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Source: General Interest/Fee Agreement Forms Manual/Preface

Preface

In 1989, CEB attorney Bob Pickus wrote and edited the first edition of this unique guide to planning and drafting attorney-client fee agreements. This second edition updates and builds on the first to continue to provide California attorneys with the complete and practical information they need to meet the requirements of the fee agreements statute (Bus & P C §§6146-6149), other applicable statutory and case law, and the California Rules of Professional Conduct.

The first chapter of the new edition, like the original, contains sample fee agreement provisions followed by detailed commentary discussing the practical, legal, and ethical issues raised by each provision. Chapters 2-16 contain a greater number of sample agreements in a greater variety of practice areas than in the first edition as well as forms for declining or terminating an engagement with a client. Appendixes A-B contain the current State Bar sample agreements and the selected text of important statutes and rules.

The help of consulting editors and practicing attorneys Merri A. Baldwin, Demetrios Dimitriou, M. Sue Talia, and Robert W. Wood was invaluable in preparing this second edition. Ms. Baldwin and Mr. Dimitriou reviewed chaps 1-16, Robert W. Wood reviewed the sections of chap 1 discussing tax issues, and M. Sue Talia provided the sample forms and checklists and reviewed the text for chap 9 (Limited Scope Representation). Biographical information about the consulting editors is found in the "About the Consulting Editors" section.

A companion computer disk of the manual's sample forms is available.

CEB Attorney Editors Karen Frasier-Kolligs and Elizabeth M. Johnson were the Managing Editors for this edition. CEB Legal Editors Elizabeth Allen, Matthew Mandelbaum, Enrique DeAnda, and Andrew Rosner contributed to this title. Linda Marousek handled copyediting and production. Kathryn Te Selle wrote the index. Composition was performed by CEB's Electronic Publishing staff.

November 2009 Update

CEB would like to thank the consulting editors of this year's update, Merri A. Baldwin, Andrew Dimitriou, Demetrios Dimitriou, and Robert W. Wood. We would also like to thank M. Sue Talia for her input on chap 9 (Limited Scope Representation).

CEB Attorney Editor Norma Piatt and Legal Editors Julie Brook, Enrique DeAnda, and Karen Nutter contributed to this title. Administrative support was provided by Kenya Denman and Nila Kanzaria. Christopher Forshay handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

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About the Consulting Editors

MERRI A. BALDWIN is a partner in the San Francisco law firm of Chapman, Popik & White. Her practice focuses on litigating business disputes and attorney liability matters at the trial court level and on appeal. She handles legal malpractice, fee disputes, sanctions, and malicious prosecution matters as well as law firm partnership disputes. She also counsels lawyers and law firms on legal ethics issues and law practice management and represents lawyers in disciplinary proceedings before the State Bar. Ms. Baldwin is a Northern California "Super Lawyer" and a member and past chair of the Executive Committee of the Litigation Section of the Bar Association of San Francisco; a Vice Chair of the Bar Association of San Francisco's Attorney-Client Fee Dispute Program; a panelist for the San Francisco Superior Court Early Settlement Program; and a member of the Bay Area Lawyers for Individual Freedom Judiciary Committee. Ms. Baldwin frequently lectures to attorneys and professional organizations on issues related to litigation, legal malpractice, and ethics. She has taught at the University of California, Berkeley, School of Law. Ms. Baldwin received her J.D. from the University of California, Berkeley, School of Law in 1989 and graduated magna cum laude from Smith College in 1984.

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Acknowledgments

All of the consulting editors who helped shape the second edition of this book are experts in their respective fields. Without exception, CEB admires both their depth of knowledge and their extraordinary generosity in sharing that knowledge within the pages of this text. The consulting editors are listed on the title page, with biographical notes in "About the Consulting Editors."

CEB also wishes to recognize the special contribution of Demetrios Dimitriou who not only served as a consulting editor of this second edition, but as the author of many updates to the first edition. Mr. Dimitriou has faithfully contacted CEB staff about statutory developments and case decisions, called attention to judicial interpretations, and generously shared his insights with other members of the California bar.

CEB wishes to thank Ellen R. Peck for her valuable recommendations for consultants on this edition, Steven A. Lewis for his helpful suggestions in the planning stage, and Hale Kronenberg and Thomas W. Latham for reviewing several of the book's sample fee agreements.

In addition, CEB wishes to acknowledge its debt to the California attorneys who contributed to the first edition of this book by reviewing and commenting on the sample provisions and commentary. Their valuable suggestions helped make the book more accurate, more practical, and more reflective of actual fee agreement practice in California.

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Selected Developments

November 2009 Update

The California Supreme Court approved Cal Rules of Prof Cond 3-410 (operative January 1, 2010), which requires attorneys to disclose in writing at the time of their engagement if they do not maintain professional liability insurance whenever it is reasonably foreseeable that the total amount of time the attorney will spend on the matter will exceed 4 hours. Cal Rules of Prof Cond 3-410(A) (operative January 1, 2010). See §1.51A.

The supreme court's decision in *People ex rel Clancy v Superior Court* (1985) 39 C3d 740, 218 CR 24, that a municipality may not hire private counsel on a contingent fee basis to bring a public nuisance abatement action, has been the subject of recent developments. In an unpublished opinion, the Ninth Circuit has held that, to the extent the municipality brings its nuisance claims in its capacity as a private property owner—and not in its capacity as a sovereign—the supreme court's ruling in *Clancy* is inapplicable. *City of San Diego v U.S. Dist. Court* (9th Cir 2008) 291 Fed Appx 798, 799 (unpublished opinion). The California Supreme Court is currently reviewing a related issue in *County of Santa Clara v Superior Court* (review granted July 23, 2008, S163681; superseded opinion at 161 CA4th 1140, 74 CR3d 842). See §1.26.

In *Green v Commissioner* (9th Cir 2009) 312 Fed Appx 929, the Ninth Circuit held that a plaintiff is required to pay income tax on statutory attorney fees awarded under the Fair Employment and Housing Act (Govt C §§12900-12996). In so holding, the court expressed sympathy to the plaintiff for the effects of the alternative minimum tax, but noted that it cannot change income tax rules to correct the result. See §§1.26, 1.36.

The court in *Shopoff c³ Cavallo LLP v Hyon* (2008) 167 CA4th 1489, 1523, 85 CR3d 268, noted that even if the rule announced in *Fletcher v Davis* (2004) 33 C4th 61, 70 n3, 14 CR3d 58 (attorney who seeks charging lien to secure hourly fees must satisfy requirements of Cal Rules of Prof Cond 3-300), extends to liens attached to contingent fee agreements, only liens asserted would be unenforceable, not the underlying fee agreement. See §1.38.

On the successor attorney's ethical obligations to notify prior counsel, who has a valid lien against the recovery, of the fact or amount of a settlement, see California State Bar Formal Opinion No. 2008-175, discussed in §1.38. Also discussed there is California State Bar Formal Opinion No. 2009-177, on options available when seeking enforcement of a charging lien.

If a civil action filed after nonbinding arbitration under the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206) is dismissed, the court will reinstate the arbitration award. See *Perez v Grajales* (2008) 169 CA4th 580, 602, 86 CR3d 784 (involuntary dismissal of attorney's civil action following nonbinding arbitration under MFAA constitutes repudiation of his rejection of arbitration decision), discussed in §1.47.

In *Schatz v Allen Matkins Leck Gamble c³ Mallory, LLP* (2009) 45 C4th 557, 571, 87 CR3d 700, the supreme court held that the MFAA does not limit the ability of attorneys and clients to enter into binding contractual arbitration. Thus, when a client chooses MFAA arbitration, binding arbitration under a preexisting agreement may go forward once the MFAA arbitration process is over. See §§1.47, 1.49.

In *People v Gutierrez* (2009) 45 C4th 789, 803, 89 CR3d 225, the California Supreme Court found that the trial court made an adequate inquiry under *People v Marsden* (1970) 2 C3d 118, 84 CR 156, and did not abuse its discretion by concluding that it was unnecessary to substitute counsel. See §5.3.

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Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of August 28, 2009, and monitored developments through September 14, 2009.

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Fee Agreement—Sample Provisions and Commentary

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§1.1 I. SCOPE OF THIS BOOK

This forms manual contains sample contract provisions that attorneys may choose to adapt for use in their own fee agreements. It also contains entire sample agreements that may serve as guides for fee agreements in particular circumstances.

Chapter 1 gives a brief introduction to the law governing fee agreements and sets out sample provisions that may be adapted for inclusion in a fee agreement. The commentary to these provisions discusses practical and ethical problems raised by each provision and the applicable law.

The sample fee agreements for use in particular circumstances are set out in chaps 2-15, in alphabetical order from business agreements to an agreement for representation in a wrongful termination matter. Chapter 16 contains two letters, one to be sent on the completion of representation (see §16.2) and the other to be sent if, after consultation with a potential client, the attorney decides to decline the engagement (see §16.3). Three sample attorney-client fee agreements prepared by the Committee on Mandatory Fee Arbitration of the State Bar of California and approved by the Board of Governors are found in App A. Appendix B contains the full text of selected sections of the Business and Professions Code and the Rules of Professional Conduct.

As with any forms book, it is essential that users select, evaluate, and modify the provisions and forms in light of their own professional judgment and the particular client and factual situation.

NOTE: In this book, "fee agreement" means the agreement between attorney and client as to all aspects of their relationship, not simply as to the amount and method by which the attorney will be paid for legal services, *i.e.*, "fee agreement" means what is also referred to as a "representation," "engagement," or "retainer" agreement.

§1.2 II. SCOPE OF THIS CHAPTER

This chapter first touches on the basic considerations counsel must take into account when entering into a fee agreement, including a brief discussion of the law governing fee agreements (see §§1.3-1.12) and the reasons why a written agreement is almost always preferable to an oral or implied agreement. See §§1.13-1.14.

The main body of the chapter sets out individual provisions that might be included in a fee agreement. The commentary to the provisions discusses various legal and ethical principles in connection with those provisions. See §§1.15-1.54.

Although this chapter offers a comprehensive selection of sample provisions to be considered for inclusion in fee agreements, it does not cover certain specialized situations such as class actions or representation provided by an insurer.

NOTE: The chapter uses "Attorney" throughout the sample provisions; when multiple attorneys are involved, whether directly or through their association with the attorney or attorneys handling the matter, other appropriate terms (e.g., "Attorneys," "Law Firm") may be used and the provisions may be modified accordingly. Likewise, the term "Client" is generally used in the sample provisions in this chapter, but the plural form may be used and other modifications may be made (see, e.g., §1.34).

III. BASIC CONSIDERATIONS

§1.3 A. Fee Agreements Are Contracts

A matter of contract. As a general rule, attorney and client may agree to the measure and mode of an attorney's compensation. CCP §1021. Although statutes, case law, and rules of professional conduct may substantially limit the ability of attorney and client to contract as to some aspects of their relationship, the agreements they reach are contracts. Because the fee agreement is drafted by the attorney, its provisions are interpreted strictly against the attorney and any ambiguity is resolved in favor of the client. *Alderman v Hamilton* (1988) 205 CA3d 1033, 1037, 252 CR 845. See also *Norman v Berney* (1965) 235 CA2d 424, 434, 45 CR 467.

NOTE: Some of the limitations on fee agreements are discussed in §§1.5-1.12, others are discussed in the commentary to individual sample contract provisions.

Many attorneys prefer to set out their fee agreements in numbered paragraphs. Some attorneys prefer to draft their agreements in a letter which the client signs to indicate his or her assent to its terms. Whichever method is used, it is highly recommended that all fee agreements be in writing. See §§1.13-1.14.

Selecting contractual provisions. In selecting the provisions to be used in a fee agreement, the attorney should consider the client's perspective as well as his or her own. Including a large number of the applicable provisions offers valuable information to the client and protection against many possible future problems or misunderstandings between the attorney and client. But a lengthy document may be intimidating or even overwhelming to the client and make him or her distrustful of the attorney. The proper balance in each instance may thus depend on the particular substantive issues involved in the representation, the attorney's earlier experience with the client, the psychological factors involved, the complexity of the matter, and the sophistication of the client.

PRACTICE TIP: A client's reaction to an agreement is likely to depend more on its content and the manner in which it is presented than on its form. To the extent practicable, the attorney should draft the agreement in basic, nontechnical language and explain its purpose and effect in a pleasant and understandable manner.

Declining engagement or stating that contract has been performed. Whenever an attorney or law firm decides not to represent a potential client after an interview or discussion with the potential client that might conceivably be interpreted to have created an attorney-client relationship, it is wise to send a nonengagement letter clarifying that attorney and client have not entered into a contract for legal services. See §16.3. When an attorney or law firm has completed representing a client, it is wise to send a termination letter, making clear that the contract has been performed and the representation is at an end. See §16.2.

§1.4 B. There Are Different Types of Fee Agreements

There are several types of fee agreements discussed in the commentary to the contract provisions set out in this chapter.

Hourly fee. Under an hourly fee agreement, the attorney and client agree that the client will pay the attorney a particular amount for each hour of legal services rendered under the agreement. See §1.23.

Contingent fee. Under a contingent fee agreement, the attorney and client agree that the attorney will receive a particular percentage of the client's recovery as a fee for legal services, if there is a recovery. See §1.26.

Hybrid. The attorney and client may choose to agree on a hybrid of the hourly and the contingent fee. See §1.26.

Fixed or flat fee. Under a fixed or flat fee agreement, the attorney receives a fixed amount for the performance of a particular service, *e.g.*, obtaining a judgment of dissolution.

Fee based on results. There may be instances in which the attorney and client may want to agree that the attorney will be paid at a certain hourly rate for legal services, but that if a particular result is achieved, the attorney will receive an extra amount. For discussion, see §1.24.

True retainer. A "true" or "classic" retainer agreement secures the attorney's availability to perform services for a particular period and the attorney's fee is earned when paid. See §1.32.

C. Fee Agreements Are Subject to Statutory Requirements

§1.5 1. Contingent Fee Agreements

In writing. Contingent fee agreements must be in writing to be enforceable, except those for the recovery of workers' compensation benefits or certain merchants' claims. Bus & P C §§6147-6147.5. See §§1.7, 1.26.

Containing certain specific provisions. In addition to a description of the contingencies entitling the attorney to a fee, the agreement must specify such matters as (Bus & P C §6147):

- The fee rate agreed on;
- How the costs of prosecuting the case will affect the fee and the client's recovery; and
- A statement that the fee is negotiable.

Although failure to include these required items makes the agreement voidable at the option of the client, the attorney is still entitled to a reasonable fee. Bus & P C §6147(b).

Medical malpractice claim. Additional requirements must be met for a contingent fee involving a medical malpractice claim. If the claim is for medical malpractice and is subject to the maximum fee limits on contingent fees (see Bus & P C §6146), then the fee agreement must include a statement that the rates set forth in §6146 are the maximum limits for the contingent fee arrangement and that the attorney and the client may negotiate a lower rate. Bus & P C §6147(a)(5).

NOTE: In such a medical malpractice case, the attorney may want to attach a copy of Bus & P C §6146 to the fee agreement to ensure that the client is informed of its content. See §§1.26, 11.2.

§1.6 2. Noncontingent Fee Agreements

In writing, and containing certain specific provisions. A noncontingent fee agreement must also be in writing in the absence of one of several exceptions. Bus & P C §6148. For an example of a noncontingent fee agreement, see §§1.23, 3.2.

Noncontingent fee agreements must also contain (Bus & P C §6148(a)(1)):

- The bases of compensation, including hourly rates, statutory fees, or flat fees; and
- Other standard rates, including fees and charges applicable to the case.

Exceptions to writing requirement. The exceptions to the requirement of a written noncontingent fee agreement exist when:

- It is reasonably foreseeable that the total expense to the client, adding fees and costs, will not exceed \$1000 (Bus & P C §6148(a));
- The client is a corporation (Bus & P C §6148(d)(4));

NOTE: That the client is a corporation does not excuse the requirement of a written fee agreement if the attorney accepts work on a contingent fee basis. Bus & P C §6147.

- Services are rendered in an emergency, *i.e.*, when foreseeable prejudice to the rights or interests of a client present an emergency need for legal services, or when a writing is otherwise impracticable (Bus & P C §6148(d)(1));
- The attorney has fully disclosed the Bus & P C §6148 requirement of a written agreement and the client knowingly states in writing that a written fee agreement is not required (Bus & P C 6148(d)(3));
- The attorney has previously rendered services of the same general kind and the client paid for them (Bus & P C §6148(d)(2)); or
- An oral fee agreement was entered into before January 1, 2000, and was otherwise enforceable. See Bus & P C §6148(e).

CAUTION: Counsel should not assume that a particular case falls under a recognized exception. To simplify possible later disputes, fee agreements should be in writing and if it is impossible to begin the case with a written agreement, then counsel and client should put the fee arrangement in writing as soon as practicable.

§1.7 3. Fees May Be Set by Statute

When accepting employment in an unfamiliar area of law, counsel should investigate possible limitations on the ability to negotiate fees, *e.g.*:

- **Probate.** Attorney fees for work done for the personal representative in a probate proceeding, while the personal representative is acting in his or her official capacity, are statutory and do not arise from contract. *Estate of Lee* (1981) 124 CA3d 687, 693, 177 CR 229. See Prob C §§10800, 10810, 13660. Work performed for the personal representative while he or she is acting in any other capacity should have a separate written agreement.
- **Indigent criminal defendants.** Attorney fees for counsel assigned to represent indigent criminal defendants are set by the trial court (Pen C §987.2) or by the court of appeals in appellate matters (Pen C §1241).
- **Foreclosure.** Attorney fees in judicial foreclosure matters are set by the trial court, regardless of any contrary provision in the mortgage or deed of trust. CCP §730.
- **Workers' compensation.** Attorney fees for representation in Workers' Compensation Appeals Board matters are set by the Appeals Board (Lab C §5801) and by the court or Appeals Board in third party matters (Lab C §3860(f)). However, fee agreements for a reasonable amount will be enforced if the amount agreed on coincides with the Appeals Board's determination of a fee. Lab C §4906. See California Workers' Compensation Practice §§15.10-15.21 (4th ed Cal CEB 2000).
- **Medical malpractice.** Maximum fee limits have been set on contingent fees in medical malpractice cases under Bus & P C §6146. See §1.26.

Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.8
4. Fees May Be Subject to Court Approval

§1.8 4. Fees May Be Subject to Court Approval

Court approval of fee agreements is required in some instances, *e.g.*, the compromise of the claim of a minor or a person with a disability (as defined by Prob C §3603). Prob C §3601(a).

Probate. Attorney fees for representing a special administrator are fixed by the court (Prob C §8547) as are fees for extraordinary services rendered by a special administrator (Prob C §8547(d)) or by the attorney for the personal representative of an estate (Prob C §10811) for work performed while the personal representative was acting in his or her official capacity.

Workers' compensation. Court approval or Appeals Board approval of an attorney fee agreement is also required in workers' compensation third party actions (Lab C §3860(f)), and workers' compensation matters require the approval of the Appeals Board as to any fee agreement between attorney and client (Lab C §5801). See California Workers' Compensation Practice §§15.10-15.21 (4th ed Cal CEB 2000).

Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.9
D. Fee Agreements Are Subject to Ethical Requirements

§1.9 D. Fee Agreements Are Subject to Ethical Requirements

Although legal and ethical issues involving fee agreements are discussed in the commentary after the individual contract provisions in §§1.15-1.54, the following sections (§§1.10-1.14) briefly discuss three of the major ethical considerations. For selected Business and Professions Code sections and Rules of Professional Conduct with which counsel should be familiar, see App B. Attorneys should also be aware that the State Bar maintains an "Ethics Hotline" (1-800-2ETHICS), which may be consulted on ethics questions.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§1.10 1. No Unconscionable Fee

An attorney must not charge, collect, or enter into an agreement to charge an unconscionable or illegal fee. Cal Rules of Prof Cond 4-200(A). In California, a fee is unconscionable when it is "so exorbitant and wholly disproportionate to the services performed as to shock the conscience." *Tarver v State Bar* (1984) 37 C3d 122, 134, 207 CR 302, quoting *Herrscher v State Bar* (1935) 4 C2d 399, 401, 49 P2d 832. See also *Goldstoe v State Bar* (1931) 214 C 490, 498, 6 P2d 513.

Under Cal Rules of Prof Cond 4-200(B), unconscionability is to be determined "on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events." Rule 4-200(B) lists 11 nonexclusive facts to be considered when determining whether a fee is conscionable. See App B.

For examples of unconscionable fees, see *Bushman v State Bar* (1974) 11 C3d 558, 563, 113 CR 904. See also *In re Silverton* (2005) 36 C4th 81, 29 CR3d 766 (provision that attorney could retain 100 percent of money he saved by negotiating reduction in medical liens was unconscionable).

§1.11 2. Fee Negotiations Generally at Arm's Length

The negotiation of a fee agreement at the inception of the attorney-client relationship is generally an arm's-length transaction. *Ramirez v Sturdevant* (1994) 21 CA4th 904, 913, 26 CR2d 554 (attorney entitled "to negotiate the terms on which he would accept employment as he wished" and client has no complaint "absent issues of duress, unconscionability, or the like"). See also *Setzer v Robinson* (1962) 57 C2d 213, 217, 18 CR 524.

Probate Code §16004, which applies to the attorney-client relationship as well as to that of trustee-beneficiary, provides that transactions between trustee and beneficiary during the relationship, by which the trustee gains an advantage, are presumed to be the result of undue influence. Section 16004 specifically does *not* apply to the hiring or compensation of the trustee (or attorney), however, even when there is a previously existing relationship. *Ramirez*, 21 CA4th at 917. Thus, the presumption of undue influence does not apply to attorney and client fee agreement negotiations during the course of the relationship. 21 CA4th at 917. See also *Walton v Broglio* (1975) 52 CA3d 400, 125 CR 123; 1 Witkin, California Procedure, *Attorneys* §97 (5th ed 2008).

On modifying the agreement and complying with Cal Rules of Prof Cond 3-300, see §1.45.

§1.12 3. Acquiring Ownership or Other Pecuniary Interest Adverse to Client

Rule 3-300. An attorney is prohibited from entering into a transaction with a client in which the attorney acquires an "ownership, possessory, security, or other pecuniary interest adverse to a client" unless certain requirements are met. Cal Rules of Prof Cond 3-300. See §§1.23, 1.36, 1.38, 1.45. An attorney may enter into such a transaction with a client if:

- The terms of the transaction are fair and reasonable to the client, fully disclosed in writing, and set forth in a manner that the client should reasonably understand (Rule 3-300(A));
- The attorney advises the client in writing that the client may seek advice from an independent attorney (Rule 3-300(B)); and
- After compliance with the terms in Rules 3-300(A) and (B), the client consents in writing (Rule 3-300(C)).

