. 434 (1984) (donated legal services as charitable contest prize permissible); ABA Model Rule 6.1]

Generally, however, there is no obligation to do so (¶8:55). (But see Bus. & Prof.C. §6072 (*discussed at* ¶8:55.5 *ff.*)—contract to provide legal services to the State exceeding \$50,000 must contain law firm’s certification that it will make a “good faith effort” to provide minimum number of hours of pro bono legal services.)

[5:41-49] *Reserved.*

## B. TYPES OF FEES AND FEE ARRANGEMENTS

[5:50] All attorney fee arrangements, however characterized, involve one or more of four basic fee *types*:

- **Hourly rate** for services rendered by the attorney and the attorney’s support staff (¶5:53 *ff.*);
- **Flat or fixed fee** for services rendered in the case, regardless of the outcome (¶5:58 *ff.*);
- **Contingent or contingency fee** under which the attorney is paid a percentage of what the creditor recovers or the debtor saves (¶5:77 *ff.*);
- **“True” or “classic” retainers** where sums of money are paid to the attorney solely to secure the attorney’s availability for a given period of time or on a specific matter (¶5:255 *ff.*).

[5:51] Determining an appropriate fee arrangement for handling a new case may be affected by:

- The nature of the case (e.g., most personal injury cases are handled on a contingent fee basis); or
- The nature of the client (e.g., businesses often hire attorneys on an hourly or flat-fee basis, rather than on a contingent fee basis); or
- The attorney’s usual practice (e.g., attorneys handling a large volume of unlawful detainer cases can readily establish routine procedures and charge a fixed fee for each).

[5:52] In some cases, *several* different types of fees may be agreed upon for handling a new case, either as alternatives (e.g., an hourly fee or a percentage of total recovery, whichever is higher) or to supplement

[5:53 — 5:58]

each other (e.g., an hourly fee *plus* a percentage of any recovery over a certain amount).

1. [5:53] **Hourly Rate Fees:** Under an hourly rate arrangement, attorney fees are computed by multiplying the number of hours worked by the agreed hourly rate. Hourly fees generally are payable regardless of the outcome of the case.

**FORM:** Sample written fee agreements for hourly rate fees are available (in Form No. 1, ¶15; Form No. 2, ¶15) on the State Bar website ([www.calbar.ca.gov](http://www.calbar.ca.gov)) under Attorney Regulation, then Mandatory Fee Arbitration, then Forms & Resources.

- a. [5:54] **Most commonly used fee type:** Hourly rate fees are the standard payment type in the legal profession. [*Cazares v. Saenz* (1989) 208 CA3d 279, 287, 256 CR 209, 214]

- (1) [5:54.1] **Comment:** Straight hourly billing as the standard is being questioned—particularly with the availability of information technology and automated practice systems. The ABA has information on the pros and cons of the billable hour system (see [www.americanbar.org](http://www.americanbar.org)).

- (2) [5:55] **Compare—blended rate:** Firms whose members have different billing rates sometimes quote a uniform rate no matter who works on the case. This rate is obtained by blending the anticipated proportion of work to be done by the persons charging the highest rates with the percentage of work to be performed by persons charging the lowest rates.

The problem with this arrangement is that clients sometimes feel the firm is assigning too many younger members and not enough partners to the case.

- (3) [5:56] **Compare—discounted rates:** Lawyers often offer discounted rates to attract new business. Discounts might also be offered on a *volume* basis; e.g., 10% discount on billings over \$10,000 a month, etc.

- b. [5:57] **Timing of payment:** Typically, the client is billed at specific intervals, usually monthly. In some cases (e.g., personal injury insurance defense cases), fees are calculated and charged quarterly, or when the file is closed.

2. [5:58] **Fixed or Flat Fee:** A lawyer is permitted to make an agreement for, and to charge or collect, a fixed or flat fee for specified legal services. A fixed or flat fee is a set amount that constitutes complete payment for the performance of described services (e.g., \$5,000 to incorporate client's business) regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer's provision of those services. [CRPC 1.5(e) (no former CRPC); see also Cal. State Bar Interim Opn. 20-0003—flat fee agreement should clearly state what services are covered by the fee and when the fee (or portion thereof) is earned]

**FORM:** A sample fee agreement provision for a flat or fixed fee is available (in Optional Clauses & Disclosure Forms, ¶17) on the State Bar website ([www.calbar.ca.gov](http://www.calbar.ca.gov)) under Attorney Regulation, then Mandatory Fee Arbitration, then Forms & Resources.