Charging liens. On complying with Rule 3-300 when entering into an hourly fee agreement with a client that includes a charging lien, see §1.38. On whether a contingent fee based on the client's recovery, secured by a lien granted in the fee agreement, falls within the ambit of Rule 3-300, see §1.38.

Modifications or related agreements. A subsequent agreement or modification of a fee agreement may create an adversity of interest between attorney and client that requires the attorney to comply with Rule 3-300. See §1.45.

E. All Fee Agreements Should Be in Writing

§1.13 1. Risks of Unwritten Agreement

It is strongly recommended that all agreements regarding fees, costs, and expenses be in writing, whether or not required by statute, because it limits the potential for disagreement and strengthens the attorney's position if and when a fee dispute arises. On statutory requirements of a writing, see §§1.5-1.6.

Agreement voidable. The failure to have a written fee agreement when required by Bus & P C §6147 (contingent fee agreements) or §6148 (all other written fee agreements) renders the fee agreement voidable at the client's option. Although, in that event, the attorney may collect "a reasonable fee" or quantum meruit (Bus & P C §§6147(b), 6148(c)), the reasonable fee may be less than the attorney would have received under a written agreement.

Statute of limitations. Furthermore, an oral agreement is subject to a 2-year statute of limitations (CCP §339), as opposed to the 4-year limitation period applicable to written instruments (CCP §337). See *Iverson, Yoakum, Papiano & Hatch v Berwald* (1999) 76 CA4th 990, 996, 90 CR2d 665 (suit against former clients for attorney fees barred by 2-year statute of limitations for obligation not in writing; if fee agreement had been in writing, suit would have been timely under 4-year statute for obligation in writing).

§1.14 2. Benefits of Written Agreement

Limit client misunderstandings. The written fee agreement also gives the attorney the opportunity to limit client misunderstandings (and related malpractice exposure) by, e.g., clearly identifying the client and the scope of the legal services to be rendered. When there is a question about the client's identity, e.g., partners and partnership entity, corporation, board of directors, or officers, counsel should consider including a provision that identifies persons or entities intended and not intended to be clients. For a provision identifying the client, see §1.15. If the attorney is taking on a limited role in a situation involving legal issues that are outside the scope of the fee agreement, it can be particularly important to include a provision specifying services that are not included in the agreement. For provisions on the scope of legal services, see §§1.20-1.21. On "unbundling" legal services, see chap 9.

Agree on possibly troublesome issues. The written fee agreement offers the attorney and client the opportunity to reach an understanding on matters that might eventually prove troublesome. For example, including clauses covering the attorney's right to withdraw (see §1.40), the client's right to discharge the attorney (see §1.39), and the client's fee obligation on discharge of attorney (see §1.39) gives the attorney the opportunity to address in advance issues that might cause difficulty later.

Recover full fee. When the attorney and client have entered into a written fee agreement that complies with the applicable statutes, the attorney is entitled to recover the full fee agreed to in the contract for services reasonably rendered and is not limited to quantum meruit recovery. *Berk v Twentynine Palms Ranchos, Inc.* (1962) 201 CA2d 625, 637, 20 CR 144 ("where the attorney and the client each have the capacity to contract, and the fee is fixed or determined by their contract, such determination is generally binding").

IV. SAMPLE PROVISIONS AND COMMENTARY

§1.15 A. Form: Identification of Parties

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1.15-1 Identification of parties

This agreement __ __[, *executed in duplicate with each party receiving an executed original,*]__ __ **is made between**
__ __[*name*]__ __, **hereafter referred to as "Attorney,"** and __ __[*name*]__ __, **hereafter referred to as "Client."**

[*If appropriate, add*]

This agreement is required by California law.

Comment: Writing requirement. For fee agreements subject to Bus & P C §6147 (*i.e.*, most contingent fee agreements) or §6148 (*i.e.*, most cases in which it is reasonably foreseeable that total fees and costs will exceed \$1000), attorney and client must execute the agreement in duplicate and the client must be provided with an executed original. Bus & P C §§6147(a), 6148(a). This procedure, which is good practice even when not required by statute, should be indicated by use of the optional bracketed wording in the first line of the form.

Some clients will want to know why a written agreement is being prepared. That question may be answered through use of the optional paragraph, when applicable, or in a separate cover letter.

NOTE: It can sometimes be important to clarify in the agreement who is not the client as well as who is. On the necessity of defining the scope of the representation and the limitations on the representation, see §§1.20-1.21.

When representing a minor or disabled person. Whenever the party whose interests the attorney is representing is a minor or a person with a disability under Prob C §3603, the fee agreement should be made between the attorney and a person acting on behalf of the minor or person with a disability. A fee agreement made by a minor could be disaffirmed by him or her. See Fam C §6710. A person for whom a conservatorship of the estate is in effect cannot make a binding fee agreement unless the court specifically grants such authority. See Prob C §§1872(a), 1873. A person who is "entirely without understanding" cannot make a valid fee agreement (see CC §38), and an agreement made by someone "of unsound mind, but not entirely without understanding," is subject to rescission (see CC §39). For a minor, the fee agreement should be entered into with a guardian ad litem or guardian of the estate; for a person with a disability under Prob C §3603, the representative party should be a guardian ad litem or conservator of the estate. See CCP §372. The representative should sign the agreement in his or her representative capacity.

§1.16 B. Form: Payment of Attorney Fees by Third Party in Noncontingent Fee Matter

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1.16-1 Payment of attorney fees by third party in noncontingent fee matter

[Add one of the following alternatives]

[Alternative 1: If person responsible for payment of fees and costs is not a party to the fee agreement]

Another person or entity may agree to pay some or all of Client's attorney fees and costs. Any such agreement will not affect Client's obligation to pay attorney fees and costs under this agreement, nor will Attorney be obligated under this agreement to enforce such agreement. Any such amounts actually received by Attorney, however, will be credited against the attorney fees set forth in this agreement _ *[or delivered to Client if there is no balance due Attorney]*_. The fact that another _ *[person/entity]* _ may agree to pay some or all of Client's attorney fees will not make that _ *[person/entity]* _ a client of Attorney and that _ *[person/entity]* _ will have no right to instruct Attorney in matters pertaining to the services Attorney renders to Client. Unless Client gives written permission to discuss all or a portion of Client's matters with _ *[the person/the entity]* _ paying all or a portion of the attorney fees, Attorney will not disclose any confidential information to _ *[him/her/it]*_. By signing this agreement, Client consents to this arrangement and acknowledges that Attorney has advised Client of the advantages and disadvantages of this arrangement.

[Alternative 2: If person responsible for payment of fees and costs will be a party to the fee agreement]

_ *[Name]* _ agrees to pay attorney fees for services performed and costs incurred in the representation of Client under this agreement. _ *[Name]* _ acknowledges that _ *[his/her/its]* _ agreement to pay attorney fees and costs does not make _ *[him/her/it]* _ a client of Attorney. Unless Client gives written permission to discuss all or a portion of Client's matters with _ *[name]*_, Attorney will not disclose any confidential information to _ *[him/her/it]* _.

Comment: Potential issues. When, in a noncontingent matter, a third party pays part or all of the attorney fees, a number of issues can arise concerning the nature of the attorney's relationship with the individual or entity actually paying for the attorney's services. Alternative 1 avoids potential ethical issues posed by such arrangements by making it clear that the party paying the bills is not the client and is not party to the confidential attorney-client relationship. The attorney should be aware that Cal Rules of Prof Cond 3-310(F) requires informed written consent.

An attorney who wants a remedy against the party assuming responsibility for payment must have an agreement with that individual or entity. One option, illustrated in Alternative 2, is for the attorney to make the individual or entity assuming responsibility for payment a party to the fee agreement.

Fee dispute arbitration. Even though the party assuming responsibility for payment does not become the attorney's client in the sense of directing the representation or becoming privy to confidential information, the attorney should send notice of the right to compel arbitration of a fee dispute to this individual or entity as well as to the client. *Wager v Mirzayance* (1998) 67 CA4th 1187, 79 CR2d 661 (plaintiff attorney's suit to collect fees from client's father, who had agreed to pay fees, dismissed because attorney failed to notify father of right to arbitrate). On arbitration of fee disputes, see §§1.46-1.49.

For informational purposes, the attorney might want to include in the initial agreement a provision describing the client's right to arbitrate fee disputes under California's Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206). For a sample provision, see §1.46. Note, however, that including this provision in a fee agreement does not replace the attorney's obligation to provide notice of the client's right to compel arbitration *after* a fee dispute arises. See Bus & P C §6201(a).

Other suggested provisions. The attorney should have a separate written agreement with the person or entity paying the fees to ensure that the attorney has all contractual advantages to pursue payment in case the fee-payer

ceases paying. For suggested provisions dealing with settlement agreements or court orders for payment of attorney fees by other parties in litigation matters, see §§1.36-1.37.

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Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.17
C. Form: Retention of Law Firm Rather Than Particular Attorney

§1.17 C. Form: Retention of Law Firm Rather Than Particular Attorney

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1.17-1 Retention of law firm rather than particular attorney

Client is retaining a law firm, not any particular attorney, and the attorney services to be provided to Client will not necessarily be performed by any particular attorney. _ _ *[It is anticipated, however, that the services will be performed principally by _ _ [insert name(s) of attorney(s)] _ _.]* _ _

Comment: When the attorney services will be performed by a law firm and not necessarily by a particular attorney, that fact should be made clear to the client at the outset. Additionally, when a particular attorney is likely to perform most or all of the work, this provision will support the firm's continuing representation of the client and the transferring of responsibilities to another attorney if the attorney who is initially responsible dies, becomes disabled, leaves the firm, or is otherwise unavailable to handle all or some part of a client matter. Of course, the client will retain the absolute power to discharge the firm at any time, with or without cause. See §1.39. When applicable, the bracketed language may clarify the situation and assure the client.

For a provision regarding delegation to other attorneys when a single attorney is retained, see §1.18.

Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.18
D. Form: Delegation of Attorney Services

§1.18 D. Form: Delegation of Attorney Services

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1.18-1 Delegation of attorney services

Attorney may delegate to other attorneys some of the attorney services to be provided to Client. Any such delegation will not affect Client's obligation to pay attorney fees as provided for in this agreement.

Comment: If the attorney being retained may delegate performance of some of the services to other attorneys, counsel should make that clear to the client at the outset. See California State Bar Formal Opinion No. 2004-165 (if attorney anticipates delegating services to other attorneys, issue should be addressed in fee agreement). In certain circumstances, the client must specifically consent to an attorney's sharing part of a fee with another attorney outside his or her firm. See §1.27.

For a provision regarding retention of a law firm rather than a particular attorney, see §1.17.

Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.19
E. Form: Authorized Representative of Client

§1.19 E. Form: Authorized Representative of Client

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1.19-1 Authorized representative of client

Client designates _ [name] _ as the authorized representative to direct Attorney and to be the primary person to communicate with Attorney regarding the subject matter of Attorney's representation of Client under this agreement. This designation is intended to establish a clear line of authority and to minimize potential uncertainty, but not intended to preclude communication between Attorney and other representatives of Client.

Comment: Whenever there are multiple clients or multiple client representatives with whom the attorney may be communicating, it may be helpful to establish the primary party from whom the attorney is to take direction and with whom the attorney is to communicate. See, e.g., §§2.2, 2.5. The attorney needs to have a designated individual to ensure no conflicting directions are given, and to ensure that the attorney may easily comply with Cal Rules of Prof Cond 3-600(B) if the organization is going to embark on illegal or unethical behavior.

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§1.20 F. Form: Legal Services to Be Provided

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1.20-1 Legal services to be provided

The legal services to be provided by Attorney to Client are as follows: _ _ [e.g., *representation of Client through judgment or settlement in* _ _ [name of case and case number]_ _] _ _.

Comment: Meeting Bus & P C §6148(a)(2) requirements. A written fee agreement required by Bus & P C §6148 must contain the "general nature of the legal services to be provided to the client." Bus & P C §6148(a)(2). With certain specified exceptions, Bus & P C §6148 requires a written fee agreement in any noncontingent fee case in which it is reasonably foreseeable that the total expense to the client, including attorney fees, will exceed \$1000. See §1.6.

It appears from the language of the statute that this section can be satisfied by a very general statement. Although attorneys often give little consideration to the description of the services they will provide, the description should be drafted with care because poor drafting can have serious consequences. For example, malpractice litigation may result from the failure of the attorney and the client to agree on the scope of the attorney's services. See, e.g., *Piscitelli v Friedenber*g (2001) 87 CA4th 953, 105 CR2d 88. See §1.21. If the scope of representation materially changes after execution of the fee agreement, counsel should amend the agreement to clarify the revised scope of services.

Avoiding fee disputes. Fee disputes may arise from the failure of the attorney and the client to reach a clear understanding of what services are and are not covered under the agreement. The type of fee arrangement is important. When the attorney is to be paid on an hourly basis, the description should fairly apprise the client of the entire scope of the services for which he or she might expect to be charged. Depending on the type of matter, similar attention should be given to providing a comprehensive list of the specific activities for which the client may be charged. See §1.23. When there is a fixed fee or contingent fee arrangement, the description should fairly apprise the client of the limits on the services that he or she might expect to receive without a separate fee agreement, e.g., appeals or collection efforts after judgment. See *Joseph E. Di Loreto, Inc. v O'Neill* (1991) 1 CA4th 149, 158, 1 CR2d 636 (fee agreement specified that attorney would resist defense motion for new trial if judgment was received, but would not handle appeal without further fee arrangements). Careful drafting and discussion of the services to be provided can help avoid later disputes over the scope of such services and the responsibilities of the attorney.

It is often helpful to follow the provision setting out the services to be provided with one specifying certain related services that will not be provided under the agreement. For a sample provision, see §1.21. On respective responsibilities of the attorney and the client regarding performance of the agreement, see §1.22.

§1.21 G. Form: Legal Services Specifically Excluded

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1.21-1 Legal services specifically excluded

Legal services that are excluded under this agreement specifically include, but are not limited to, the following: _ _[e.g., tax advice]_ _.

If Client wishes Attorney to provide any legal services excluded under this agreement, a separate written agreement between Attorney and Client will be required.

[If applicable, add the following option]

[Because many civil actions result in settlements or judgments that will be counted, at least in part, as taxable income to the prevailing party, the careful practitioner may want to include the following clause in the representation agreement.]

Attorney has advised Client that any settlement or judgment obtained as a result of the representation may be partly or wholly taxable. Attorney has informed Client that tax advice is specifically excluded from the scope of the services Attorney will provide under this agreement. Attorney has informed Client that _ _[he/she]_ _ is not an expert in tax law, and has recommended that client obtain advice from a tax practitioner concerning the tax consequences of any recovery or any other tax matter.

[If applicable, add the following option]

[Attorneys who practice before the IRS may want to include a clause advising the client that absent a separate written agreement, the representation does not include covered opinions; see "IRS Circular 230" discussion at the end of this section.]

Any tax advice that Attorney gives in the course of Attorney's representation of Client is not intended to, and will not, meet Treasury Department standards for legal opinions on which a taxpayer can rely for the purpose of avoiding tax penalties. To comply with these standards (see 31 CFR pt 10, referred to as "Circular 230"), a legal opinion must meet strict requirements. If Client wishes Attorney to provide such a legal opinion, a separate written agreement between Attorney and Client will be required.

Comment: Anticipating services client might want, but attorney will not provide. In many instances, the attorney will be able to anticipate related services that he or she does not intend to provide under the existing fee agreement with the client, but that the client might want provided (e.g., attorney retained to advise on or negotiate a dispute, but not to litigate it). To apprise the client fairly of the effect of the fee agreement and to avoid future conflict with the client, the attorney should include this provision to exclude these services expressly from those to be provided under the agreement. See LA County Bar Ass'n Formal Opinion No. 476 (Apr. 1994) (fee agreement for dissolution action provided attorney would prosecute case through trial and posttrial motions, but that services would not include appellate proceedings or execution on any judgment obtained; attorney not ethically required to pursue collection).

Agreeing on scope of attorney's duty. Apart from disputes over fees, malpractice litigation may result from the failure of the attorney and the client to agree on the scope of the attorney's duty. See, e.g., *Piscitelli v Friedenberg* (2001) 87 CA4th 953, 105 CR2d 88 (attorney successfully represented client in employment-related claims against former employer Prudential Securities; because attorney contracted to represent client in all his claims against Prudential and knew that client had both sold and invested in certain Prudential securities, attorney engaged in malpractice by failing to opt client out of settlement in class action against Prudential filed by investors in those securities).

Particularly when the attorney intends to take on a limited duty, it is essential that the agreement clearly sets out the limitations on the services that the attorney will provide. See *Kane, Kane & Kritzer, Inc. v Altagen* (1980) 107 CA3d 36,

165 CR 534 (attorney had only limited duty when respective responsibilities of attorney and client sufficiently delineated by course of dealing); *Ishmael v Millington* (1966) 241 CA2d 520, 529, 50 CR 592 (attorney's failure to disclose limitation on representation established triable issue of negligence). See also *Joseph E. Di Loreto, Inc. v O'Neill* (1991) 1 CA4th 149, 158, 1 CR2d 636 (undisputed that when attorney allegedly "abandoned" client, he had already fully performed all he was required to do under contract stating, "In no event shall it be incumbent upon said attorney to take or resist an appeal without further fee arrangements between the parties").

Understanding scope of attorney's duty, despite agreement. In some circumstances, even a provision expressly limiting the scope of the attorney's services may not absolve the attorney of the responsibility to advise the client of matters beyond the scope of the services the attorney is to provide (e.g., other possible remedies and applicable statutes of limitations) that may result in adverse consequences if not considered. See *Nichols v Keller* (1993) 15 CA4th 1672, 19 CR2d 601 (attorney in workers' compensation case has duty to advise client of possible action against third party). In some instances, the attorney may even have a responsibility to advise someone other than the client of such matters. See *Meighan v Shore* (1995) 34 CA4th 1025, 40 CR2d 744 (on being consulted by husband and wife about husband's medical malpractice action and agreeing to take case, attorney had duty to advise wife about her possible action for loss of consortium).

Limited scope representation. In limited scope representation, also called "unbundling," responsibilities for a legal matter are divided between the attorney and the client on an issue-by-issue basis or are otherwise apportioned between the attorney and the client. Although most common in family law matters, limited scope representation may be used in other types of litigation as well. For complete forms, including commentary, and checklists an attorney may use in entering into limited scope representation, see chap 9.

Tax consequences and planning. It is particularly important for the attorney to inform the client at the outset of the representation about the possibility that a settlement or award of damages may have significant tax consequences. Unless the attorney is willing to advise regarding tax issues, the client should be informed in writing that he or she should seek tax advice.

Currently, attorney fees and court costs incurred in connection with a judgment or settlement in actions based on unlawful discrimination or certain other specified claims, or in connection with any award under 26 USC §7623(b) (awards to whistleblowers), are excluded from the determination of the client taxpayer's adjusted gross income. IRC §§62(a)(20)-(21). See §1.36. In general, however, all damage awards and settlement proceeds, except those directly attributable to physical injury or physical illness, are treated as income. See IRC §104(a) (1996 amendment); *U.S. v Burke* (1992) 504 US 229, 119 L Ed 2d 34, 112 S Ct 1867 (back pay). See also the United States Supreme Court decision in *Commissioner v Banks* (2005) 543 US 426, 160 L Ed 2d 859, 125 S Ct 826, discussed in §1.36. See also Wood, Taxation of Damage Awards and Settlement Payments (4th ed Tax Institute 2009).

Discussion of tax consequences. Including the first optional clause set forth above in the initial representation agreement will remind the attorney to discuss potential tax consequences with the client, and will provide the attorney with a record indicating that the discussion took place. The risk of malpractice litigation arising from an attorney's erroneous advice about the client's tax liability for settlement or judgment proceeds is more than hypothetical. In *Jalali v Root* (2003) 109 CA4th 624, 135 CR2d 168, a client sued her attorney for malpractice, alleging that he gave her incompetent tax advice when he told her that her tax liability would be based on the amount she received after paying attorney fees, not on the entire settlement amount. Although the malpractice claim ultimately failed, the client won in the trial court, obtaining a jury verdict in the amount of the tax she had to pay on the attorney fee portion of her recovery. Furthermore, although the reviewing court reversed the judgment, it based its decision on the plaintiff's failure to prove damages; it did not rule that the attorney's erroneous tax advice was not malpractice.

Consider involving a tax practitioner. In a case in which the attorney anticipates that costs and attorney fees will be a substantial percentage of the total award, it may be advisable to include tax planning in the litigation strategy by bringing a tax practitioner into the case at an early stage. For discussion of specific contract terms that may work to ameliorate the tax consequences of a settlement or judgment for the client, see §§1.36, 1.38.

Tax treatment of damage awards. The case law on the tax treatment of damage awards illustrates the importance of (1) being aware of potential issues outside the direct scope of the litigation and (2) advising the client of limitations on the services the attorney is agreeing to provide. This is certainly true concerning the tax treatment of attorney fees.

In *Commissioner v Banks* (2005) 543 US 426, 430, 160 L Ed 2d 859, 866, 125 S Ct 826, the Supreme Court unanimously held that "when a litigant's recovery constitutes income, the litigant's income includes the portion of the

recovery paid to the attorney as part of the contingent fee." After stating its holding "as a general rule" (which implies there will be exceptions), the Court explained the problem of deducting legal fees as a miscellaneous itemized expense, noting that Congress remedied the problem for cases arising in the employment context. In large part, the Supreme Court adopted the assignment of income cases, referring to *Helvering v Horst* (1940) 311 US 112, 85 L Ed 75, 61 S Ct 144, and *Lucas v Earl* (1930) 281 US 111, 74 L Ed 731, 50 S Ct 241. According to the Supreme Court, no matter what the attorney may do, the client retains "ultimate dominion and control over the underlying claim." *Banks*, 543 US at 436.

NOTE: For the argument that the Jobs Act provision is merely a clarification of existing law despite its prospective effective date, see the Senate floor debate discussed in Wood, *Effective Date of Attorneys' Fee Deduction Misses Many Judgments*, 105 Tax Notes 1643 (Dec. 14, 2004), p. 1643.

Exceptions. In *Banks*, the Supreme Court noted in dicta that it was not addressing several theories, advanced in taxpayer and amicus briefs, that would exclude attorney fees from gross income or permit them to be deductible. The Court declined to comment on these theories because they had not been advanced below. These supplementary theories included:

- Viewing the attorney/client relationship as a business partnership or joint venture for tax purposes (543 US at 436);
- Possible existence of a state law or contract provision that converts the attorney from an agent to a partner (543 US at 437);
- Viewing litigation recoveries as proceeds from the disposition of property and attorney fees as a capital expense that must be subtracted from the proceeds (543 US at 437);
- Viewing attorney fees as deductible reimbursed employee business expenses (543 US at 437);
- Determining whether taxation of attorney fees to prevailing plaintiffs under federal fee-shifting statutes is inconsistent with the purpose and undermines the effectiveness of those statutes (543 US at 438); and
- Determining whether to treat attorney fee awards as income in situations in which plaintiff seeks only injunctive relief or when fee awards exceed plaintiff's monetary recovery (543 US at 438).

IRS Circular 230. Attorneys practicing before the IRS should be aware that 31 CFR pt 10 (referred to as "Circular 230") requires that when the "principal" purpose of an attorney's written advice is to avoid or evade any tax, the attorney must comply with 31 CFR §10.35(c) by using reasonable efforts to ascertain relevant facts and not relying on unreasonable factual assumptions. See *"Revised Revised" Final Regulations and Continuing Debate—The Ongoing Circular 230 Controversy*, 26 CEB Cal Est Plan Rep 157 (June 2005). If, however, a "significant" purpose of the written advice is to avoid or evade tax *and* the practitioner discloses to the client in writing that "this advice is not intended or written by the author to be used, and it cannot be used by any taxpayer, for purposes of avoiding tax penalties," then the practitioner need not comply with the 31 CFR §10.35(c) requirements. See 31 CFR §10.35(b)(4)(ii). Many tax practitioners include some form of the disclosure on their opinion letters, e-mails, or other written communications to their clients. Some tax practitioners include a form of the disclosure in the fee agreement itself. Practitioners choosing to exclude Circular 230 "covered opinions" from the scope of the representation, unless the attorney and client enter into a separate written agreement, may decide to include in the fee agreement some form of the second optional clause, above. Some attorneys who do not practice before the IRS also may choose to include the Circular 230 disclosure on their written communications with clients or in their fee agreements.

§1.22 H. Form: Responsibilities of Attorney and Client

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1.22-1 Responsibilities of attorney and client

Attorney will _ _ *[e.g., perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries and communications]*_ _.

[Add one of the following alternatives]

[Alternative 1: Short form]

Client will _ _ *[e.g., be truthful and cooperative with Attorney; keep Attorney reasonably informed of developments and of Client's address, telephone number, and whereabouts; and timely make any payments required by this agreement]*_ _.

[Alternative 2: Long form]

In addition to Client's other responsibilities set forth in this agreement, Client will be truthful, candid, and cooperative with Attorney and will keep Attorney informed with complete and accurate factual information, documents, and other communications relevant to the subject matter of Attorney's representation or as otherwise reasonably requested by Attorney. Client will also assist Attorney by making the necessary personal, business, and strategic decisions appropriate to enable Attorney to accomplish the legal services which Attorney has agreed to perform under the terms of this agreement.

Attorney must be able to communicate with Client at all times in order to be able to competently render the legal services provided for under the terms of this agreement. Therefore, Client agrees to inform Attorney, in writing, of any changes in _ _ *[Client's/Client's authorized representative's]*_ _ address, telephone, facsimile numbers, and e-mail addresses, or any relevant changes regarding Attorney's ability to communicate with Client. If Attorney is not able to effectively communicate with Client, then Attorney cannot either properly perform or represent Client's legal interests with respect to the legal services called for under this agreement.

Comment: An agreement required by Bus & P C §6148 must set forth the "respective responsibilities of the attorney and the client as to the performance of the contract." Bus & P C §6148(a)(3).

Alternative 2 has become a relatively standard clause in fee agreements. If the attorney cannot reach the client for an extended period, the attorney's ability to effectively represent the client may be compromised. The provision highlights this to the client and additionally protects the attorney if the client fails to comply.

I. Attorney Fees

§1.23 1. Form: Hourly Fee

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1.23-1 Hourly fee

[Choose applicable alternative]

[Either]

Client will pay to Attorney the sum of *[dollar amount]* **per hour for attorney fees for the legal services provided under this agreement.** *[Indicate variations, if any, e.g., minimum charge for court appearance.]*

[Or]

Client will pay Attorney fees for the legal services provided under this agreement at the respective hourly rates of the individuals providing the services. The rates fall within the following ranges: *[E.g.,* *[dollar amount]* *to* *[dollar amount]* *per hour for partners,* *[dollar amount]* *to* *[dollar amount]* *per hour for associates,* *[dollar amount]* *to* *[dollar amount]* *per hour for law clerks, and* *[dollar amount]* *to* *[dollar amount]* *per hour for paralegals]* *[Indicate variations, if any, e.g., minimum charge for court appearance.]*

[Continue]

Attorney will charge in increments of *[e.g., one-tenth]* **of an hour** *[, rounded off for each particular activity to the* *[nearest/next highest]* *[e.g., one-tenth]* *of an hour]* *[The minimum time charged for any particular activity will be* *[e.g., one-tenth]* *of an hour.]*

Attorney will charge for all activities undertaken in providing legal services to Client under this agreement including, but not limited to, the following: *[E.g., conferences, court sessions, and depositions (preparation and participation); correspondence and legal documents (review and preparation); legal research; and telephone conversations]* *[Discuss aspects of time to be charged, if any, that merit special attention (e.g., travel time, waiting time, multiple personnel working on matter at same time).]*

[If appropriate, add]

Attorney's hourly rates are adjusted from time to time (usually at the beginning of every year) and may change during the course of this agreement. However, Attorney will not change any of the rates set forth above without first providing Client at least *[number, e.g., at least 30]* **days' written notice of the proposed changes. If such notice is given, Attorney and Client agree to negotiate in good faith with respect to such proposed changes and execute a written amendment to this agreement reflecting the agreed-on rate changes. If Attorney and Client cannot reach an agreement with respect to the proposed changes, this agreement shall terminate and no further legal services will be rendered on Client's behalf under the terms of this agreement.**

[If appropriate, add]

Client acknowledges that Attorney has made no promises about the total amount of attorney fees to be incurred by Client under this agreement.

Comment: Basis of compensation. An agreement required by Bus & P C §6148 must set forth 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." Bus & P C §6148(a)(1). Any variations from straight application of the hourly rate (*e.g.*, minimum charges) should be specified so that the information conveyed is both accurate and complete.

List of activities. The list of activities that might be undertaken should be reasonably comprehensive so that the

client is apprised fairly of the entire range of activities for which he or she might be charged. In particular, the attorney should attempt to list potential activities for which the attorney will charge, but for which the client might not expect to be billed, e.g., participating in telephone conferences, returning telephone calls, or making photocopies.

Fee increases. Whenever the attorney wishes to retain the right to increase the hourly rate to be charged to the client, the agreement should apprise the client of that possibility and provide for advance notice of the increase. See *Severson & Werson v Bolinger* (1991) 235 CA3d 1569, 1 CR2d 531 (attorney may not unilaterally increase rates set by agreement without notification to client). A clause is provided here for notifying the client of prospective fee increases. It provides that an increase in the attorney's hourly rate will become effective only if the client affirmatively approves the increase by returning a signed acknowledgement. Some attorneys provide in their fee agreements that rate increases will become effective automatically on notice unless the client objects. It is better practice to obtain the client's affirmative consent to the fee increase. Although such a provision may be unnecessary with a long-term business client who expects periodic rate increases, it is always advisable, particularly when clients are under pressure to limit attorney fees. See Bus & P C §6148(d)(2).

Both hourly fee and fixed fee. The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has expressed the opinion that there is no ethical impropriety in billing a client on an hourly rate, on the basis of hours actually worked, for certain legal services, and billing the same client on a fixed-fee basis for other legal services, as long as the client is adequately informed and consents to the fee arrangements, "preferably prior to the commencement of work on behalf of the client." LA County Bar Ass'n Formal Opinion No. 479 (Nov. 21, 1994). On fixed fee agreements, see §1.25.

Unconscionable fees. California attorneys are prohibited from entering into an agreement for charging or collecting an illegal or unconscionable fee. Cal Rules of Prof Cond 4-200(A). See §1.10. For some of the factors to be considered, when appropriate, in determining whether a fee is unconscionable, see Cal Rules of Prof Cond 4-200(B). For a case in which an attorney was disciplined for violating the prohibition against charging an unconscionable fee, see *In re Silverton* (2005) 36 C4th 81, 85, 29 CR3d 766; *In re Van Sickle* (2006) 4 Cal St Bar Ct Rptr 980, 2006 Cal Op Lexis 5.

Security for fees; Cal Rules of Prof Cond 3-300. Securing payment of fees through measures such as acquiring a note secured by a deed of trust on the client's property is frowned on by the courts because these methods give the attorney a pecuniary interest adverse to the client and permit attorneys to collect disputed fees without judicial scrutiny. See *Hawk v State Bar* (1988) 45 C3d 589, 600, 247 CR 599. An attorney who enters into such an agreement must comply with Cal Rules of Prof Cond 3-300. See §§1.12, 1.38. For examples of other arrangements that require compliance with Cal Rules of Prof Cond 3-300, see *Mayhew v Benninghoff* (1997) 53 CA4th 1365, 62 CR2d 27 (client entrusted funds to attorney for investment purposes); *Brockway v State Bar* (1991) 53 C3d 51, 64, 278 CR 836 (fee arrangement gave attorney ownership interest in client's property that had value greater than amount absolutely agreed on for fees); *Sugarman v State Bar* (1990) 51 C3d 609, 616, 274 CR 246 (attorney obtained loan from client); *Hawk v State Bar* (1988) 45 C3d 589, 600, 247 CR 599 (attorney secured payment of fees by note secured by deed of trust on client's property).

Attorney's lien in noncontingent fee case. An attorney in a noncontingent fee case who wants to secure payment of attorney fees and costs by means of a lien on amounts obtained for the client must comply with Cal Rules of Prof Cond 3-300. *Fletcher v Davis* (2004) 33 C4th 61, 14 CR3d 58. That is, the attorney must obtain the client's written consent to the lien after disclosing how the lien may affect the client, advising the client to seek independent legal advice, and giving the client a reasonable opportunity to seek the advice. *Fletcher v Davis, supra*.

NOTE: In California State Bar Formal Opinion No. 2006-170, the State Bar Committee on Professional Responsibility and Conduct concluded that Cal Rules of Prof Cond 3-300 does not apply to charging liens in contingent fee contracts. See §§1.12, 1.38.

When court approval needed. Whenever the party whose interests the attorney is representing is a minor or person with a disability, the attorney should anticipate the possibility that court approval of the fee agreement may be required. See Fam C §6602 (fee agreement by or on behalf of minor for services in litigation); Prob C §2644 (contingent fee agreement by guardian or conservator); Prob C §3601 (payment of attorney fees from judgment for minor or person with disability).

NOTE: "Person with a disability" has replaced "incompetent person" in Prob C §§3600-3604, 3610-3612. For definition of "person with disability," see Prob C §3603.

Counsel should consult the policies of the court from which any such approval might be requested regarding possible limitations on available fees. See, *e.g.*, San Diego Ct R 2.4.6(B) (on petition to compromise claim of minor, except under "extraordinary circumstances," attorney fees may not exceed 25 percent of gross proceeds of settlement).

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§1.24 2. Form: Fee Based on Results

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1.24-1 Fee based on results

Client will pay to Attorney an amount that is at least the sum of *[dollar amount]* **per hour** *[indicate variations, if any, e.g., minimum charge for court appearance and set forth fee provisions as discussed in §1.23]* **for the legal services provided under this agreement. In addition to this minimum amount, Client will pay to Attorney an amount that Attorney may charge based on these and other relevant factors, e.g., the time limitations Client imposes on Attorney, the time and labor required to perform the services, the novelty and difficulty of the questions involved, the skill required to perform the services properly, the amount of money involved, and the results obtained. In no event will the additional amount exceed** *[specify number]* **percent of the minimum amount charged and in no event will the final total fee (minimum hourly fee plus additional amount) be an unreasonable amount after taking these factors into account.**

Comment: Results-based fee. This is an example of a "results-based" fee provision, the concept of which has been approved by Tennessee courts. See, e.g., *Alexander v Inman* (Tenn 1998) 974 SW2d 689, 693. Such a fee is not considered a contingent fee because it guarantees that the attorney will receive some amount regardless of the case outcome. *Alexander v Inman, supra*. For an unpublished and thus uncitable case upholding a results-oriented fee provision, see *Silva v Buckley* (Tenn App, Dec. 31, 2003, No. M2002-00045-COA-R3-CV) 2003 Tenn App Lexis 941.

Counsel considering such a provision should recognize that there is no California authority directly approving or disapproving it.

Bonus provision. The results-based fee is similar to what has been termed a "bonus" fee which rewards the attorney for a particularly good result in a matter. For example, attorney and client might be able to define in advance what would be an extraordinarily favorable result in the negotiation of a contract for a professional athlete or entertainer. See Pansky, *Bonus Points: Bonus Provisions Agreed to by Attorneys and Their Clients Will Likely Be Enforceable if the Agreement Clearly Delineates an "Extraordinarily Favorable Result,"* 23 LA Law 41.

Lodestar. On establishing reasonable fees under civil rights fee-shifting statutes using the "lodestar" amount, see California Attorney Fee Awards, chap 11 (2d ed Cal CEB 1994); on increasing or decreasing the lodestar amount based on factors such as the results obtained, see Attorney Fee Awards, chap 13.

§1.25 3. Form: Fixed Fee

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1.25-1 Fixed fee

Client will pay to Attorney the fixed sum of _ _ [dollar amount] _ _ for attorney fees for the legal services to be provided under this agreement, payable as follows: _ _ [Specify date(s) and amount(s)] _ _ . The _ _ [payment is/payments are] _ _ earned upon payment.

Comment: A fixed or flat fee is often used in, e.g., certain criminal matters, trust and estate matters, and marital dissolutions. Fee agreements governed by Bus & P C §6148 must set forth 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." Bus & P C §6148(a)(1). On the prohibition against illegal and unconscionable fees (Cal Rules of Prof Cond 4-200(A)), requirements regarding deeds of trust as security for payment of fees, and court approval of the fee agreement when the attorney is representing the interests of a minor or person with a disability, see §1.23.

PRACTICE TIP: Even in a fixed fee arrangement, the attorney should state the customary hourly rate. This protects the attorney in the event that he or she is discharged prior to completion and must defend against an unconscionable fee charge or request for refund of unearned fees.

For an example of a fixed fee clause in a criminal fee agreement, see §4.2.

§1.26 4. Form: Contingent Fee

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1.26-1 Contingent fee

The amount Attorney will receive for attorney fees for the legal services to be provided under this agreement will be

[E.g., itemized percentages of recovery to be paid as attorney fees based on the points in the proceedings at which recovery may be obtained, as in the following example]

(a) _ _[number]_ _ percent of the _ _[net/gross]_ _ recovery if the recovery is obtained before the filing of a lawsuit;

(b) _ _[number]_ _ percent of the _ _[net/gross]_ _ recovery if the recovery is obtained after the filing of a lawsuit but before the arbitration hearing, settlement conference, or trial, whichever occurs first;

(c) _ _[number]_ _ percent of the _ _[net/gross]_ _ recovery if the recovery is obtained at or after the arbitration hearing, settlement conference, or trial, whichever occurs first, but before the filing of Client's brief in an appeal from a court judgment; and

(d) _ _[number]_ _ percent of the _ _[net/gross]_ _ recovery if the recovery is obtained after the filing of Client's brief in an appeal from a court judgment.

[Add one of the following alternatives]

[Alternative 1: Net recovery]

"Net recovery" means the amount remaining after the total amount received (whether by settlement, arbitration award, or court judgment) has been reduced by the sum of all "costs," as defined in Paragraph _ _[letter]_ _ of this agreement.

[Alternative 2: Gross recovery]

"Gross recovery" means the total amount received (whether by settlement, arbitration award, or court judgment) without reduction for "costs" as defined in Paragraph _ _[letter]_ _ of this agreement.

[Continue]

[Add one of the following alternatives]

[Alternative 1: Lump sum with remainder deferred]

If payment of all or any part of the amount to be received will be deferred (such as in the case of an annuity, a structured settlement, or periodic payments), then the "total amount received," for purposes of calculating the attorney fees, will be the initial lump-sum payment plus _ _[the present value, as of the time of the settlement, final arbitration award, or final judgment of the payments to be received thereafter/the cost to the defendant of purchasing the annuity or other deferred-payment asset or, if the asset is self-funded, the cost of purchasing a comparable asset on the open market]_ _ . The attorney fees will be paid out of the initial lump-sum payment. If the payment is insufficient to pay the attorney fees in full, the balance will be paid from subsequent payments of the recovery before any distribution to Client _ _[and, in addition, Client will pay to Attorney interest on the unpaid balance at the rate of _ _[e.g., 10 percent per annum]_ _]_ _ .

[Alternative 2: Deferred payments]

If payment of all or any part of the amount to be received will be deferred (such as in the case of an annuity, a structured settlement, or periodic payments), then the percentage of the recovery Attorney will receive for

attorney fees will be applied to each payment as it is received.

[Continue]

[If agreement is subject to Bus & P C §6146 (medical malpractice), choose applicable alternative]

[Either]

Client is informed that this attorney fee provides for the maximum limits allowed by law, as set forth in California Business and Professions Code §6146, for a contingent fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based on the health care provider's alleged professional negligence. __[A copy of that section is attached as Exhibit __.]__

Client is further informed that only the maximum limits are set by law and that the Attorney and the Client may negotiate a lower rate.

[Or]

Client is informed that the maximum limits allowed by law for a contingent fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based on the health care provider's alleged professional negligence are set forth in California Business and Professions Code §6146. __[A copy of that section is attached as Exhibit __.]__

Client is further informed that only the maximum limits are set by law and that the Attorney and the Client may negotiate a lower rate.

[Continue]

[If agreement is not subject to Bus & P C §6146, add]

Client is informed that this attorney fee is not set by law but rather is negotiable between the Attorney and the Client.

[Continue]

If there is no __[net]__ recovery, Attorney will receive no attorney fees.

Comment: Bus & P C §6147 applies. Except for agreements in workers' compensation cases (Bus & P C §6147(c)) and agreements for recovery of specified claims between merchants (Bus & P C §6147.5(a)), all contingent fee agreements are subject to Bus & P C §6147. In *Franklin v Appel* (1992) 8 CA4th 875, 10 CR2d 759, the court of appeal held that former Bus & P C §6147 applied only to contingent fee agreements involving plaintiffs in litigation matters, rather than to all contingent fee agreements. If the legislature intended the section to apply to *all* contingent fee agreements, the court suggested, a simple amendment substituting the word "client" or "person" for "plaintiff" in the statute would suffice. 8 CA4th at 891. The legislature subsequently followed the court's suggestion and amended the statute, effective January 1, 1995, by replacing the word "plaintiff" in every instance with the word "client." (At the same time, the legislature enacted a different version of Bus & P C §6147, which became effective January 1, 2000, and reverts to use of the word "plaintiff" in two places, but that version does not appear to intend a substantive change in regard to the scope of the fee agreements to which Bus & P C §6147 applies.)

Contingent fee rate. Contingent fee agreements must specify the contingent fee rate (Bus & P C §6147(a)(1)) and how disbursements and costs in connection with the prosecution or settlement of the claim will affect the contingent fee and the client's recovery (Bus & P C §6147(a)(2)). Unless the claim is for medical malpractice and the agreement is thus subject to Bus & P C §6146, the agreement must also include a statement that the fee is not set by law but rather is negotiable between the attorney and the client. Bus & P C §6147(a)(4).

Failure to comply with any provision of Bus & P C §6147 renders the agreement voidable at the option of the client. *Fergus v Songer* (2007) 150 CA4th 552, 570, 59 CR3d 273. Modifications to a contingency fee agreement must also comply with §6147. *Stroud v Tunzi* (2008) 160 CA4th 377, 382, 72 CR3d 756. If the client chooses to void the agreement, the attorney will be entitled to collect a "reasonable fee." Bus & P C §6147(b); *Alderman v Hamilton* (1988) 205 CA3d 1033, 252 CR 845.

If the percentage of the client's recovery to be paid as the attorney fees is to be determined by the point in the

proceedings that recovery is obtained, the specific points at which the percentages increase should be determined with reference to the type of case and the procedures and speed of litigation in the particular court. The points presented in the sample provision are illustrative only.

Contingent fee agreements take many forms. For example:

- Different percentages might be applied to different parts of the recovery, *e.g.*, one percentage on amounts from \$1 to \$25,000, a second on those from \$25,000 to \$75,000, and a third on those above \$75,000.
- An agreement might combine aspects of contingent fees and hourly fees, *e.g.*, either a specified contingent fee or a specified hourly rate up to a stated maximum fee, whichever is greater.

When the award might be partially or entirely in a form other than cash (*e.g.*, reinstatement in a wrongful termination action), the fee agreement should provide for that possibility. This might be accomplished by providing for a specified hourly fee if the award is not entirely in cash and a contingent fee if it is. It may also be accomplished by providing for a method for valuing noncash awards.

On the prohibition against illegal and unconscionable fees, requirements regarding deeds of trust as security for payment of fees, and court approval of the fee agreement when the attorney is representing the interests of a minor or person with a disability, see §1.23.

Medical malpractice contingent fee rate. If the claim is for medical malpractice and the agreement is subject to Bus & P C §6146, it must include a statement that the rates set forth in that section are the maximum limits for the contingent fee arrangement and that the attorney and the client may negotiate a lower rate. Bus & P C §6147(a)(5). When the agreement is subject to Bus & P C §6146, it may be appropriate to attach a copy of that section as an exhibit to ensure that the client is informed of its content.

Successive representation. The Review Department of the State Bar has expressly rejected the conclusion that whenever successive attorneys represent a client and the second attorney charges a contingent fee that, when added to the previous fee, exceeds 30 to 40 percent, then the fee is per se unconscionable. *In re Van Sickle* (2006) 4 Cal St Bar Ct Rptr 980, 989 n13, 2006 Cal Op Lexis 5.

Contingent fee on medical payments. In *In re Silverton* (2005) 36 C4th 81, 84 n2, 29 CR3d 766, the supreme court appeared to question the propriety of an attorney's conduct in charging a one-third fee on medical payments that a client had received from an insurer, when there was no dispute as to the client's entitlement to those benefits or their amount. Some commentators suggest that in such a case, it may be advisable to charge a one-third contingent fee only for disputed medical payments, and a lower fee if medical payments are undisputed. See Peck, *Nonrefundable Fees and Toxic Fee Provisions*, Cal Bar J 14 (June 2006).