- a. [5:59] **Common for routine legal services:** Fixed fees are common for routine legal services, such as preparing a trust or marital settlement agreement.

Profitability depends on the lawyer's ability to estimate hours accurately and to work efficiently. The client gets the benefit of cost certainty.

➡ [5:60] **PRACTICE POINTERS:** Setting a fixed fee requires knowing:

- How much time is *ordinarily required* to do the work in question;
- What risk exists that the time required in the particular case may *exceed* the time ordinarily required; and
- What controls, if any, are available to minimize that risk.

Considerable experience in handling cases in a particular field is usually required to answer these questions. Fixed fees therefore generally work best when you are handling numerous similar cases (for the same or different clients). Losses resulting from problem cases are then offset by the higher profits from “run of the mill” cases.

Avoid fixed fees for *nonroutine* cases. Whatever fees you set will usually turn out to be too low (meaning loss to you), or too high (usually meaning an unhappy client). Fees grossly excessive to the work required may also violate ethical rules against “unconscionable” fees (CRPC 1.5(a) (formerly CRPC 4-200); *see* ¶5:395 *ff.*).

- b. [5:61] **Compare—statutory “maximum” fees:** Some statutes setting a “maximum” fee or “not to exceed” fee chargeable for specified legal services function as the equivalent of a fixed fee. [See Prob.C. §10810—fee for “ordinary services” of attorney for personal representative in probate proceedings; *see also* ¶5:360 *ff.*]

- (1) [5:62] **Excess fees illegal:** Fees charged in excess of statutory maximum limits are illegal and can result in attorney discipline. [CRPC 1.5(a) (formerly CRPC 4-200(A)), *discussed at* ¶5:395 *ff.*]

- c. **Variations on fixed or flat fee**

- (1) [5:63] **“Exploratory” or “diagnostic” fees:** An “exploratory” or “diagnostic” fee is a fixed fee paid to explore

the potential cost of a particular matter. It is common where clients want a contingent or fixed-fee arrangement and the attorney does not have enough information to accept the case on a contingency or to quote a fixed fee. If attorney and client agree to go forward with the case after the attorney has performed the exploratory work, the parties then enter into a fixed-fee or other fee arrangement.

- (2) [5:64] **Per diem fee:** A per diem fee is a specified daily charge for a particular service. For example, an attorney may charge a flat fee for each day of out-of-town depositions, or for each day of trial.
- (3) [5:65] **Incremental fixed fees:** A fixed fee may be set for separate tasks or phases of an engagement. For example, a lawyer may be paid an incremental fixed fee for preparing and filing a complaint or answer; for preparing or responding to an initial set of interrogatories; for preparing and arguing a motion for summary judgment, etc.
- (4) [5:66] **Value-oriented fees:** A value-oriented fee reflects the relative importance or difficulty of a particular service undertaken by the attorney. Value billing emphasizes the *value* of the particular service rather than the *time* spent in performing the service—for example, an agreed-upon fee for drafting a lease or contract, or an estate plan.
- (5) [5:67] **Commission-based fee (real estate transactions):** An attorney who holds a valid California real estate broker's license may represent a seller in a real property transaction in which the seller agrees to pay the attorney's law firm a real estate broker commission instead of an hourly (or presumably flat or fixed) fee for legal services rendered in connection with the transaction, *provided* no one in the firm who does not hold a real estate license performs any act related to the transaction that requires a real estate license. [88 Ops.Cal.Atty.Gen. 203 (2005)]
- (6) [5:68] **Websites offering legal services:** Some lawyers have websites offering flat-rate fees to perform specific legal tasks. *See discussion at ¶13:33.5.*

[5:69-74] *Reserved.*

- d. [5:75] **Timing of payment:** Depending upon the agreement with the client, a flat fee may be paid before, during or after services are performed. [CRPC 1.5(e)]