"Hybrid" fees. The Ethics Committee of the Bar Association of San Francisco has considered the ethical implications of agreements for hybrid fees such as the ones described above that call for both a contingent fee and an hourly fee. SF County Bar Ass'n Ethics Committee Formal Opinion 1999-1. The formal opinion concludes that there is nothing in the Rules of Professional Conduct that precludes an attorney from entering into a "hybrid" fee agreement as long as it is fair. Such an arrangement reduces the risk to the attorney, a factor frequently cited as an important justification for contingent fee agreements, and if a hybrid fee agreement results in an unconscionable fee, the attorney may be subject to discipline under Cal Rules of Prof Cond 4-200(A). SF County Bar Ass'n Ethics Committee Formal Opinion 1999-1. The ethics opinion recommends that the attorney "consider both prospective conscionability and retrospective reasonableness when drafting" a hybrid agreement, and concludes that "if an unjustified allocation of risks or costs is avoided, and the parties incorporate a clear articulation of probable outcomes into the agreement, they will bolster the client's informed consent, thus protecting the client at the inception, and the attorney at the conclusion of the engagement." SF County Bar Ass'n Ethics Committee Formal Opinion 1999-1. For a sample "hybrid" fee agreement, see §15.2.

Deferred payments; structured settlements. Whenever payment of the recovery, or any part of it, may be deferred, the fee agreement should specify when the attorney fees must be paid and, when appropriate, how they should be calculated. Otherwise, the agreement invites dispute and, perhaps, litigation. If the award for future damages in an action for injury or damages against a health care provider is at least \$50,000 and either party requests that the award be paid by periodic payments, then the court must order that the future damages be paid, in whole or in part, by periodic payments rather than by a lump-sum payment. CCP §667.7. In that event, the court must also place a total value on the periodic payments and include that amount in computing the total award from which attorney fees are

calculated for purposes of determining the statutory maximum fee. Bus & P C §6146(b). Of course, a structured settlement may be entered into by agreement of the parties in any kind of action. On structured settlements, see Muntean, *How to Save an Otherwise Disastrous Tax Situation on Settlement: Use an IRC §468B Fund*, 27 CEB Civ Litigation Rep 176 (Oct. 2005).

In *Sayble v Feinman* (1978) 76 CA3d 509, 142 CR 895, the parties failed to anticipate such payments. Their agreement simply called for the attorneys to be paid 28 1/3 percent "of any money recovered" in a wrongful death matter. The case was settled for an initial lump-sum payment of \$200,000 plus periodic payments of \$2500 per month for the lifetime of the client. The attorneys filed a declaratory relief action, contending that they were entitled to receive, out of the payments already made, their entire fee, which they claimed should be 28 1/3 percent of the present cash value of the periodic payments in addition to 28 1/3 percent of the lump-sum payment. The client asserted that the attorneys were entitled only to 28 1/3 percent of the lump-sum payment plus 28 1/3 percent of each monthly periodic payment as it was received. The trial court ruled for the client. The court of appeal affirmed this ruling, placing the blame for the attorneys' inability to collect their entire fee before their client received anything on the attorneys themselves: "If anything prevented the immediate payment of all attorneys' fees as soon as the settlement became final, it was [the attorneys'] failure specifically to express that intention in the contract." 76 CA3d at 515. See also California State Bar Formal Opinion No. 1994-135 (attorney whose fee agreement is silent on how attorney fees will be paid in event of structured settlement may receive fees only on same prorata basis that client receives compensation).

The two approaches advocated by the respective parties in *Sayble* regarding the timing of the attorney fees payment are presented in the alternative clauses in this section. The obvious benefit to the attorney in providing for payment of attorney fees before any distribution to the client is that the attorney need not wait to receive payment over the entire period of the deferral as the client does. On the other hand, such an approach may seem unfair to the client and the required determination of the amount to be paid to the attorney may be complex or become the subject of dispute between the attorney and the client. Also presented in this provision are two approaches to valuation of the deferred payments for purposes of calculating attorney fees when payment of the fees will not be deferred. Under the present-value approach, a determination is made of the present value of the client's right to receive the future payments due to him or her. Under the cost-of-the-annuity approach, a determination is made of the cost of purchasing such a deferred-payment asset. See 5 Levy, Golden & Sacks, California Torts §75.10[1] (favoring present-value approach); Meyer, *Settling in Your Client's Interest*, 8 Cal Law 53 (July 1988) (favoring cost-of-the-annuity approach). For a discussion of ethical issues that arise in the use of structured settlements, see California State Bar Formal Opinion Nos. 1994-135, 1987-94.

Contingent fees and nonprofit legal services providers. In *Frye v Tenderloin Hous. Clinic* (2006) 38 C4th 23, 40 CR3d 221, the California Supreme Court held that Corp C §13406(b), which required nonprofit corporations providing legal services to refrain from entering into contingent fee agreements, is not the sole authority under which a nonprofit corporation may practice law and that imposing §13406's requirements on nonprofits would conflict with the section's intent and with the First Amendment's protection of associational and expressive rights.

Contingent fees and public entities. In *People ex rel Clancy v Superior Court* (1985) 39 C3d 740, 218 CR 24, the California Supreme Court held that a municipality may not hire private counsel on a contingent fee basis to bring a public nuisance abatement action. The court found that private attorneys representing public entities in public nuisance cases must maintain a standard of neutrality and that contingent fee agreements violate this standard. 39 C4th at 750. In an unpublished opinion, the Ninth Circuit has held that, to the extent the municipality brings its nuisance claims in its capacity as a private property owner—and not in its capacity as a sovereign—the supreme court's ruling in *Clancy* is inapplicable. *City of San Diego v U.S. Dist. Court* (9th Cir 2008) 291 Fed Appx 798, 799 (unpublished opinion).

NOTE: The issue of whether a public entity may retain private counsel in a "limited, subordinate role" in the prosecution of a public nuisance abatement action under a contingent fee agreement is currently before the California Supreme Court in *County of Santa Clara v Superior Court* (review granted July 23, 2008, S163681; superseded opinion at 161 CA4th 1140, 74 CR3d 842).

Tax consequences. The federal income tax laws (see §§1.21, 1.36, 1.38) count as income to the plaintiffs the fees they paid to their attorneys under contingent fee agreements. That makes significant tax consequences for the plaintiff in any case that may result in a taxable recovery, e.g., back wages, punitive damages. See *Commissioner v Banks* (2005) 543 US 426, 160 L Ed 2d 859, 872, 125 S Ct 826; *Lucas v Earl* (1930) 281 US 111, 113, 74 L Ed 731, 50 S Ct

241 (transfer of right to receive income from taxpayer to wife, valid under state law, did not relieve taxpayer of obligation to pay tax on income). It was thought that the holding in *Flannery v Prentice* (2001) 26 C4th 572, 575, 110 CR2d 809—that, in the absence of an agreement to the contrary, attorney fees awarded under Govt C §12965(b) (California Fair Employment and Housing Act (FEHA) fee-shifting provision) belong to the attorney, not the plaintiff—might possibly alleviate this problem in cases involving California fee-shifting statutes. This argument may still be viable. In one case, however, the Tax Court rejected the notion that the availability of statutory attorney fees would distinguish a case from *Commissioner v Banks* and held that reliance on *Flannery v Prentice* was misplaced. See *Nancy J. Vincent*, TC Memo 2005-95. The *Vincent* court, however, did not discuss how representation by a nonprofit legal foundation would have affected this result. Similarly, the Ninth Circuit, in *Green v Commissioner* (9th Cir 2009) 312 Fed Appx 929, has held that a plaintiff is required to pay income tax on statutory attorney fees awarded under the Fair Employment and Housing Act (Govt C §§12900-12996).

NOTE: The attorney should keep in mind that IRC §62(a)(20) has altered the landscape of taxation of attorney fee awards in many cases. If IRC §62(a)(20) does not apply, however, and no other exclusion applies, the attorney fees would be only at best an itemized deduction for the client. See §1.36.

Suggestions for addressing the tax consequences of a successful lawsuit in the fee agreement are included in §§1.21, 1.36, 1.38. However, this may well be a problem that cannot be solved contractually. In a case in which the attorney anticipates that costs and fees will be a substantial portion of the recovery, it may be a good idea for the attorney and client to explore the possibility of, e.g., structuring a settlement in such a way that the client does not receive the entire recovery in a single tax year.

§1.27 5. Form: Division of Attorney Fees

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1.27-1 Division of attorney fees

Attorney will divide the attorney fees received for the legal services provided under this agreement with __ [insert name of other attorney or law firm] __. **The terms of the division are as follows:** __ [E.g., Attorney will pay to __ [name] __ one-third of all attorney fees received] __. **Client is informed that, under the Rules of Professional Conduct of the State Bar of California, such a division may be made only with the Client's written consent after a full disclosure to the Client in writing that a division of fees will be made and of the terms of such division. This division will not increase the amount of fees paid by Client. Client expressly consents to the division.**

Comment: **Agreement to divide fees with attorney who is neither partner nor associate.** Under Cal Rules of Prof Cond 2-200, the client must consent in writing to any division of fees between the attorney handling the matter and attorneys who are not partners or associates in the same law firm. An attorney who is "of counsel" to the firm is not considered a partner or associate (i.e., an employee) in the law firm. See Rule 2-200. See also California State Bar Formal Opinion No. 1994-138.

The prohibition against fee-splitting in Cal Rules of Prof Cond 2-200 does not apply to agreements between a partner and his or her own law firm. By its terms, the rule applies to fee-splitting arrangements between an attorney and another "who is not [his] partner." Thus, a partnership agreement that provides that a partner who leaves the firm and takes clients with him or her will pay the firm according to a provided formula does not violate Rule 2-200. See *Anderson, McPharlan & Connors v Yee* (2005) 135 CA4th 129, 37 CR3d 627.

Agreements between attorney and nonattorney. A fee-sharing agreement between an attorney and a nonattorney is unenforceable because Cal Rules of Prof Cond 1-320(A) prohibits members of the State Bar from sharing legal fees with a person who is not an attorney. *McIntosh v Mills* (2004) 121 CA4th 333, 17 CR3d 66 (no exception to general rule of unenforceability warranted when nonattorney had counsel when negotiating agreement and was as blameworthy as attorney).

On the other hand, in the view of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee, it is not an improper fee split under Rule 1-320 for an attorney and a client in a public interest case to agree that the client will be billed at the firm's hourly rate up to a certain sum and will not be obligated to pay above that amount, and that, if the case succeeds, the law firm will retain a portion of the fees recovered under the private attorney general statute (CCP §1021.5) to compensate it for its uncompensated time and will give the balance to the client. Such an agreement is not a fee-splitting agreement because the reimbursement to the client is a refund of an overpayment, not a sharing of an earned fee. LA County Bar Ass'n Formal Opinion No. 515 (Aug. 15, 2005).

Direct division of fees. Rule 2-200 applies whenever an attorney has a compensation arrangement with an outside lawyer that "involves a direct division of the actual fees the client pays to the law office." *Chambers v Kay* (2002) 29 C4th 142, 149, 126 CR2d 536. Its applicability does not depend on whether the fee paid to the outside attorney is for referring the case or for performing actual legal services on behalf of the client. 29 C4th at 148.

An arrangement for compensation of an outside attorney that is not tied to receipt of specific fees from the client (e.g., payment of an hourly rate to a contract attorney) does not come within the purview of Cal Rules of Prof Cond 2-200. California State Bar Formal Opinion No. 1994-138. For other examples, see California State Bar Formal Opinion No. 1994-138.

Written disclosure may be required. Formal Opinion No. 1994-138 also discusses circumstances in which the use of an outside attorney may require disclosure, even though the client's written consent is not necessary. California State Bar Formal Opinion No. 1994-138. See also Cal Rules of Prof Cond 3-500; Bus & P C §6068(e).

Obtaining client's written consent protects outside attorney. In *Chambers*, 29 C4th at 149, the California Supreme Court acknowledged but was not swayed by the seeming unfairness of allowing the attorney refusing to honor

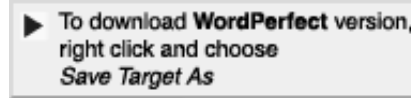
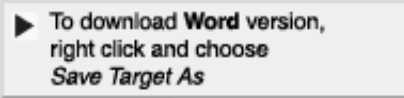
the fee division agreement "to take advantage of his own disregard of the Rules of Professional Conduct," observing that an outside attorney can protect him- or herself by obtaining proof of the client's written consent to the fee division before rendering significant services on behalf of the client. 29 C4th at 162. Including the required consent in the fee agreement would seem to be appropriate whenever practical. For an example of a letter requesting a client's consent to fee splitting, see §3.3.

Quantum meruit. In *Huskinson & Brown v Wolf* (2004) 32 C4th 453, 9 CR3d 693, the California Supreme Court held that quantum meruit recovery is available to a law firm that renders legal services under a fee-sharing agreement lacking written client consent in violation of Cal Rules of Prof Cond 2-200. The basis for the recovery is not the particular fee the attorneys negotiated without the client's consent, but the reasonable value of legal services actually rendered. 32 C4th at 458 n2. Under these circumstances, however, the fee recovery claim under quantum meruit may only be sustained against the other attorney who is party to the fee-sharing agreement. It may not be sustained against the client. *Strong v Beydoun* (2008) 166 CA4th 1398, 83 CR3d 632.

Client consent must precede fee division. California Rules of Professional Conduct 2-200 requires that for any division of fees between attorneys, a client's written consent is needed before the fees are divided. *Mink v Maccabee* (2004) 121 CA4th 835, 17 CR3d 486. Rule 2-200 does not require that the agreement between the attorneys be in writing, nor that the client's consent be obtained when the fee-splitting agreement is reached or before the legal work is done. *Mink v Maccabee, supra*. See also *Cohen v Brown* (2009) 173 CA4th 302, 319, 93 CR3d 24 (client consent required before actual division of fees, not before legal work commenced).

J. Costs

§1.28 1. Form: When Agreement Provides Hourly or Fixed Fee



1.28-1 When agreement provides hourly or fixed fee

Client will pay all "costs" in connection with Attorney's representation of Client under this agreement. Costs will be advanced by Attorney and then billed to Client _ _ *[unless the costs can be met out of Client deposits that are applicable toward costs]* _ _ *[However, for substantial cost items, Attorney may, at _ _ [his/her] _ _ option, require that Client make advance payment.]* _ **Costs include, but are not limited to,** _ *[e.g., court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees]* _ _ *[Attorney will obtain Client's consent before incurring any costs _ _ [in excess of _ _ [dollar amount] _ _] _ for consultants, expert witnesses, or investigators.]* _ _

Comment: Advancement of costs permitted. Advancement of costs by the attorney is clearly permitted by Cal Rules of Prof Cond 4-210(A)(3). Under this provision, costs will be advanced by the attorney and then billed to the client, unless the costs can be met out of client deposits that are applicable toward costs (see §1.30). The bracketed language in the second sentence should be used if the client is providing a deposit applicable to costs. An optional clause is provided that allows the attorney to require the client to pay certain substantial costs in advance. This clause may be considered when the client is not providing any deposit applicable to costs.

Listing reasonably likely costs. The list of costs should include all reasonably likely costs in the particular matter, including, e.g., mileage and out-of-town travel expenses such as meals, transportation, and lodging. If there will be some costs that will require the client's advance approval, that may be indicated by the optional clause at the end of the provision. If any items (e.g., in-office photocopying, mileage, computer time) will be passed on to the client other than strictly at cost, their charges should be specified.

Client's possible liability for other parties' costs. In the provision about costs, some attorneys include language advising the client that if the matter proceeds to trial or arbitration, the client may be required to pay fees and/or costs to other parties and that paying such costs will be entirely the client's responsibility. See, e.g., State Bar sample forms in App A.

§1.29 2. Form: When Agreement Provides Contingent Fee

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1.29-1 When agreement provides contingent fee

[Add one of the following alternatives]

[Alternative 1: Costs reimbursed from recovery]

Attorney will advance all "costs" in connection with Attorney's representation of Client under this agreement. Attorney will be reimbursed out of any recovery before any distribution of fees to Attorney or any distribution to Client. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, then _ _ [Attorney will bear the loss/Client will pay to Attorney the unreimbursed balance of the costs advanced]_ _.

[Alternative 2: Costs paid as incurred]

Client will pay all "costs" in connection with Attorney's representation of Client under this agreement. Costs will be advanced by Attorney and then billed to Client _ _ [unless the costs can be met out of Client deposits]_ _ . _ _ [However, for substantial cost items, Attorney may, at _ _ [his/her]_ _ option, require that Client make advance payment.]_ _

[Continue]

Costs include, but are not limited to, _ _ [e.g., court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees]_ _ . _ _ [Attorney will obtain Client's consent before incurring any costs _ _ [in excess of _ _ [dollar amount]_ _]_ _ for consultants, expert witnesses, or investigators.]_ _ . _ _ [Items that are not to be considered costs, and that must be paid by Client without being either advanced or contributed to by Attorney, include, but are not limited to, _ _ [e.g., Client's medical expenses and other parties' costs, if any, that Client is ultimately required to pay]_ _ .]_ _

Comment: Advancement of costs permitted. Advancement of costs by the attorney is clearly permitted by Cal Rules of Prof Cond 4-210(A)(3), even if their repayment is contingent on the outcome of the matter. Under Alternative 1, the attorney will advance costs and then be reimbursed at the conclusion of the representation, unless the recovery is insufficient and the attorney has agreed to bear the loss. The Ethics Committee of the Bar Association of San Francisco has expressed the opinion that it is ethically proper for an attorney who advances costs in litigation to provide in the contingent fee agreement that costs will be recoverable only out of a judgment or settlement. SF County Bar Ass'n Ethics Committee Formal Opinion No. 1985-2.

Under Alternative 2, costs will be advanced by the attorney and then billed to the client, unless the costs can be met out of client deposits (see §1.30). The bracketed language in the second sentence should be used if the client is providing a deposit. The optional clause allows the attorney to require the client to pay certain substantial costs in advance. This clause may be considered when the client is not providing any deposit.

Listing all reasonably likely costs. The list of costs should include all reasonably likely costs in the particular matter. If there will be some costs that require the client's advance approval, that may be indicated by the optional clause provided. If any items (e.g., in-office photocopying, mileage, computer time) will be passed on to the client other than strictly at cost, their charges should be specified. See ABA Formal Opinion 93-379 (Dec. 6, 1993) (absent specific agreement to contrary, attorney should only charge client direct cost associated with service).

Listing items that are not included in costs. An effort should also be made to anticipate and list any items that are not included in costs but that the client might believe are included. This is particularly important when the client will incur medical expenses or may be ordered to pay costs of other parties. The client should be expressly informed that he or she must bear such obligations without any advancement or contribution by the attorney.

Client's possible liability for other parties' costs. In the provision about costs, counsel should consider including language advising the client that if the matter proceeds to trial or arbitration, the client may be required to pay fees or costs, or both, to other parties and that paying such costs will be entirely the client's responsibility. See, *e.g.*, State Bar sample forms in App A.

K. Deposit

§1.30 1. Form: Deposit for Fees and/or Costs

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1.30-1 Deposit for fees and/or costs

Client will pay to Attorney [a/an initial] **deposit of** [dollar amount] , **to be received by Attorney on or before** [date] , **and to be applied against** [attorney fees/costs/attorney fees and costs] **incurred by Client.** [This amount will be deposited by Attorney in a trust account. Client authorizes Attorney to withdraw funds from the trust account to pay [attorney fees/costs/attorney fees and costs] as they are incurred by Client.]

[If applicable, add the following option]

[Option: Trial deposit]

After a trial, arbitration, or mediation date has been set, Client will pay to Attorney all sums then owing and will also pay an additional deposit consisting of the amount of attorney fees Attorney estimates will be incurred in preparing for and completing the trial, arbitration, or mediation; the estimated amount of jury fees, arbitration, or mediation fees; the estimated amount of expert witness fees; and the estimated other costs. [The trial deposit amount will be deposited by Attorney in an interest-bearing trust account. Client authorizes Attorney to withdraw funds from the trust account to pay [attorney fees/costs/attorney fees and costs] as they are incurred by Client.] **The amounts actually incurred may exceed the amount of the deposit and Client agrees to pay any difference between the deposit and the actual amount.**

[Continue]

The balance remaining of the [initial/trial] **deposit(s) is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for** [attorney fees/costs/attorney fees and costs] **is less than the amount of the** [initial/trial] **deposit(s), the difference will be refunded to Client.**

Comment: Purpose of deposit provision. Fee agreements often contain provisions for deposits to cover the attorney's out-of-pocket expenditures or to provide the attorney with some degree of protection against nonpayment by the client or both.

In this book, deposits for fees are used only for hourly fees. All advance payments of fixed fees are treated in the provision on attorney fees (see §1.25) rather than in the provisions on deposits. Deposits for costs may be used with hourly, fixed, or contingent fee arrangements.

When the attorney intends to ask the client for deposits covering both fees and costs, the use of a separate provision for each deposit may enhance the clarity of the agreement.

Questions on receipt of deposit. The receipt of a deposit from a client raises two significant questions:

- (1) Must the attorney segregate the funds received from the client by placing them in a trust account?
- (2) If so, should the deposit be placed in the State Bar trust account, in which the interest is used to fund legal services for the indigent, or should it be placed in a separate trust account with the interest payable to the client?

Client trust account when deposit for costs. Under Cal Rules of Prof Cond 4-100(A), deposits for costs must be placed in a client trust account.

Client trust account when deposit for attorney fees? The rule is less clear when it comes to deposits for attorney fees. Rule 4-100(A) provides that "[a]ll funds received or held for the benefit of clients" must be kept in a trust account but does not define "funds received or held for the benefit of clients." The question raised by this omission—whether advance deposits for fees are "funds received or held for the benefit of clients" that must be kept in trust—remains undecided. In *Baranowski v State Bar* (1979) 24 C3d 153, 163, 154 CR 752, the California Supreme Court declined an

opportunity to resolve the issue, and legal ethicists have differing views on it. Compare *Baranowski* with *T & R Foods, Inc. v Rose* (1996) 47 CA4th Supp 1, 7, 56 CR2d 41 (under Rule 4-100, advance fee payments must be maintained in client trust account until earned). In proposing amendments to the Rules of Professional Conduct after the decision in *Baranowski*, the State Bar considered but decided against requiring attorneys to place "advance fee payments" in trust accounts, on the ground that such a provision would be "unworkable in light of the realities of the practice of law." State Bar of California, *Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation*, 42 (Dec. 1987). See <http://calbar.ca.gov>.

Because any unearned portion of the deposit must be returned to the client at the termination of the engagement (Cal Rules of Prof Cond 3-700(D)(2)), however, it is usually a good idea to keep deposits segregated from the attorney's unrestricted funds until the attorney earns them by performing the legal services the funds were intended to compensate. See *Baranowski v State Bar* (1979) 24 C3d 153, 163 n4, 154 CR 752 (distinguishing advance fee payment, which does not belong to attorney until earned, from "classic retainer," which secures attorney's availability and is earned when paid). On provision for "classic retainer," see §1.32. A bankruptcy proceeding is an example of a situation in which the attorney might not want to open a trust account in the client's name because the bankruptcy court will treat any deposit held in trust for the client as an asset of the client. For further discussion, see Shank, *Are Advance Fee Payments Clients' Funds?*, 55 Cal Bar J 370 (1980).

Client authorization to withdraw funds from trust account. If the deposit is placed in a trust account, the attorney may not withdraw funds from the account without the client's authorization. The fee agreement should include the client's authorization to withdraw the funds on deposit. The attorney should withdraw funds from the account only as they are earned or needed to pay expenses related to the client's matter and should keep clear time and materials records to support the withdrawals.

NOTE: The failure to segregate and accurately account for client deposits is one of the most common causes for attorney discipline. See, e.g., *Matthew v State Bar* (1989) 49 C3d 784, 263 CR 660.

Interest on Lawyers' Trust Accounts (IOLTA) account versus individual account. Client funds on deposit that are nominal in amount or are on deposit for a short period of time must be maintained in an IOLTA account. Bus & P C §6211(a). However, if the interest earned by the deposit will exceed the fees for opening and maintaining the account, the attorney should put the money in an individual interest-bearing account with the interest paid to the client. See *Brown v Legal Found. of Wash.* (2003) 538 US 216, 155 L Ed 2d 376, 123 S Ct 1406 (upholding state's trust account rules, which require attorneys to place client funds in pooled trust account if they could not otherwise generate earnings and in individual client trust accounts when net interest would be earned, against claim that they mandated taking without just compensation in violation of Fifth Amendment). On how to calculate whether interest earned will exceed the fees for opening and maintaining the account, see the Handbook on Client Trust Accounting for California Attorneys (2006), available on the California State Bar website at http://www.calbar.ca.gov/calbar/pdfs/ethics/2006_CTA_Handbook.pdf.

Provision for refundable deposit. Another way to protect against default by the client is to provide for a single, fully refundable deposit that is similar to a security deposit in a rental agreement. Such a deposit is not applied to attorney fees or costs as they are incurred; the client pays these in addition to the deposit. At the termination of services, the deposit is applied to any outstanding balance and any excess is refunded to the client. This approach may be indicated in the provision on statements and payments. See §1.33.

Provision for nonrefundable fee. Attorneys sometimes attempt to protect themselves against defaulting clients by providing that the deposit for fees will be partially or fully nonrefundable. The attorney must always be able to defend the reasonableness of the fee. Such language is enforceable only to the extent that it complies with Cal Rules of Prof Cond 4-200 (member may not charge or agree to illegal or unconscionable fee).

The use of "nonrefundable" in the agreement may unnecessarily create an issue for the State Bar. Although the State Bar's Rules Revision Committee has discussed making a nonrefundable fee per se illegal, there is no explicit statutory or ethical prohibition against such a nonrefundable fee. One example of such a provision states: "Client will pay Attorney an initial nonrefundable fee of \$ _ [dollar amount] _ which will be applied against _ [attorney fees/costs/attorney fees and costs] _ incurred by Client. This fee is due and payable on execution of this agreement and is deemed earned when received. It will not be refunded in any circumstance."

Nevertheless, Cal Rules of Prof Cond 3-700(D)(2) provides that an attorney whose employment has terminated must "[p]romptly refund any part of a fee paid in advance that has not been earned." Any fee not earned must be returned, regardless of how it is described; failure to refund an unearned fee can result in discipline. *Matthew v State Bar* (1989) 49 C3d 784, 263 CR 660. The refund requirement does not apply "to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter." Cal Rules of Prof Cond 3-700(D)(2). On true retainer fees, see §1.32. A provision stating that a nonrefundable fee is credited against services indicates that it is *not* a true retainer agreement and that the fee is earned when the services are performed, not when the attorney receives the fee. See *In re Lais* (1998) 3 Cal St Bar Ct Rptr 907, 923, 1998 Cal Op Lexis 11 ("nonrefundable" fee had to be repaid under Rule 3-700(D)(2)). As a general rule, attorney and client are free to contract as they wish regarding fees. See CCP §1021. Nevertheless, attorneys should be aware of the risk that a nonrefundable fee will be found to be refundable in any particular fee dispute and of the possibility that nonrefundable fees will be found to be against public policy in general. See Peck, *Nonrefundable Fees and Toxic Fee Provisions*, Cal Bar J 14 (June 2006).

§1.31 2. Form: Additional Deposits

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1.31-1 Additional deposits

[Add one of the following alternatives]

[Alternative 1: Additional deposit when original exhausted]

Attorney will notify Client whenever the full amount of any deposit has been applied to *[attorney fees/costs/attorney fees and costs]* **incurred by Client. Within** *[number, e.g., 15]* **days after each notification is mailed, Client will pay to Attorney an additional deposit in the same amount as the initial deposit to be applied in the same manner.** *[Deposit of such additional amounts and payment of any interest earned will be made in the same manner as for the initial deposit. Client authorizes Attorney to withdraw the principal from the trust account to pay* *[attorney fees/costs/attorney fees and costs]* *as they are incurred by Client.]* **The balance remaining of such additional deposits will also be refundable. If, at the termination of services under this agreement, the total amount incurred by Client for** *[attorney fees/costs/attorney fees and costs]* **is less than the total amount of all deposits, the difference will be refunded to Client.**

[Alternative 2: Replenishing deposit]

Attorney will provide Client with a monthly statement of all *[attorney fees/costs/attorney fees and costs]* **incurred by Client during the applicable billing period. Attorney will apply the deposit to the balance shown on the statement. If** *[attorney fees/costs/attorney fees and costs]* **exceed the amount of the deposit, Client will pay any additional balance due on receipt of Attorney's monthly statement. Client will also replenish the deposit each month in the amount of all payments made to Attorney from the deposit. At the conclusion of the matter, the deposit will be applied to the final statement. Client will be responsible for any amount due over and above the deposit. If the amount due from Client in the final statement is less than the amount of the deposit, the difference will be refunded to Client.**

Comment: The fee agreement may provide for payment of additional deposits from the client. Two possible approaches are set forth here: The first one calls for the client to make an additional deposit in the amount of the original deposit whenever the balance in the client's account or accounts has been depleted. The second approach, sometimes called an "evergreen" or "replenishing" deposit, calls for the client to "top up" the amount on deposit with the attorney as the balance is expended, as reflected in each statement sent by the attorney.

§1.32 3. Form: Retainer Provision

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1.32-1 Retainer provision

Client will pay to Attorney a retainer fee of __[dollar amount]__, to be received by Attorney on or before __[date]__. This retainer is paid to secure Attorney's availability during the period from __[date]__ to __[date]__. The retainer is not refundable and is earned on the date when Attorney receives it, whether or not any services are performed during the retainer period. If Attorney performs services during the retainer period, Attorney will bill and Client will pay for these services under the terms set out in this agreement at __[insert reference to fee provision section or repeat fee provision here]__.

Comment: A "true" or "classic" retainer secures the attorney's availability and is earned when paid, regardless of whether the attorney actually performs any services for the client. See *Baranowski v State Bar* (1979) 24 C3d 153, 163 n4, 154 CR 752. See also Cal Rules of Prof Cond 3-700(D)(2); *In re Lais* (1998) 3 Cal St Bar Ct Rptr 907, 923, 1998 Cal Op Lexis 11 (true retainer agreement specifies particular period of time during which attorney will be available to the client). Because a true retainer belongs to the attorney when paid, there should be no requirement that it be placed in the client's trust account. In fact, placing it in the trust account might raise the issue whether it is in fact a refundable deposit, not a true retainer. See Cal Rules of Prof Cond 4-100(A). Placing a true retainer in the trust account might also be considered commingling. It is also likely that a retainer fee is subject to the prohibition against charging, or collecting, an illegal or unconscionable fee. See Cal Rules of Prof Cond 4-200(A).

Attorneys often attempt to protect themselves by including in their agreements provisions for "partially refundable" or "partially nonrefundable" deposits. Such provisions raise serious ethical issues and are likely to be treated by the courts as refundable deposits. For discussion of refundable deposits and nonrefundable fees, see §1.30.

§1.33 L. Form: Statements and Payments

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1.33-1 Statements and payments

Attorney will send Client monthly statements indicating _ *[attorney fees and costs/costs]* _ **incurred and their basis** _ *[, any amounts applied from the deposit(s),]* _ **and any current balance owed.** _ *[If no* _ *[attorney fees or costs/costs]* _ *are incurred for a particular month, or if they are minimal, the statement may be held and combined with that for the following month unless a statement is requested by Client.]* _ **Any balance will be paid in full within** _ *[number, e.g., 30]* _ **days after the statement is mailed.**

[If applicable, add]

Thereafter, interest will be payable on the unpaid principal balance, i.e., fees and costs. Interest will be calculated by multiplying the unpaid principal balance by the periodic rate of _ *[specify fraction, e.g., 0.83]* _ **percent per month (** _ *[number, e.g., 10]* _ **percent per annum) until the principal balance is paid.**

[If applicable, add]

The deposit paid by Client will be applied only against the final statement.

Comment: All statements must clearly state the basis for charges. Statements for attorney fees must include the amount, rate, basis for calculation, or other method of determination. Statements for costs must clearly identify the costs and amounts. Bus & P C §6148(b).

Interest on past-due receivables. An attorney may charge interest on past-due receivables. See California State Bar Formal Opinion No. 1980-53. Under Cal Const art XV, §1, 10-percent simple interest per year is the maximum that can be charged for "any loan or forbearance of any money." However, an interest charge for the late payment of an amount due from a client for the attorney's services is neither a loan nor a forbearance of money and, thus, might be exempt from the usury law. See *Southwest Concrete Prods. v Gosh Constr. Corp.* (1990) 51 C3d 701, 704, 274 CR 404 (holding that interest payments on overdue commercial accounts are not subject to usury law). Any interest charge on an overdue account would, however, be subject to the prohibition on unconscionable fees in Cal Rules of Prof Cond 4-200. Whether an interest charge that exceeded the amount allowable under Cal Const art XV, §1 would be considered unconscionable has not been decided. It seems readily apparent, however, that an interest charge complying with the 10-percent simple interest provision would be permissible. Note that interest and principal can be compounded annually without running afoul of Cal Const art XV, §1. *Heald v Friis-Hansen* (1959) 52 C2d 834, 839, 345 P2d 457.

NOTE: Some attorneys have found that accepting credit card payments for legal services obviates the need to charge late fees or impose interest on an unpaid balance. To understand the ethical considerations of accepting credit card payments, attorneys should read State Bar Formal Opinion No. 2007-172.

Interest charges and consumer protection statutes. Before providing in a fee agreement for payment of interest, the attorney should consider the possibility that the agreement will be thereby made subject to consumer protection laws. See Jensen, *Fee Agreements: The Untold Story*, 8 Cal Law 71 (June 1988). The State Bar Committee on Mandatory Fee Arbitration, in its Sample Written Fee Agreement Forms (see App A), notes that if interest is charged, it must be reasonable and it must be simple interest, "made a part of the agreement, and separately stated as an increment on the monthly or other periodic billing." App A, Instructions and Comments, V Additional Provisions (3) (amended effective June 23, 2005). The committee adds: "If the Agreement uses the terms 'finance charges,' 'late fees,' 'penalty payment,' or anything other than simple interest, this may create problems with the Federal Truth In Lending Law and the California Unruh Act." See App A, Instructions and Comments, V Additional Provisions (3).

For discussion of the approach under which the deposit is applied only against the final statement, see §1.30.

§1.34 M. Form: Multiple Clients: Confidentiality and Conflict

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1.34-1 Multiple clients: confidentiality and conflict

Any communications and information may be fully disclosed by Attorney to [both/all] Clients, unless a Client informs Attorney of [his/her/his or her] desire that a particular communication or item of information be considered confidential and be withheld from the other Client(s). Clients are informed that California state law requires that an Attorney not disclose confidential communications or secrets of a Client. Each Client expressly consents to such disclosure to the other Client(s) except for communications or items of information about which [he/she/he or she] informs Attorney that confidentiality from the other Client(s) must be maintained. Nothing in this provision is intended to authorize, under any circumstances, Attorney's disclosure of confidential communications or secrets of [either/any] Client to any individual or entity other than the other Client(s). If a Client informs Attorney that confidentiality from the other Client(s) must be maintained with respect to a particular communication or item of information, Attorney will advise the other Client(s) that such a request has been made, without divulging its subject matter, and will withdraw from representing [both/all] Clients, provided the withdrawal is permitted under the Rules of Professional Conduct of the State Bar of California.

Clients are informed that the Rules of Professional Conduct of the State Bar of California require, before an attorney may concurrently represent two or more clients interested in the same subject matter, that the attorney inform the clients in writing of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the clients. Clients are further informed that the Rules require that when the clients' interests potentially conflict, the attorney may not represent them without their informed written consent. Attorney has explained to Clients the possibility of conflict that is raised by such multiple representation. Specifically, [amplify potential conflict in this case] . Each client expressly consents to the multiple representation despite the possibility of conflict and acknowledges that each has had the opportunity to consult independent counsel before entering into this agreement. Attorney may withdraw from representing [both/all] clients if there is an actual conflict between the interests of [the/any] clients, provided the withdrawal is permitted under the Rules of Professional Conduct of the State Bar of California.

Comment: Confidentiality. Whenever the attorney represents multiple clients with respect to the same subject matter, it may be appropriate for the issue of confidentiality to be addressed at the beginning of the attorney-client relationship. An attorney has a duty not to disclose confidential communications or secrets of a client. Bus & P C §6068(e)(1). See below.

NOTE: A very limited exception to the confidential communication rule permits, but does not require, the attorney to reveal a client confidence relating to the representation when the attorney reasonably believes the disclosure is necessary to *prevent a criminal act* likely to result in death of, or substantial bodily harm to, an individual. Bus & P C §6068(e)(2).

Obligation to withdraw. If one client directs the attorney to maintain confidentiality of a particular communication or item of information from one or more other clients the attorney is representing with respect to the same subject matter, then the attorney can no longer adequately represent the other client or clients, and should withdraw. By way of illustration, assume that two spouses jointly retain an attorney for wills and related estate planning, and one spouse subsequently tells the attorney confidentially about substantial property acquired before the marriage about which the other spouse is unaware. The attorney will not be able to continue the joint representation without either violating one client's right to confidentiality or withholding relevant information from the other client. Neither of these alternatives is acceptable. Further, because the party being denied disclosure cannot be told what it is that is being withheld, he or she cannot give informed consent to maintaining the confidentiality. See Comment to Cal Rules of Prof Cond 3-310, which, although in the context of conflict rather than confidentiality, notes that other laws and rules (e.g., Bus & P C

§6068(e)) may preclude making adequate disclosure, which, in turn, will preclude informed consent.

Potential conflicts between multiple clients. The attorney should address the potential for conflict between multiple clients represented by the same attorney. When an attorney has a relationship with two or more parties interested in the same representation, the attorney may not represent them without informing them in writing of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to them. Cal Rules of Prof Cond 3-310(A)(1), (B)(1).

If the clients' interests potentially conflict, the attorney may not represent them without the informed written consent of each. Cal Rules of Prof Cond 3-310(C)(1). The same is true of clients whose interests are in actual conflict. Cal Rules of Prof Cond 3-310(C)(2). Thus, if the potential conflict addressed by this fee agreement provision were to become actual, the attorney would have to obtain the further consent of the clients as required by Cal Rules of Prof Cond 3-310(C)(2). Comment to Cal Rules of Prof Cond 3-310. For example, two business partners jointly retain counsel to represent them in efforts to collect delinquent accounts receivable. One way a potential conflict may become an actual one is if the partners disagree about whether to file suit against a particular debtor when other measures do not succeed.

Multiple representation involving entities as well as individuals. Attorneys should note that multiple representation need not be representation of two or more individuals. Multiple representation can also occur when an attorney represents both an individual and an entity with which he or she is affiliated, *e.g.*, an individual partner and the partnership, a corporate executive and the corporation, a close corporation and its shareholder. See, *e.g.*, California State Bar Formal Opinion No. 1999-153 (attorney who has not represented close corporation on subject of dispute may represent corporation and one shareholder in suit brought against them by only other shareholder). Misunderstandings are common in such situations because the individual client may not realize that any potential or actual conflict with the entity could exist. For example, an individual partner may enter a transaction in which it is not clear whether the partnership, as distinct from the individual partner, is a party. If litigation occurs, the individual partner and the partnership may have conflicting positions and interests.

Attorneys entering into such a multiple representation should make written disclosure of the potential conflicts and their reasonably foreseeable adverse consequences as well as of the inevitable effects of multiple representation, *e.g.*, the lack of confidentiality as to substantive communication between the clients and the attorney. For an example, see §§2.2, 2.5. An attorney representing multiple clients may wish to address in the fee agreement how the clients will allocate the payment of costs and attorney fees; sometimes, each client assumes responsibility for payment of fees and costs.

Examples. Some attorneys incorporate the disclosure of actual or potential conflict into the fee agreement (see §2.2); others draft a disclosure and consent letter for the clients' signatures (see §2.5).

§1.35 N. Form: Representation of Adverse Interests

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1.35-1 Representation of adverse interests

Attorney _ _ [has/had] _ _ _ [a relationship with a party in a separate matter/relationships with parties in a separate matter] _ _ , and _ _ [that party/those parties] _ _ _ [has/have] _ _ an interest in the subject matter of Attorney's services for Client under this agreement that is adverse to the Client's interest. Specifically, _ _ [describe circumstances and any adverse consequences] _ _ . Client expressly consents to Attorney's representation under this agreement despite _ _ [this relationship/these relationships] _ _ . Except for _ _ [this relationship/these relationships] _ _ , Attorney is not aware of any relationship with any other party interested in the subject matter of Attorney's services for Client under this agreement or of any separate matter in which Client has an interest adverse to that of any other client of Attorney.

Comment: Duty to disclose. If an attorney has or had a relationship with another party interested in the subject matter of his or her representation of the present client, the attorney may not accept or continue the representation without informing the client in writing of the relevant circumstances and of the actual and reasonably foreseeable consequences to the client. Cal Rules of Prof Cond 3-310(A)(1), (B).

The requirement is not limited to situations in which the adverse party is the attorney's client. See California State Bar Formal Opinion No. 1981-63. Because conflicts may be present in what appear to be innocent and routine situations, avoiding such conflicts may require the attorney's conscientious effort. When there is a conflict with another client, the attorney should describe his or her relationship with the other client in sufficient detail to adequately inform the current client, without violating the attorney's obligation of confidentiality to the other client (see Bus & P C §6068(e)(1)).

Ongoing duty to disclose. The duty of disclosure is ongoing: The attorney must disclose the existence of any relationship with an individual or entity with a potentially adverse interest whenever he or she becomes aware of it.

Provision disclaiming conflict. Attorneys who are not aware of any relationships with individuals or entities who have any interests adverse to those of the client sometimes include a clause to that effect in their fee agreements. Although probably unnecessary, such a disclaimer introduces the subject of conflicts generally and provides a way to inform the client that if the client at any time becomes aware of an actual or potential conflict, he or she should inform the attorney promptly.

When both clients' informed written consent is required: Rule 3-310(C)(3). An attorney who is representing a client in a matter may not undertake the representation of a client who in that matter has an interest adverse to the first client without the informed written consent of both clients, even if the matter involved in the proposed representation is completely unrelated. Cal Rules of Prof Cond 3-310(C)(3). Rule 3-310(C)(3) applies to representations of clients in both litigation and transactional matters. Comment to Cal Rules of Prof Cond 3-310.

In *Gilbert v National Corp. for Hous. Partnerships* (1999) 71 CA4th 1240, 1255, 84 CR2d 204, the appellate court relied on Cal Rules of Prof Cond 3-310(C)(3) to uphold the disqualification of an attorney who proposed to have a client who had reached a confidential settlement in a different action against the same defendant testify in another client's action without obtaining the informed consent of both clients. The court saw a very real danger to the first client in giving any testimony in the second client's case. 71 CA4th at 1252. But see *McPhearson v The Michaels Co.* (2002) 96 CA4th 843, 847, 117 CR2d 489 (*Gilbert* exaggerated effect of confidentiality clause; nothing in it precluded settling plaintiff from testifying as percipient witness in another action).

When informed written consent of client or former client is required: Rule 3-310(E). Under Cal Rules of Prof Cond 3-310(E), an attorney may not, without the informed written consent of the client or former client, accept employment adverse to the client or former client when, by reason of the representation of the client or former client, the attorney has obtained confidential information material to the employment. If a substantial relationship exists

between the prior representation and the new representation, there is a presumption that the attorney possesses confidential client information and must be disqualified. *Adams v Aerojet-General Corp.* (2001) 86 CA4th 1324, 1331, 104 CR2d 116. This substantial-relationship test is not strictly limited to the facts, claims, and issues of a particular case. *Knight v Ferguson* (2007) 149 CA4th 1207, 1213, 57 CR3d 823 (substantial relationship existed disqualifying counsel from representation of defendants when counsel had previously advised plaintiff regarding her concerns about formation of partnership and lease agreement that later became subject of dispute with defendants). Thus, a substantial relationship exists if the subjects of the past and current representations are linked in a rational way. *Knight v Ferguson, supra*. For further discussion of disqualification, see below.

An attorney should not accept the representation without the former client's informed written consent if he or she "knows or through the exercise of reasonable diligence could learn about" the prior representation. California State Bar Formal Opinion No. 1998-152.

When insurer raises conflict of interest. In *State Farm Mut. Auto. Ins. Co. v Federal Ins. Co.* (1999) 72 CA4th 1422, 1428, 86 CR2d 20, the court of appeal relied on Cal Rules of Prof Cond 3-310(C)(3) to reverse denial of a disqualification motion. The court held that an attorney-client relationship existed between an attorney and the insurer that hired him to defend an insured; thus, the conflict created when the attorney subsequently took on representation of a party adverse to the insurer in another matter survived the settlement of the first matter. The State Bar itself disputes this interpretation, explaining that "[n]otwithstanding State Farm, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action." Comment to Cal Rules of Prof Cond 3-310. In *Jessen v Hartford Cas. Ins. Co.* (2003) 111 CA4th 698, 3 CR3d 877, the defendant insurer sought to disqualify insured's counsel under Cal Rules of Prof Cond 3-310(E) on the ground that as an associate at a law firm, counsel had previously represented the insurer in a variety of matters. The court remanded for determination of the disqualification issue, including the initial inquiry of whether counsel's placement to the client in the former relationship had been "direct and personal." 111 CA4th at 711.

Disqualification. Whether a conflict requires disqualification is a separate question from whether the attorney is entitled to compensation for services rendered. See *Pringle v La Chapelle* (1999) 73 CA4th 1000, 1005, 87 CR2d 90 (violation of rule of professional conduct, in this case Cal Rules of Prof Cond 3-310 and 3-600, must be "serious" before attorney required to forfeit fees). But see *A. I. Credit Corp. v Aguilar & Sebastinelli* (2003) 113 CA4th 1072, 6 CR3d 813 (because attorney's disqualifying conflict of interest violated his ethical obligations, attorney not entitled to attorney fees).

As a general rule, the receipt of confidential information is not sufficient to require disqualification; the existence of an attorney-client relationship between the attorney and the party asserting the disqualification is the dispositive issue. *Dino v Pelayo* (2006) 145 CA4th 347, 354, 51 CR3d 620 (degree of confidentiality established among opposing parties and their attorneys in mediation is insufficient to establish right to disqualification); *Strasbourg, Pearson, Tulcin, Wolff Inc. v Wiz Technol., Inc.* (1999) 69 CA4th 1399, 1403, 82 CR2d 326 (court of appeal reversed disqualification of plaintiff's counsel; fact that defendant paid attorney fees in connection with stock offering did not establish attorney-client relationship between defendant and plaintiff's attorney). But see *Morrison Knudsen Corp. v Hancock, Rother & Bunshoft* (1999) 69 CA4th 223, 232, 81 CR2d 425 (disqualification upheld in litigation against subsidiary when law firm had obtained confidential information concerning principal, even though law firm had represented neither subsidiary nor principal, but instead acted as counsel monitoring litigation for principal's insurance underwriter).

Knowledge of confidential matters gained by one member of a law firm is imputed to all members of the firm. Thus, an attorney who accepts employment adverse to the interests of a former client of another attorney in the same law firm, e.g., representation of the defendant in a case about which the plaintiff had consulted another attorney in the firm, is subject to disqualification if he or she does not obtain the informed written consent of the former client. See, e.g., *Rosenfeld Constr. Co. v Superior Court* (1991) 235 CA3d 566, 573, 286 CR 609. But see *Oaks Mgmt. Corp. v Superior Court* (2006) 145 CA4th 453, 465, 51 CR3d 561 (disqualification of law firm was not required; although two attorneys at law firm had prior lender-borrower relationship with defendant, law firm could represent plaintiffs in litigation against defendant because there was no evidence that any information attorneys had received would give plaintiffs unfair advantage or affect outcome of litigation).

Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.36
O. Form: Payment of Attorney Fees Under Fee-Shifting Statute, Agreement, or Court Order

§1.36 O. Form: Payment of Attorney Fees Under Fee-Shifting Statute, Agreement, or Court Order

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1.36-1 Payment of attorney fees under fee-shifting statute, agreement, or court order

The Court may order, or the parties to the dispute may agree, that another party will pay some or all of Client's attorney fees, costs, or both.

[Choose applicable alternative]

[Alternative 1: Client remains obligated to pay fees/costs]

Any such order or agreement will not affect Client's obligation to pay _ _ [attorney fees/costs/attorney fees and costs] _ _ under this agreement, nor will Attorney be obligated under this agreement to enforce such an order or agreement. Any such amounts actually received by Attorney, however, will be credited against _ _ [attorney fees/costs/attorney fees and costs] _ _ incurred by Client.

[Alternative 2: Payments belong to attorney]

Attorney and Client agree that any payment[s] of attorney fees or costs made under such order or agreement belong to Attorney. Attorney agrees to accept such payment(s) as payment in full for _ _ [all services rendered/costs advanced] _ _ under this agreement.

[Alternative 3: Attorney election]

Attorney and Client agree that any payment(s) of attorney fees or costs made under such order or agreement belong to Attorney.

If such payment(s) are equal to or greater than the _ _ [attorney fees/costs/attorney fees and costs] _ _ to which Attorney would otherwise be entitled under this agreement, Attorney agrees to accept such payment(s) as payment in full for _ _ [all services rendered/costs advanced] _ _ under this agreement.

If such payment[s] are less than the _ _ [attorney fees/costs/attorney fees and costs] _ _ to which Attorney would otherwise be entitled under this agreement, Attorney may either:

(1) Accept such payment(s) as payment in full for _ _ [all services rendered/costs advanced] _ _ under this agreement; or

(2) Choose to be compensated under this agreement.

Attorney's election to be compensated under this agreement will operate as an assignment to Client of Attorney's entire interest in any payment(s) made by another party under court order or agreement by the parties.

Comment: When adverse party pays fees, costs, or both under fee-shifting statute. Representation that involves litigation under a fee-shifting statute may result in an order or settlement agreement that provides that an adverse party will pay attorney fees, costs, or both. The fee agreement should address the relationship between fees and costs awarded by the court or made part of a settlement agreement and the client's payment obligation under the fee agreement. A number of arrangements are possible, subject to the prohibitions against unconscionable fees (Cal Rules of Prof Cond 4-200) and fees that are unreasonable or excessive in light of the services performed (see *People v Pinedo* (1998) 60 CA4th 1403, 1406, 71 CR2d 151). Specifying in the fee agreement how attorney and client will treat an award of attorney fees and what impact such an award will have on the client's obligation to pay for the attorney's services may prevent later disputes. See §15.2 (if court awards statutory fees following trial, attorney entitled to the

greater of either the full amount of statutory fee award or the percentage of net recovery agreed to in the agreement).

When fee award is less than client owes under fee agreement. Under California law, if the court's fee award is less than the amount the client owes under the fee agreement, the attorney may look to the client for the difference. *Mahoney v Sharff* (1961) 191 CA2d 191, 197, 12 CR 515. However, court-ordered fees must be credited to the amount payable by the client under the fee agreement unless the agreement expressly provides otherwise. *Mahoney v Sharff*, *supra*. See also *Flannery v Prentice* (2001) 26 C4th 572, 586, 110 CR2d 809. In *Gisbrecht v Barnhart* (2002) 535 US 789, 793, 152 L Ed 2d 996, 1002, 122 S Ct 1817, the United States Supreme Court took an identical approach to the relationship between the fee agreement and federal fee-shifting provisions, confirming "the primacy of lawful attorney-client fee agreements" in a case involving litigation for past-due Social Security benefits (see 42 USC §406(b)) and a fee award under the Equal Access to Justice Act (EAJA) (28 USC §2412). The court held that an attorney is not limited to the fee awarded under the Act, but is entitled to receive any amount that remains due under the fee agreement as long as the agreement itself provides for a reasonable fee. *Gisbrecht v Barnhart*, *supra*.

When fee agreement, not fee award, sets amount to which attorney is entitled. In an appropriate case, Alternative 1 can be used to make it clear to the client that the fee agreement (not the order or agreement for payment of fees and costs by the opposing party) establishes the total amount to which the attorney is entitled for his or her work on the matter. It also establishes the attorney's right to demand from the client the amount that the other party was to pay. These issues, which can be a source of misunderstanding between attorney and client, are far better addressed at the inception of the attorney-client relationship than after an order is made or an agreement is reached.

Other ethical issues involved in assigning fees to attorney. Another unanswered question involved in assigning fees to the attorney by contract is whether such an assignment gives the attorney a pecuniary interest adverse to the client. See Cal Rules of Prof Cond 3-300 (before acquiring adverse interest, attorney must make full disclosure, obtain client's written consent, and give client opportunity to consult with another attorney). *Flannery* expressly left unanswered the issue of "what limits the rules of professional conduct may place on attorneys' freedom to contract with clients regarding ownership of statutory attorney fees." *Flannery v Prentice* (2001) 26 C4th 572, 587 n15, 110 CR2d 809. Therefore, a cautious attorney will request that a client sign a 3-300 conflict waiver when asking for an assignment of fee claims.

NOTE: A provision in a retainer agreement assigning to the attorney the client's right to seek attorney fees in a federal civil rights action under 42 USC §1983 has been struck down as a matter of law. *Pony v County of Los Angeles* (9th Cir 2006) 433 F3d 1138. According to a Ninth Circuit panel, claims under 42 USC §1983 sound in tort and, under California law, the right to sue in tort for a personal injury is nonassignable. Just as the plaintiff cannot assign her §1983 action, she cannot assign her right to seek attorney fees as prevailing party under 42 USC §1988, because this right is fundamentally derivative of the underlying substantive claim. Accordingly, her right to seek attorney fees is not transferable and the contrary provision in the retainer agreement is void.

Tax considerations: employment cases. Under *Commissioner v Banks* (2005) 543 US 426, 160 L Ed 2d 859, 125 S Ct 826, plaintiffs generally have gross income on the amounts paid to their attorneys. In the past, this could cause them to pay tax on some or all of the attorney fees. Since 2004, however, attorney fees and costs incurred in connection with a judgment or settlement in an action based on unlawful discrimination or other claim listed in the American Jobs Creation Act of 2004 (Jobs Act) (Pub L 108-357, 118 Stat 1418), or in connection with an award under 26 USC §7623(b) (awards to whistleblowers) are deductible "above the line." California tax law has been conformed to the federal. "Unlawful discrimination" is defined broadly to include claims under any federal, state, or common law regulating *any aspect of employment*, as well as actions that are unlawful under, *e.g.*, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), and other civil rights statutes. Thus, in most cases involving employment, the Jobs Act establishes that attorney fees are not included in the plaintiff's adjusted gross income. This typically allows the plaintiff to avoid tax issues that arise when attorney fees and costs are miscellaneous itemized deductions, as discussed below.

NOTE: Be aware that IRC §62(a)(20) applies only to settlements or judgments after October 22, 2004, and payment of fees and costs after October 22, 2004. Anything else must qualify for exclusion based on prior law, or the deduction of attorney fees is subject to the 2-percent floor on itemized deductions as well as AMT.

Tax considerations: other cases. The general rule is that "when a litigant's recovery constitutes income, the

litigant's income includes the portion of the recovery paid to the attorney as a contingent fee." *Commissioner v Banks* (2005) 543 US 426, 160 L Ed 2d 859, 866, 125 S Ct 826. See also *Benci-Woodward v Commissioner* (9th Cir 2000) 219 F3d 941 (entire judgment, including that portion retained by the taxpayers' attorneys for fees and costs, was income to taxpayers who were plaintiffs in a lawsuit in which they obtained a judgment that included taxable punitive damages, even though it was subject to an attorney's lien). See §1.38. In such cases, the nature of the agreement between attorney and client may have significant tax consequences for the client.

If it is anticipated that all or a substantial part of the recovery will be subject to federal income tax, the attorney should think carefully before using Alternative 1 of the above agreement. Because the first clause gives the client the burden of enforcing any order or agreement for payment of attorney fees and/or costs, it could be construed as an agreement that such fees and/or costs paid by another party belong to the client, with the result that attorney fees are included in the client's income for federal tax purposes. Alternatives 2 and 3, which explicitly state that any fees and/or costs awarded by the court or agreed on in settlement belong to the attorney, are included here as a contractual approach to a series of developments in tax law making the proceeds of many judgments and settlements, including attorney fees and costs, taxable to the plaintiff.

CAUTION: Alternatives 2 and 3 are offered with the caveat that the law in this area is still unsettled. No one knows whether a contractual solution to the income tax problem is even possible. Some practitioners who have considered the matter, however, believe that plaintiffs' attorneys may have an ethical obligation to handle statutory attorney fees in the manner that at least has a chance of making them nontaxable to the client. The summary of recent developments in federal income tax law that follows is intended only as an introduction. A number of law review articles have discussed the problems these developments present in greater depth. For an excellent overview, see Sager & Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 S Cal L Rev 1075, 1082 (July 2000).

Tax consequences of attributing fees and costs to plaintiff. If attorney fees and costs were fully deductible, imputing them to the client as income would be of academic interest only. Unfortunately, attorney fees and costs are only fully deductible in federal False Claims Act cases, unlawful discrimination cases, and some other employment cases; however, in other cases, attorney fees and costs are partially deductible or not deductible at all. The Jobs Act enacted in 2004 provides for an above-the-line deduction from adjusted gross income for fees and costs in unlawful discrimination cases (see IRC §62(a)(20)) and thus when the Jobs Act applies, the historical problems concerning the deduction of attorney fees and costs are academic.

Outside the application of the Jobs Act, fees and costs to individual taxpayers are generally categorized as miscellaneous itemized deductions under IRC §67(b). As a general rule, a taxpayer may deduct only that portion of miscellaneous itemized deductions that exceeds 2 percent of adjusted gross income. IRC §67(a).

NOTE: These deductions had been phased out for higher income taxpayers under IRC §68(a), but are no longer phased out for tax years beginning after December 31, 2009. IRC §68(g).

The most significant consequences of attributing the fees and costs to the plaintiff occur in those cases in which the alternative minimum tax (AMT) provisions of the Internal Revenue Code (IRC §§55-59) come into play. These provisions are of Byzantine complexity, but the practitioner should be aware that the AMT can be applicable to moderate-income taxpayers.

The result is that if a plaintiff's income from a judgment or settlement triggers the AMT provisions, the plaintiff may have to pay tax on the entire recovery, including fees and costs, with no offsetting deduction. This is what happened in *Benci-Woodward v Commissioner*, *supra*. See also *Coady v Commissioner* (9th Cir 2000) 213 F3d 1187. In *Coady*, the designation of attorney fees and costs as income to the plaintiffs resulted in a tax bill that exceeded their net recovery by more than \$11,000 (plus interest). In *Sinyard v Commissioner* (9th Cir 2001) 268 F3d 756, the Ninth Circuit applied the rule that fees are income to the prevailing party in a case in which attorney fees were awarded under 29 USC §216(b)—the fee-shifting provision of the federal Fair Labor Standards Act of 1938 (FLSA). (Note that under the Jobs Act, attorney fees in an FLSA case should now be excluded from adjusted gross income because the FLSA is a law regulating an aspect of employment.) *Sinyard* requires that the plaintiff must pay income tax on attorney fees awarded under the California Fair Employment and Housing Act (Govt C §§12900-12996). The Ninth Circuit expressed sympathy to the plaintiff for the effects of the AMT, but noted that it cannot change income tax rules to correct the result.

NOTE: Counsel should remember that IRC §62(a)(20) only applies to settlements or judgments after October 22, 2004, and payment of fees and costs after October 22, 2004.

The decision in *Flannery v Prentice* (2001) 26 C4th 572, 575, 110 CR2d 809, may offer a counterargument, at least in cases in which attorney fees are awarded under Govt C §12965(b)—the fee-shifting provision of the California Fair Employment and Housing Act (FEHA) (Govt C §§12900-12996). In *Flannery*, the California Supreme Court held that, in the absence of an agreement to the contrary between attorney and client, the attorney owns any fee awarded under Govt C §12965(b). Because, under *Flannery*, the attorney owns unassigned attorney fees awarded under that provision, an argument can be made that the fee award (or the fee portion of a FEHA settlement) is *not* income to the client. See IRC §61(a). The reasoning of *Flannery* is also potentially applicable to attorney fee awards made under CCP §1021.5—the "private attorney-general" provision. Alternatives 2 and 3 incorporate the rule set forth in *Flannery* into an attorney fee agreement. (Under the Jobs Act, attorney fees awarded under FEHA may be excluded from adjusted gross income.)

The United States Supreme Court, in *Commissioner v Banks* (2005) 543 US 426, 438, 160 L Ed 2d 859, 872, 125 S Ct 826, noted, but did not address, the claim that taxing the successful plaintiff on the attorney's fee award is inconsistent with the public purpose served by fee-shifting statutes (like those in *Flannery*) which encourage compliance with federal and state laws by shifting a successful plaintiff's attorney fees to the defendant. A close reading of *Banks* suggests that in cases involving fee-shifting statutes, a provision in the fee agreement between plaintiff and lawyer indicating that the contingent fees are in lieu of statutory fees might be a way to avoid the tax. See Wood, *Contingent Fees and Tax Burdens: Planning After Commissioner v Banks*, 27 CEB Civ Litigation Rep 52 (Apr. 2005).

The Tax Court has cast doubt on this argument, however. The Tax Court rejected the notion that the availability of statutory attorney fees would distinguish a case from *Banks*, and that reliance on *Flannery v Prentice* was misplaced. See *Nancy J. Vincent*, TC Memo 2005-95. Neither the fee agreement nor the settlement agreement in *Vincent* contained the language that the Supreme Court in *Banks* implied might be enough. Still, the *Vincent* court took a fairly dim view of the statutory fee argument.

CAUTION: The clauses in this section have not been tested in any court. In *Commissioner v Banks*, the United States Supreme Court adopted the tried and true assignment of income cases, such as *Lucas v Earl* (1930) 281 US 111, 113, 74 L Ed 731, 50 S Ct 241, in which the Court held that all of a taxpayer's earnings could properly be taxed to him even though he had assigned half of his earnings to his wife in a agreement that was valid under state law. Arguably, under *Banks*, state law does not dispose of the question of what constitutes income. Nevertheless, the effect on taxability of state fee-shifting statutes may remain open, as the *Banks* court noted (see *Commissioner v Banks*, 160 L Ed 2d at 872), even after *Vincent*. The *Banks* court also seemed to leave open the possibility that a different result might be reached if a court orders fees paid directly to the attorney. See 160 L Ed 2d at 872. See Wood, *Contingent Fees and Tax Burdens: Planning After Commissioner v Banks*, 27 CEB Civ LR at 53.

A number of commentators have decried the injustice of taxing the successful plaintiff on his or her gross recovery, which often bears no resemblance to any actual benefit he or she received, while not allowing any offset for the cost of obtaining the recovery. See, e.g., Sager & Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 S Cal L Rev 1075, 1082 (July 2000). If, as seems likely, the IRS continues to press the issue, the United States Supreme Court may eventually step in again and decide the underlying tax questions. Alternatively, Congress could cool the controversy considerably by taking further action (after the Jobs Act) to resolve the anomaly created by allowing attorney fees and costs only as miscellaneous deductions. See *Sinyard v Commissioner* (9th Cir 2001) 268 F3d 756, 763 (dissenting opinion of McKeown, J).

In the meantime, the prudent practitioner would be well advised to:

- Know or find out whether a new or prospective client's claim is likely to result in a taxable recovery; and
- Make a written disclosure to the client of the possible tax consequences and alert the client to the need to obtain accurate tax advice from a tax practitioner.

If a preliminary assessment of the tax situation appears bleak, the conscientious practitioner may want to involve a tax attorney in the case to explore the possibility of, e.g., a structured settlement plan that would spread the recovery out over more than one tax year.

CAUTION: The civil litigation practitioner needs to be familiar enough with these tax developments to know when to call in outside assistance. The plaintiff's attorney should, however, resist the temptation to provide the necessary tax advice him- or herself.

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§1.37 P. Form: Settlement

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1.37-1 Settlement

Attorney will not settle Client's _ _[claim/case]_ _ without the approval of Client, who will have the absolute right to accept or reject any settlement. Attorney will notify Client promptly of the terms of any settlement offer received by Attorney.

[If applicable, add the following option(s)]

[Option 1: Payment made directly to client]

Client will notify Attorney promptly of any payments received directly and will pay promptly to Attorney any amounts due from such payments, under the terms of this agreement, for attorney fees and costs advanced.

[Option 2: Debtor files bankruptcy]

If the debtor files bankruptcy after making any payments to Attorney on account of Client's claim, Client will hold Attorney harmless from any claim or demand for repayment or reimbursement made by the debtor or a trustee in bankruptcy under the Bankruptcy Code and will submit to the jurisdiction of the bankruptcy court for purposes of indemnification.

Comment: In general. On the client's right to accept or reject any settlement, even against the attorney's recommendation, see *Estate of Falco* (1987) 188 CA3d 1004, 1018, 233 CR 807; 1 Witkin, California Procedure, Attorneys §179 (5th ed 2008). On the responsibility of the attorney to communicate settlement offers to the client, see Bus & P C §6103.5; Cal Rules of Prof Cond 3-510. On the authority of a representative to settle on behalf of a minor or a person with a disability under Prob C §3603, see CCP §372.

When recovery paid directly to client. Option 1 should be used in all cases in which a recovery may be obtained on behalf of the client and part or all of the recovery might be paid directly to the client rather than to the attorney. Such direct payments are particularly possible in collection cases.

Debtor's bankruptcy. Option 2 also has particular application to collection cases. When an attorney collects money from a debtor who later files bankruptcy, the bankruptcy court may require the attorney, as the initial recipient, to refund for the benefit of creditors funds that the attorney transferred to the client. The clause requires the client to hold the attorney harmless and to submit to the bankruptcy court's jurisdiction on the issue of the responsibility for payment.

Advance authority to settle. The client may give advance authorization for the attorney to settle a claim on specified terms and "to perform those ministerial acts necessary to conclude a settlement." California State Bar Formal Opinion 2002-160. Thus, for example, in a fee agreement, the client could authorize the attorney to accept a settlement of two-thirds or more of the amount sought in the claim and to endorse a settlement check in the client's name. See California State Bar Formal Opinion 2002-160. However, such authorization is not inherent in the attorney-client relationship. See, e.g., *Levy v Superior Court* (1995) 10 C4th 578, 41 CR2d 878; *Palomo v State Bar* (1984) 36 C3d 785, 794, 205 CR 834. Even if granted, the attorney should be very careful not to exceed the terms of the client's express authorization. See California State Bar Formal Opinion 2002-160 (attorney may not settle claim on terms not expressly authorized by client even if client is unavailable and rejection of settlement offer is likely to result in detriment to client).

Reduced fee if client agrees not to accept confidentiality clause. The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has expressed the opinion that an attorney may ethically include in an initial fee agreement a provision reducing the attorney's fee if the client agrees not to accept a confidentiality clause as part of a settlement. LA County Bar Ass'n Formal Ethics Opinion No. 505 (Aug. 21, 2000).

§1.38 Q. Form: Attorney's Lien

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1.38-1 Attorney's lien

By signing and returning this fee agreement to Attorney, Client grants Attorney a lien for all unpaid attorney fees and costs advanced on all claims and causes of action that are the subject of Attorney's representation of Client under this agreement and on all proceeds of any recovery obtained, whether by settlement, award, order, or judgment.

Client is aware, and acknowledges, that this lien may significantly impair Client's interest because Attorney may be able to delay payment of any recovery or settlement funds to Client until any disputes with Attorney about unpaid attorney fees and costs advanced have been resolved. Client acknowledges that Client has been advised to seek independent legal advice about granting Attorney this lien and has had a reasonable opportunity to do so. By signing this fee agreement and returning it to Attorney, Client represents that Client has either obtained legal advice about this lien or has decided that it was unnecessary to do so.

Comment: Liens in general. A lien is a charge imposed on specific property to make it security for the performance of an act. CC §2872; *Fletcher v Davis* (2004) 33 C4th 61, 66, 14 CR3d 58. It may be created by contract (CC §2881(1)), attach to property not yet acquired by the party agreeing to give the lien (CC §2883), and be security for obligations not then in existence (CC §2884).

Attorney's charging lien on future recovery. The attorney and client may provide in their fee agreement for a lien on a future recovery to secure the client's obligation to pay attorney fees and costs when that recovery is received. See *Levin v Gulf Ins. Group* (1999) 69 CA4th 1282, 82 CR2d 228 (having received notice of lien of plaintiff's discharged attorney, insurer and attorneys retained to defend insureds are liable for intentional interference with prospective economic advantage for paying plaintiff and plaintiff's new attorney in settlement or in satisfaction of judgment with knowledge of lien); California State Bar Formal Opinion No. 2008-175 (successor attorney has ethical obligation to notify prior counsel, who has valid lien against recovery, of fact and amount of settlement). Such a lien on a future recovery is called a "charging lien." *Fletcher v Davis* (2004) 33 C4th 61, 66, 14 CR3d 58. See also *Epstein v Abrams* (1997) 57 CA4th 1159, 67 CR2d 555 (reversing trial court approval of settlement in which party released judgment for attorney fees on which former attorney had lien); *In re Feldsott* (1997) 3 Cal St Bar Ct Rptr 754, 758, 1997 Cal Op Lexis 2 (attorney acted properly in refusing to endorse settlement draft payable to himself, former client, and former client's subsequent attorney when to do so would have extinguished attorney's lien provided by fee agreement). For guidance on options available to an attorney who seeks to enforce a charging lien when a client demands that the attorney endorse a settlement check payable jointly to the client and his current and former attorneys, see California State Bar Formal Opinion No. 2009-177.

Created by contract. In California, a charging lien can be created only by contract; it does not arise automatically from the attorney's performance of services on the client's behalf. *Fletcher v Davis, supra*. The charging lien gives the attorney a security interest in the proceeds of the litigation (see *Isrin v Superior Court* (1965) 63 C2d 153, 158, 161, 45 CR 320) and the authority, *e.g.*, to delay payment of the recovery or the settlement until disputes over the lien have been resolved. See *Fletcher*, 33 C4th at 68.

Satisfying Rule 3-300 when using lien to secure hourly fees. Because the attorney's charging lien is potentially adverse to the client, the attorney who seeks such a lien to secure hourly fees must satisfy the requirements of Cal Rules of Prof Cond 3-300. *Fletcher v Davis, supra*. See *Hawk v State Bar* (1988) 45 C3d 589, 601, 247 CR 599. On the requirements of Cal Rules of Prof Cond 3-300, which applies when an attorney acquires an interest adverse to the client, see "Discussion" in Rule 3-300 of App B.

Contingent fee cases. The supreme court in *Fletcher* specifically did not decide the question of whether compliance

with Cal Rules of Prof Cond 3-300 is required when a *contingent fee* agreement is coupled with a lien on the client's prospective recovery in the same proceeding. *Fletcher v Davis* (2004) 33 C4th 61, 70 n3, 14 CR3d 58. See *Shopoff & Cavallo LLP v Hyon* (2008) 167 CA4th 1489, 1523, 85 CR3d 268 (noting that, even if rule announced in *Fletcher* extends to liens attached to contingent fee agreements, only liens asserted would be unenforceable, not underlying fee agreement). The State Bar of California Standing Committee on Professional Responsibility and Conduct has concluded that Cal Rules of Prof Cond 3-300 does not apply to charging liens in contingent fee contracts because such liens are inherent in the contingent fee contract; among other things, the parties to a contingent fee agreement agree that the attorney's fee is derived only from the client's recovery and that any payment for the attorney is delayed until that recovery. See California State Bar Formal Opinion No. 2006-170, n14 ("No court has applied Rule 3-300 or one of its predecessors to a charging lien in a contingency fee case").

Nevertheless, because the court in *Fletcher* did not offer reasons explaining why a contingent fee might be different, a cautious attorney who wants the benefit of a lien for fees in a contingent fee case might include the provision for a lien in any fee agreement in which a lien is desired, even a contingent fee agreement.

Examples of arrangements requiring compliance with Rule 3-300. For additional examples of arrangements that require compliance with Cal Rules of Prof Cond 3-300, see *BGJ Assocs. v Wilson* (2003) 113 CA4th 1217, 7 CR3d 140 (attorney involved in business transaction with client failed to overcome presumption of undue influence); *Mayhew v Benninghoff* (1997) 53 CA4th 1365, 62 CR2d 27 (client entrusted funds to attorney for investment purposes); *Brockway v State Bar* (1991) 53 C3d 51, 64, 278 CR 836 (fee arrangement gave attorney ownership interest in client's property that had value greater than amount absolutely agreed on for fees); *Sugarman v State Bar* (1990) 51 C3d 609, 616, 274 CR 246 (attorney obtained loan from client); see *Hawk v State Bar* (1988) 45 C3d 589, 600, 247 CR 599 (attorney secured payment of fees by note secured by deed of trust on client's property). Note that any agreement that allows the attorney to collect disputed fees without judicial scrutiny is improper. *Hulland v State Bar* (1972) 8 C3d 440, 105 CR 152. See also §1.23.

Obtaining client's initials showing reasonable opportunity to consult independent attorney. Depending on factors such as the sophistication of the client, counsel may want to include space for the client to initial the paragraph to indicate that he or she has had a reasonable opportunity to consult an independent attorney about the propriety of the attorney's lien in an hourly fee agreement. If the fee agreement is several pages long, some attorneys include a closing sentence at the end of the agreement above the signature line specifically referring to this and other appropriate paragraphs of the agreement.

Lien priority. Generally, other things being equal, different liens on the same property have priority according to the time of their creation. CC §2897. For a good illustrative case, see *Wujcik v Wujcik* (1994) 21 CA4th 1790, 1793, 27 CR2d 102 (contractual liens held by medical providers and attorney against personal injury award took precedence over ex-spouse's subsequent judgment lien against same award for delinquent child support). See also *Brown v Superior Court* (2004) 116 CA4th 320, 9 CR3d 912 (even though attorney not party to action, trial court should have considered priority of lien); *Pangborn Plumbing Corp. v Carruthers & Skiffington* (2002) 97 CA4th 1039, 1051, 119 CR2d 416 (attorneys' contractual liens for legal services have priority over judgment creditor's liens). In certain instances, however, an attorney lien may be granted priority over medical liens, even when the attorney lien was created after the other liens. See *Gilman v Dalby* (2009) 176 CA4th 606, 98 CR3d 231 (attorney lien had priority over medical lien, despite being created after medical lien). For a case in which priority among competing liens was *not* granted according to the time of their creation, see *Hoover-Reynolds v Superior Court* (1996) 50 CA4th 1273, 58 CR2d 173. In *Hoover-Reynolds*, the court held that an attorney's lien does not attach when the underlying funds are payments of court-ordered child support. The court distinguished *Wujcik v Wujcik*, *supra*, and *Cappa v F & K Rock & Sand, Inc.* (1988) 203 CA3d 172, 249 CR 718, as cases in which, although the underlying claim of the judgment creditor was for unpaid child support, the funds to which the liens attached were personal injury judgments.

Enforcing lien. Although it is common practice for an attorney who has been discharged from a case to file a notice of lien in the pending action (see, e.g., *Hansen v Jacobsen* (1986) 186 CA3d 350, 230 CR 580), an independent action must be brought to establish the amount of the lien and to enforce it (*Bandy v Mt. Diablo Unified Sch. Dist.* (1976) 56 CA3d 230, 126 CR 890). See also *Carroll v Interstate Brands Corp.* (2002) 99 CA4th 1168, 121 CR2d 532 (trial court in pending action acted in excess of jurisdiction when it expunged discharged attorney's lien). In *Carroll*, the court of appeal also questioned the practice of filing a notice of lien in the underlying action, pointing out that filing the notice is not necessary to establish the lien, the lien itself is not properly before the court in the underlying action, and filing the

notice has the potential to tie up the proceeds of a judgment or settlement until the validity of the lien is litigated independently.

It has been held that a lien may be established and enforced in the underlying action when the client is a minor, because under Prob C §3601(b) the court that approves a settlement or gives judgment in a suit brought on behalf of a minor may also order payment of attorney fees. See *Padilla v McClellan* (2001) 93 CA4th 1100, 113 CR2d 680; *Curtis v Estate of Fagan* (2000) 82 CA4th 270, 98 CR2d 84.

The lien survives the attorney's discharge by the client, in which case it protects the attorney's recovery of the reasonable value of services rendered before discharge. *Weiss v Marcus* (1975) 51 CA3d 590, 124 CR 297.

Notice. On the notice required to make the lien enforceable against a holder of proceeds (most commonly an insurer or the client's successor attorney), see *Bree v Beall* (1981) 114 CA3d 650, 171 CR 73.

Taxable recovery. Under California law, a lien on the proceeds of the recovery gives the attorney only a "professional interest" in the litigation; it does not confer "the beneficial rights of a real party in interest." *Isrin v Superior Court* (1965) 63 C2d 153, 161, 45 CR 320, quoted in *Benci-Woodward v Commissioner* (9th Cir 2000) 219 F3d 941, 943. In *Benci-Woodward*, a tax case, the taxpayers were plaintiffs in a lawsuit in which they obtained a judgment that included punitive damages. Relying on *Isrin*, the Ninth Circuit held that the entire punitive damages award, including that portion retained by plaintiffs' attorneys for fees and costs, was includable in plaintiffs' gross income, even though the fees and costs were subject to an attorney's lien. Further, because including the fees and costs in plaintiffs' gross income made them subject to the alternative minimum tax (AMT) provisions of the Internal Revenue Code, and because attorney fees and costs are "miscellaneous itemized deductions" under IRC §67(b), which do not reduce income under the AMT (IRC §§55-59), the attorney fees and costs were not allowed as deductions for AMT purposes. 219 F3d at 944. See also *Coady v Commissioner* (9th Cir 2000) 213 F3d 1187. In *Coady*, the application of the AMT resulted in a tax bill that exceeded the plaintiffs' net recovery by more than \$11,000 (plus interest). On the AMT, see §1.36.

In a case in which the attorney anticipates the possibility of a taxable recovery (e.g., cases seeking punitive damages or recovery for nonphysical injuries or illness), it might be possible to avoid the adverse tax consequences for the client by drafting a provision in the fee agreement that gives the attorney an ownership interest (as opposed to an attorney's lien) in the portion of the proceeds of the litigation that are attributable to attorney fees and costs. *Flannery v Prentice* (2001) 26 C4th 572, 110 CR2d 809, holding that unassigned attorney fees awarded under Govt C §12965(b)—the fee-shifting provision of the California Fair Employment and Housing Act (FEHA)—belong to the attorney, not the client, provides support for such an approach, at least with respect to statutory fee awards under state law. However, the Tax Court in *Nancy J. Vincent*, TC Memo 2005-95 may have cast doubt on this argument. See §1.36.

NOTE: Under the American Jobs Creation Act of 2004 (Jobs Act) (Pub L 108-357, 118 Stat 1418), attorney fees and court costs incurred in connection with a judgment or settlement in an action based on unlawful discrimination, such as that in *Flannery* or certain other claims, are excluded from the determination of the client taxpayer's adjusted gross income. IRC §62(a)(20).

Such an agreement might well, however, be considered an anticipatory assignment of income and, hence, be deemed ineffective to relieve the plaintiff of the burden of paying tax. See *Commissioner v Banks* (2005) 543 US 426, 160 L Ed 2d 859, 866, 125 S Ct 826; *Lucas v Earl* (1930) 281 US 111, 113, 74 L Ed 731, 50 S Ct 241 (transfer of right to receive income did not relieve taxpayer of obligation to pay tax, even though assignment was valid under state law); *Helvering v Horst* (1940) 311 US 112, 116, 85 L Ed 75, 61 S Ct 144 (taxpayer who has enjoyed benefit of economic gain represented by right to receive income cannot avoid taxation by anticipatory assignment of income); *Baylin v U.S.* (Fed Cir 1995) 43 F3d 1451, 1454 (same as *Helvering v Horst*).

§1.39 R. Form: Discharge of Attorney

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1.39-1 Discharge of attorney

Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Attorney is Client's attorney of record in any proceeding, Client will execute and return a substitution-of-attorney form immediately on its receipt from Attorney.

[Add one of the following alternatives]

[Alternative 1: If hourly fee, add]

Notwithstanding the discharge, Client will remain obligated to pay Attorney at the agreed rate(s) for all services provided and to reimburse Attorney for all costs advanced.

[Alternative 2: If results-obtained fee, add]

Notwithstanding the discharge, Client will remain obligated to pay Attorney the agreed minimum amount and the additional amount that Attorney may charge based on these and other relevant factors, e.g., the time limitations Client imposes on Attorney, the time and labor required to perform the services, the novelty and difficulty of the questions involved, the skill required to perform the services properly, the amount of money involved, and the results obtained, up to and until the time of discharge. In no event will the final total fee (minimum hourly fee plus additional amount) be an unreasonable amount after taking these factors into account. Client will also remain obligated to reimburse Attorney for all costs advanced and remaining unpaid before discharge.

[Alternative 3: If fixed fee, add]

Notwithstanding the discharge, Client will remain obligated to pay Attorney all attorney fees required under the terms of this agreement and to reimburse Attorney for all costs advanced.

[Alternative 4: If contingent fee, add]

Notwithstanding the discharge, Client will be obligated to pay Attorney out of any recovery a reasonable attorney fee for all services provided and to reimburse Attorney *[out of any recovery]* **for all costs advanced.** *[If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced,*
 [Attorney will bear the loss/Client will pay to Attorney the unreimbursed balance of the costs advanced] .

Comment: Client's power to discharge attorney. The client has an absolute power to discharge his or her attorney at any time, with or without cause. *Fracasse v Brent* (1972) 6 C3d 784, 790, 100 CR 385.

Reasonable value of services. The discharged attorney is entitled to recover the reasonable value of his or her services rendered to the time of discharge, whether the discharge is with or without cause. 6 C3d at 792.

Hourly fee. When the agreement provides for an hourly fee, the discharged attorney's claim for attorney fees at the specified rate for the work performed to the time of discharge is based on the theory that the agreed-on rate represents the reasonable value of the services. See *Cazares v Saenz* (1989) 208 CA3d 279, 287, 256 CR 209; *Mitchell v Towne* (1939) 31 CA2d 259, 266, 87 P2d 908.

Fixed or flat fee. If the agreement is for a fixed or flat fee and the attorney is discharged without cause, the entire fixed fee may be recoverable, depending on the circumstances, even though the discharge prevents the attorney from completing the anticipated services. See *Countryman v California Trona Co.* (1917) 35 CA 728, 736, 170 P 1069. If the attorney is discharged with cause, only the reasonable value of the services provided is recoverable. An attorney entering into a fee agreement for a fixed fee may maximize his or her chances of recovering the full fee in the event of

a discharge without cause by providing in the agreement that the entire fee be paid before work begins and be nonrefundable.

PRACTICE TIP: Because nonrefundable fees are still subject to Cal Rules of Prof Cond 4-200, the attorney should also indicate hourly rates. In the event of discharge, this will help defend the reasonableness of the fee.

For a sample provision, see §1.25. Of course, if the attorney is discharged with substantial services as yet unperformed, retention of the entire fixed fee may be unconscionable. On the prohibition against unconscionable fees, see §§1.10, 1.23.

Contingent fee. In the case of a contingent fee, the discharged attorney is entitled to the reasonable value of the services provided, regardless of whether the discharge is with or without cause, but must defer receipt of his or her fee until recovery by the client. *Fracasse v Brent* (1972) 6 C3d 784, 791, 100 CR 385; *Mardirossian & Assocs. v Ersoff* (2007) 153 CA4th 257, 272, 62 CR3d 665 (contingency fee attorney discharged 9 days before settlement of case entitled to reasonable value of services rendered before discharge). When the fee agreement provides that reimbursement of costs will also come out of any recovery, the attorney must likewise defer recovery of costs. *Kroff v Larson* (1985) 167 CA3d 857, 213 CR 526. In *Cazares v Saenz* (1989) 208 CA3d 279, 288, 256 CR 209, the court suggested that the way to calculate a contingent fee for partial performance is to determine the partially performing attorney's prorata share of the value of all services performed by all attorneys on the case, and then to multiply the prorata share by the total fee due under the contract.

An attorney who entered into a 35-percent contingent fee agreement with a personal injury client was found by the Review Department of the State Bar Court to have violated the prohibition against charging an unconscionable fee (Cal Rules of Prof Cond 4-200(A)) because he failed to disclose to the client that he intended this fee to be *in addition* to a 25-percent contingent fee earned by her previous attorney, who had represented her up to that point without recovery. *In re Van Sickle* (2006) 4 Cal St Bar Ct Rptr 980, 989 n13, 2006 Cal Op Lexis 5. Because he never explained his position to the client, there was no valid fee agreement, and the attorney's compensation was to be measured on a quantum meruit basis. The court rejected a per se finding of unconscionability in every case in which successive attorneys represent a client and the second attorney charges a contingent fee that, when added to the previous fee, exceeds 30 to 40 percent. *In re Van Sickle, supra*.

NOTE: The sample clauses for the four kinds of agreements assume that any discharge is without cause. If the attorney is discharged with cause, then the attorney may have breached the agreement and be unable to enforce it (see 1 Witkin, Summary of California Law, *Contracts* §853 (10th ed 2005)), although he or she will still be entitled to the reasonable value of his or her services (see 1 Witkin, California Procedure, *Attorneys* §§215-216 (5th ed 2008)). On the difficulty of determining whether a discharge is with or without cause, see 1 Witkin, Procedure, *Atty* §217.

§1.40 S. Form: Withdrawal of Attorney

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1.40-1 Withdrawal of attorney

Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. _ _ [The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: _ _ [E.g., (a) client consents, (b) client's conduct makes it unreasonably difficult for the attorney to carry out the employment effectively, and (c) client fails to pay attorney fees or costs as required by his or her agreement with the attorney] _ _.] _ _

[Add one of the following alternatives]

[Alternative 1: If hourly fee, add]

Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate(s) for all services provided, and to reimburse Attorney for all costs advanced, before the withdrawal. _ _ [Attorney will not be entitled, however, to the nonrefundable _ _ [portion of the] _ _ [initial] _ _ deposit for attorney fees to the extent, if any, that it exceeds Client's total obligation for attorney fees incurred.] _ _

[Alternative 2: If results-obtained fee, add]

Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney the agreed minimum amount and the additional amount that Attorney may charge based on these and other relevant factors, e.g., the time limitations Client imposes on Attorney, the time and labor required to perform the services, the novelty and difficulty of the questions involved, the skill required to perform the services properly, the amount of money involved, and the results obtained, up to and until the time of discharge. In no event will the final total fee (minimum hourly fee plus additional amount) be an unreasonable amount after taking these factors into account. Client will also remain obligated to reimburse Attorney for all costs advanced and remaining unpaid before discharge.

[Alternative 3: If fixed fee, add]

Notwithstanding Attorney's withdrawal, Client will be obligated to pay Attorney a reasonable attorney fee for all services provided, and to reimburse Attorney for all costs advanced, before the withdrawal.

[Alternative 4: If contingent fee, add]

Notwithstanding Attorney's withdrawal, Client will be obligated to pay Attorney out of any recovery a reasonable attorney fee for all services provided, and to reimburse Attorney _ _ [out of any recovery] _ _ **for all costs advanced before the withdrawal.** _ _ [If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, _ _ [Attorney will bear the loss/Client will pay to Attorney the unreimbursed balance of the costs advanced] _ _.] _ _

Comment: Rule 3-700. The circumstances under which an attorney's withdrawal becomes mandatory or permissible, and the attorney's obligation with respect to termination of employment, are set forth in Cal Rules of Prof Cond 3-700.

Reasonable value of attorney's services. An attorney who withdraws may recover the reasonable value of his or her services only if the withdrawal is made with justifiable cause; otherwise, compensation will be denied. *Estate of Falco* (1987) 188 CA3d 1004, 233 CR 807; *Hensel v Cohen* (1984) 155 CA3d 563, 202 CR 85; but see *Joseph E. Di Loreto, Inc. v O'Neill* (1991) 1 CA4th 149, 158, 1 CR2d 636 (attorney's withdrawal or alleged abandonment did not prevent fee recovery, because he had fully performed all obligations set out in agreement before withdrawal). On considerations in determining whether a withdrawal is justified, see *Estate of Falco*, 188 CA3d at 1016. See also *Rus, Miliband & Smith v Conkle & Olesten* (2003) 113 CA4th 656, 6 CR3d 612.

When the agreement provides for an hourly fee, the withdrawing attorney's claim for attorney fees at the specified

rate for the work performed to the time of withdrawal is based on the theory that the agreed-on rate represents the reasonable value of the services. See *Cazares v Saenz* (1989) 208 CA3d 279, 287, 256 CR 209; *Mitchell v Towne* (1939) 31 CA2d 259, 266, 87 P2d 908.

On calculating a contingent fee for partial performance, see *Cazares v Saenz*, *supra*, discussed in §1.39.

NOTE: The additional sample clauses above for four kinds of agreements assume that any withdrawal is made with justifiable cause. If a withdrawal is made without justifiable cause, then presumably the attorney has breached the agreement and will be unable to enforce it (see 1 Witkin, Summary of California Law, *Contracts* §853 (10th ed 2005)).

§1.41 T. Form: Release, Retention, and Disposition of Client's Papers and Property

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1.41-1 Release, retention, and disposition of client's papers and property

[Choose preferred alternative]

[Alternative 1: Destruction of files at time not specified in future]

It is Attorney's policy to retain and ultimately destroy all files, documents, records, and writings, including electronic versions, relating to each engagement for which Attorney has been retained without notifying clients or former clients of the destruction of these items. Therefore, to be certain that Attorney has not retained any material that Client may need or desire, Attorney will return to Client all original documents Client has made available to Attorney if Client instructs Attorney in writing within __ *[number, e.g., 90]* __ days after Attorney mails to Client a letter informing Client that Attorney has completed the services set forth under the terms of this agreement.

Attorney will provide a copy of the file to Client at the termination of the matter. It will be delivered to Client's address of record on file with Attorney. Client agrees that upon delivery of the file, Client will have the obligation to maintain or keep the file.

[Alternative 2: Destruction of files at specified time in future]

At the termination of services under this agreement, Attorney will release promptly to Client on request all of Client's papers and property __ *[, subject to any protective order or nondisclosure agreement]* __. After __ *[number, e.g., 5]* __ years have passed since the termination of services under this agreement, Attorney may dispose of Client's papers and property. If Client desires to have Attorney retain Client's papers and property beyond __ *[number, e.g., 5]* __ years after the termination of services, Client must make separate __ *[written]* __ arrangements with Attorney. "Client's papers and property" include __ *[e.g., correspondence, deposition transcripts, exhibits, experts' reports, legal documents, physical evidence, and other items reasonably necessary to Client's representation, whether Client has paid for them or not to the extent necessary to avoid prejudicing the Client's interest]* __, and include an electronic version of these documents.

Comment: Return of client's papers and property, including electronic data. The alternative clauses provided here illustrate different approaches to the problem of what to do with the contents of the case file after the representation ends. Both approaches take into account the rule that when an attorney's employment terminates, the attorney must promptly comply with any request by the client (or the client's attorney) for return of the client's papers and property. Cal Rules of Prof Cond 3-700(D)(1). See also *Academy of Cal. Optometrists, Inc. v Superior Court* (1975) 51 CA3d 999, 124 CR 668 (attorney may not withhold client's papers as "lien" to secure payment of fees or cost advances).

California State Bar Formal Opinion No. 2007-174 interprets Rule 3-700(D) to mean that an attorney is ethically obligated, on termination of employment and at the client's request, to promptly release to a client an electronic version of (1) e-mail correspondence; (2) pleadings; (3) discovery requests and responses; (4) depositions and exhibits; and (5) transactional documents.

Any materials provided by the client must be returned in the form they were given, but attorney and client might agree that the attorney may return the case files in a specific electronic format, e.g., by means of e-mailing Microsoft Word files to the client at a particular Internet address.

Withholding of work file contents. An attorney may not assert the work-product privilege in an action between the attorney and a client when the information sought is relevant to the attorney's breach of a duty arising out of the attorney-client relationship. CCP §2018.080. However, whether the attorney is obliged to release attorney work product on request in other contexts is not settled. Compare *Lasky, Haas, Cohler & Munter v Superior Court* (1985) 172 CA3d

264, 279, 218 CR 205 (cited with approval in *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 214 n5, 91 CR2d 716) (attorney is holder of work-product privilege and can assert it even against client when nondisclosure benefits client), with *Kallen v Delug* (1984) 157 CA3d 940, 950, 203 CR 879, and *Weiss v Marcus* (1975) 51 CA3d 590, 599, 124 CR 297 (attorney must release client files on request; work product belongs to client). The Ethics Committee of the Bar Association of San Francisco has stated in an ethics opinion that it concurs with *Weiss* and that the work product of an attorney belongs to the client and cannot be retained by the attorney on the client's request, unless the materials are absolutely protected from disclosure by court order or by privilege properly invoked by the attorney. SF County Bar Ass'n Ethics Committee Formal Opinion No. 1984-1. See also LA County Bar Ass'n Formal Opinion No. 330 (Nov. 30, 1972).

Length of time files must be retained. Neither Cal Rules of Prof Cond 3-700(D)(1) nor California case law addresses the length of time an attorney must retain client papers after completion of the client matter if the client does not request their return. Different approaches to the problem exist. Under the approach taken by the State Bar, there is "no shortcut, 'bright line' rule" for determining how long to retain items in a closed file, because "the need to maintain client papers cannot be measured in all cases by a fixed time period." California State Bar Formal Opinion No. 2001-157. Absent an agreement on the disposition of papers, the attorney must make reasonable efforts to obtain the client's consent before destroying items in the client's file. If the attorney is unable to obtain instructions, he or she may destroy the items unless there is reason to believe that preservation is required by law or destruction of the items would prejudice the client. California State Bar Formal Opinion No. 2001-157. A similar approach was taken in SF County Bar Ass'n Ethics Committee Formal Opinion No. 1996-1 (absent agreement, attorney must keep potentially significant client papers until there is no longer any "reasonably foreseeable prejudice to the client's rights"). Certain items with inherent value (e.g., original testamentary instruments or stock certificates) should not be destroyed under any circumstances. Similarly, client files for certain types of matters (e.g., representation of a minor or certain criminal matters) should be retained for longer periods of time because longer statutes of limitations or other considerations may apply. See below.

To reduce "the burdens and expense of preserving former client files," the State Bar suggests that "attorneys handling discrete matters such as claims or litigation" consider including in their fee agreements a provision authorizing destruction of the client's files after a specified and reasonable period of time, unless the client requests the attorney to deliver the files to the client. California State Bar Formal Opinion No. 2001-157. Alternative 1 is such a provision.

Disposition after a specified period. Another approach was taken in LA County Bar Ass'n Formal Opinion No. 475 (Jan. 1994), which held that, absent agreement, 5 years is a reasonable time to retain "potentially significant" materials in a civil matter, but that papers from criminal matters should be kept for the former client's lifetime. This 5-year retention rule is based on Cal Rules of Prof Cond 4-100 (preserving identity of funds and property of a client), not Rule 3-700 (termination of employment). See also *Ramirez v Fuselier* (BAP 9th Cir 1995) 183 BR 583, 587 (under Cal Rules of Prof Cond 4-100, "attorneys are considered fiduciary custodians of client files and are required to keep and maintain such files for five years after the conclusion of a case"). However, as California State Bar Formal Opinion No. 2001-157 points out at n5, Rule 4-100 refers not to file retention but to the attorney's obligation to retain records of "funds, securities, and other properties of clients coming into their possession." Alternative 2 represents the Los Angeles County Bar Association's approach to file retention. It limits the attorney's responsibility for maintaining and storing client materials by providing for disposition after a specified period unless the client makes arrangements for longer retention.

Closed files. Alternative 1 gives the attorney or law firm greater flexibility in the disposition of closed files, placing the responsibility for storing any materials the client wants to retain on the client. Although there may be a number of reasons to retain client files after a case closes (e.g., client relations, justification of fees, malpractice concerns), the use of this alternative eliminates protecting the client's rights from potential prejudice as a reason for retention. It also permits the development of office protocols for disposing of closed case files without further input from clients who may be difficult to locate. If this alternative is used, it should be reiterated in a letter terminating the attorney-client relationship at the conclusion of the matter. For a sample termination letter, see §16.2.

Client's original documents. Although both provisions presented here encompass original documents received from the client, there are sound reasons for distinguishing papers that may have independent value as property (e.g., birth certificates, certified copies of documents, photographs, stock certificates, original promissory notes) from other documents in the file (e.g., correspondence, pleadings, photocopies). To the extent that an attorney has received property from the client that the client expects to be returned, the attorney serves as a bailee and must return such

property to the client irrespective of other client file retention procedures or policies. The best law practice management protocol would be never to retain such items in the first instance (*i.e.*, never become a bailee).

PRACTICE TIP: Consider adopting an office policy of retaining only copies of such original documents and returning the originals to the client. You will then be able to destroy files without having to screen each one separately to be certain that it does not contain any personal property of the client that the attorney has been holding as bailee.

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§1.42 U. Form: Disclaimer of Guaranty

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1.42-1 Disclaimer of guaranty

Although Attorney may offer an opinion about possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guaranty.

Comment: Clients often want their attorneys to give them at least some idea of the likely outcome of the matter for which the attorney is being hired. It is essential that the client understand that such opinions are not guaranties, that the attorney makes no promises about the outcome, and that no such promise is part of the agreement between the attorney and the client. A disclaimer-of-guaranty clause does not protect an attorney who makes actual misrepresentations to his or her client about the potential outcome of a matter. See, *e.g.*, *Charnay v Cobert* (2006) 145 CA4th 170, 185, 51 CR3d 471 (despite "no guarantees" clause in retainer agreement, client stated intentional fraud and negligent misrepresentation claims against attorney who falsely told client that she did not have to worry about mounting litigation costs, because she would recover costs at end of case).

Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.43
V. Form: Entire Agreement

§1.43 V. Form: Entire Agreement

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1.43-1 Entire agreement

This agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

Comment: This provision supplements the parol evidence rule that, with certain exceptions, prohibits the introduction of extrinsic evidence to vary or add to an agreement's written terms. On the parol evidence rule generally, see Jefferson's California Evidence Benchbook, chap 34 (4th ed CJA-CEB 2009). For provision for effective date of the agreement, see §1.53.

Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.44
W. Form: Severability in Event of Partial Invalidity

§1.44 W. Form: Severability in Event of Partial Invalidity

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1.44-1 Severability in event of partial invalidity

If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

Comment: This provision makes explicit the parties' intent that the invalidity of any part of their agreement will not render the remainder of the agreement unenforceable. See CC §1599.

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§1.45 X. Form: Modification by Subsequent Agreement

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1.45-1 Modification by subsequent agreement

This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them.

Comment: To the extent permitted by law, this provision prohibits oral modifications of the agreement. See CC §1698. By proscribing executory oral contracts, the provision may prevent disputes regarding the existence or terms of such agreements. Parties can, however, orally waive the requirement that modifications be in writing. See *Miller & Lux, Inc. v San Joaquin Light & Power Corp.* (1932) 120 CA 589, 607, 8 P2d 560.

Subsequent modifications of the fee agreement may be scrutinized for fairness and attorneys should take care to address any potential conflicts of interest the modifications may create. See *Ramirez v Sturdevant* (1994) 21 CA4th 904, 925, 26 CR2d 554 (case remanded to trial court for determination whether separate negotiation of damages and attorney fees was fair and reasonable; in absence of any contrary evidence, it is presumed that conflict prejudiced client). Subsequent agreements with clients may also raise issues of compliance with Cal Rules of Prof Cond 3-300. See *In re Silverton* (2005) 36 C4th 81, 84 n2, 29 CR3d 766 (subsequent agreement that attorney could retain money saved by negotiating reduction in medical liens was a business transaction with a client that required attorney to comply with Rule 3-300). On Rule 3-300, see §§1.12, 1.23, 1.36, 1.38.

Y. Arbitration

§1.46 1. Form: Client May Elect Fee Arbitration

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1.46-1 Client may elect fee arbitration

If a dispute arises between Attorney and Client regarding attorney fees or costs under this agreement and Attorney files suit in any court, or begins an arbitration proceeding other than through the State Bar or a local bar association under California Business and Professions Code §§6200-6206 to resolve the fees or costs dispute, then Client will have the right to stay that suit or arbitration by timely electing to arbitrate the dispute through the State Bar or a local bar association under Business and Professions Code §§6200-6206, in which event Attorney must submit the matter involving costs or fees to that arbitration.

Comment: This provision informs the client of the client's right to elect arbitration under the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206) if the attorney files an action in any court, or begins an arbitration proceeding other than one under the MFAA for collection of attorney fees or costs. See Bus & P C §6201(b). Many attorneys do not include this provision in their fee agreements because it neither constitutes nor replaces the notice of the client's right to arbitrate under the MFAA that is required by Bus & P C §6201(a), but merely states the current law under the MFAA. See §1.47.

The Bus & P C §6201(a) notice of the MFAA rights can be effective only after an actual fee dispute has arisen. *Huang v Cheng* (1998) 66 CA4th 1230, 1234, 78 CR2d 550. When an attorney is retained by one party to provide services to another, the party who has agreed to make the payments is the one entitled to notice of the right to arbitrate any fee dispute. *Wager v Mirzayance* (1998) 67 CA4th 1187, 79 CR2d 661.

On the notice requirements for and conduct of a fee arbitration under the MFAA, see California Civil Procedure Before Trial, chap 5 (4th ed Cal CEB 2004).

§1.47 2. Form: Mandatory Nonbinding Fee Arbitration Through State or Local Bar

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1.47-1 Mandatory nonbinding fee arbitration through state or local bar

If a dispute arises between Attorney and Client regarding attorney fees or costs under this agreement, the dispute will be submitted for arbitration under California Business and Professions Code §§6200-6206, to be provided by, and in accordance with the rules of, the _ _ [fee arbitration program of the _ _ [County Bar Association/State Bar of California]_ _] _.

Comment: **MFAA.** Arbitration of disputes over attorney fees and costs is provided by the State Bar and local bar associations under the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206). See §1.46. On the notice requirements for and conduct of a fee arbitration under the MFAA, see California Civil Procedure Before Trial, chap 5 (4th ed Cal CEB 2004).

Although arbitration under the MFAA (Bus & P C §§6200-6206) is otherwise voluntary for the client, and mandatory for the attorney when the client elects it, the parties may provide in their fee agreement that the fee arbitration will be mandatory. Bus & P C §6200(c).

Subsequent action not precluded. It is important to note that compliance with the MFAA does not necessarily preclude a subsequent action by the client against the attorney predicated on the same facts that formed the basis of the fee dispute. *Liska v The Arns Law Firm* (2004) 117 CA4th 275, 12 CR3d 21 (client who lost binding MFAA arbitration could file action for breach of contract or fraud based on same facts as in MFAA arbitration, but could not seek to recover as damages any portion of fee awarded to attorney in MFAA arbitration). If subsequent action is dismissed, however, the court will reinstate the arbitration award. See *Perez v Grajales* (2008) 169 CA4th 580, 602, 86 CR3d 784 (involuntary dismissal of attorney's civil action following nonbinding arbitration under MFAA constitutes repudiation of his rejection of arbitration decision).

Predispute arbitration agreements. Under Bus & P C §6204(a), after a dispute has arisen, the parties may agree to be bound by an arbitration award made under the MFAA, but the statute does not discuss predispute arbitration agreements. The supreme court has held that a predispute arbitration agreement is enforceable even if the client retains the right to resolve the fee dispute under the MFAA by nonbinding arbitration or trial after arbitration. *Schatz v Allen Matkins Leck Gamble & Mallory, LLP* (2009) 45 C4th 557, 571, 87 CR3d 700 (when client chooses MFAA arbitration, binding arbitration under predispute agreement may go forward once MFAA arbitration process is over). See *Ervin, Cohen & Jessup, LLP v Kassel* (2007) 147 CA4th 821, 829, 54 CR3d 685. On the enforceability of predispute arbitration agreements, see §§1.48-1.49.

Drafting postdispute arbitration agreements. Attorneys should take care in drafting postdispute arbitration agreements because courts will likely construe ambiguities in such agreements against the attorney. See *Pratt v Gurse, Schneider & Co.* (2000) 80 CA4th 1105, 1107, 95 CR2d 695 (client's malpractice claim submitted to binding arbitration under postdispute agreement that expressly waived "the right to appeal from the arbitrator's award or any judgment thereby entered"; defendants' appeal from confirmation of arbitration award dismissed because their express waiver of right to appeal was binding, whether the arbitration was judicial or contractual). *Pratt* distinguished *Reisman v Shahverdian* (1984) 153 CA3d 1074, 1082, 1088, 201 CR 194 (provision on form for requesting binding arbitration that "[n]o appeal or further proceedings will be possible after the arbitration award is made" did not waive right of appeal) on the ground that the *Pratt* waiver provision was more specific. An unmentioned but possibly important distinction between *Pratt* and *Shahverdian* is that the party in *Pratt* urging the court to disregard the waiver provision was the attorney, whereas the party in *Shahverdian* seeking relief was the client.

The MFAA permits an attorney and client to enter into a postdispute agreement authorizing the MFAA arbitrators to determine the existence of an attorney-client agreement. *Glassman v McNab* (2003) 112 CA4th 1593, 1601, 6 CR3d

293 (MFAA permits parties "to confer subject matter jurisdiction on arbitrators over an issue by agreement").

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§1.48 3. Form: Agreement to Arbitrate Malpractice Dispute

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1.48-1 Agreement to arbitrate malpractice dispute

If a dispute arises between Attorney and Client about a claim of attorney malpractice under this agreement, i.e., about whether any legal services rendered under this agreement were improperly, negligently, or incompetently rendered, then the dispute will be submitted for arbitration by, and in accordance with the rules of, _ _[insert name of arbitration provider]_ _ , and Attorney and Client will be bound by the result. Client understands and acknowledges that, by agreeing to binding arbitration, _ _[he/she]_ _ waives the right to submit the dispute for determination by a court and thereby also waives the right to a jury or court trial.

Comment: **Binding arbitration agreement valid and enforceable.** The use of arbitration as a method of resolving legal malpractice claims has been found not to violate Cal Rules of Prof Cond 3-400(A) (prohibiting attorney from entering into contract with client prospectively limiting attorney's liability to client for attorney's professional malpractice). See California State Bar Formal Opinion No. 1989-116.

A fee agreement provision for binding arbitration of any malpractice claims arising from the representation, either with or without an express waiver of the right to a jury trial, is valid and enforceable, provided there is no ambiguity about the effect or scope of the agreement. *Powers v Dickson, Carlson & Campillo* (1997) 54 CA4th 1102, 63 CR2d 261. See *Aguilar v Lerner* (2004) 32 C4th 974, 12 CR3d 287. On the importance of the provision's clarity regarding its effect and scope, see *Lawrence v Walzer & Gabrielson* (1989) 207 CA3d 1501, 1504, 256 CR 6 (court refused to compel arbitration of client's action for legal malpractice when arbitration provision did not expressly mention legal malpractice, providing only that "[i]n the event of a dispute between us regarding fees, costs or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration").

In *Powers v Dickson, Carlson & Campillo, supra*, the court discerned no ethical impediment to enforcement of a predispute arbitration provision for malpractice claims and rejected the contention that a contract between attorney and client should be considered a contract of adhesion. *Powers*, 54 CA4th at 1110.

NOTE: A number of other jurisdictions are more protective of the rights of the client entering into a contract with an attorney. See discussion and cases cited in Note, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 Iowa L Rev 827, 851 (May 1999). Despite the general rule favoring severance of an invalid contract provision, the California Supreme Court, in *Armendariz v Foundation Health Psychcare Servs.* (2000) 24 C4th 83, 99 CR2d 745, held that an employment contract was a contract of adhesion and refused to enforce a provision in the contract that called for arbitration of wrongful termination claims by employees, but inferentially permitted judicial resolution of all other issues. The complete absence of mutuality was fatal to the arbitration agreement because the court was unable to strike or restrict the offending provision. This aspect of *Armendariz* is potentially relevant to attorney fee agreements requiring arbitration of malpractice claims. Note, however, that even after *Armendariz*, severance remains the preferred remedy when the illegal provision is not central to the contract's main purpose. *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1074, 130 CR2d 892 (arbitration agreement as a whole was fair; offending provision severed).

On federal law, see, e.g., *Simula, Inc. v Autoliv, Inc.* (9th Cir 1999) 175 F3d 716, 719 (Federal Arbitration Act (9 USC §§1-16) embodies clear policy in favor of arbitration; any doubts concerning scope of arbitrable issues should be resolved in favor of arbitration). See also *Green Tree Fin. Corp.-Alabama v Randolph* (2000) 531 US 79, 148 L Ed 2d 373, 121 S Ct 513 (absence of terms allocating fees and costs in contractual arbitration provision did not render agreement unenforceable; party alleging that cost of arbitration would be prohibitively expensive bears burden of showing the likelihood of incurring such costs).

Obtaining client's initials. Depending on factors such as the sophistication of the client, counsel may want to

include space for the client to initial the paragraph to indicate that he or she understands that by agreeing to mandatory arbitration, the client gives up the right to trial by jury or judge and to appeal.

Judicial reference. Although it has been held that predispute waivers of the right to a jury trial are unenforceable unless they comply with CCP §631, this holding does not apply to arbitration. *Grafton Partners, LP v Superior Court* (2005) 36 C4th 944, 32 CR3d 5. If attorney and client do not want to agree to arbitrate possible disputes, but do want to avoid a jury trial, they might consider agreeing to a judicial reference under CCP §§638, 640. See 27 CEB Civ Litigation Rep 190 (Oct 2005).

§1.49 4. Form: Agreement to Arbitrate All Disputes (Including Fee and Malpractice Disputes)

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1.49-1 Agreement to arbitrate all disputes (including fee and malpractice disputes)

Except to the extent that a dispute between the Attorney and Client about attorney fees or costs may be subject to the provisions of Business and Professions Code §§6200-6206, Attorney and Client agree to submit to binding arbitration, under the rules of the __[specify name of arbitration provider]__, all disputes arising between Attorney and Client about attorney fees or costs under this agreement, or about this agreement itself, or about any other claim (including a claim of attorney malpractice) relating to Client's legal matter which arises out of Attorney's legal representation of Client.

Client understands and acknowledges that, by agreeing to binding arbitration, __[he/she]__ waives the right to submit the dispute for determination by a court and thereby also waives the right to a jury or court trial.

The prevailing party shall be entitled to reasonable attorney fees and costs incurred in enforcing any arbitration award or engaging in any court proceedings.

Comment: An attorney must comply with the Mandatory Fee Arbitration Act (MFAA) (Bus & P C §§6200-6206) provisions on fee disputes even if attorney and client have executed an agreement to arbitrate all claims. For discussion of MFAA, see §§1.46-1.47. At least under certain circumstances, however, a predispute agreement between attorney and client to arbitrate all claims, including disputes over attorney fees and costs, is enforceable. Although it has been held that predispute waivers of the right to a jury trial are unenforceable unless they comply with CCP §631, this holding does not apply to arbitration. *Grafton Partners, LP v Superior Court* (2005) 36 C4th 944, 32 CR3d 5.

On enforceability of agreements to arbitrate malpractice disputes in particular, see §1.48.

Enforceability of predispute agreement to arbitrate fee disputes. Although the client retains the option to invoke MFAA arbitration regardless of any predispute arbitration agreement between the parties, if the client chooses not to proceed under the MFAA, then the attorney may be able to enforce the arbitration agreement against the client. See *Aguilar v Lerner* (2004) 32 C4th 974, 989, 12 CR3d 287; *Ervin, Cohen & Jessup, LLP v Kassel* (2007) 147 CA4th 821, 826, 54 CR3d 685 (because client failed to invoke statutory rights to nonbinding arbitration under MFAA, client was obligated by retainer agreement to submit fee dispute to binding arbitration before American Arbitration Association).

In *Aguilar*, the attorney and client agreed to submit to binding arbitration under the California Arbitration Act (CAA) (CCP §§1280-1294.2) any dispute that might arise between them about fees, the agreement, or any other claim relating to the client's legal matter and arising out of the representation. When the client sued the attorney for malpractice, the attorney petitioned to compel arbitration and included in the petition a claim for unpaid attorney fees. The California Supreme Court held that filing a malpractice suit against the attorney did not judicially estop the client from attempting to rely on the MFAA as an alternative to the arbitration clause, but did waive all the rights he might have asserted under the MFAA. The court observed that if a client chooses to arbitrate under the MFAA, the client has a right to do so whether or not the client has also signed an arbitration agreement. If, however, a client does not invoke his or her rights under the MFAA, those rights are waived entirely, and any preexisting arbitration agreement is enforceable, with no residual MFAA protections standing as an obstacle. 32 C4th at 989. Because the client waived the MFAA provisions, the binding arbitration agreement was enforceable as to both the malpractice and attorney fee claims.

In his concurrence, Justice Chin (joined by Justices Brown and Baxter) concluded that the MFAA and the CAA create two types of arbitration and both may be given effect. The client may always choose nonbinding fee arbitration under the MFAA and, if that arbitration does not resolve the dispute, then the parties may resolve it by arbitration under their predispute arbitration agreement (not necessarily by trial de novo). 32 C4th at 992.

Aguilar thus left undecided the issue of "whether or to what extent an arbitration agreement is enforceable if a client properly invokes the right to arbitrate under the MFAA but subsequently exercises his statutory right to reject the

arbitrator's decision and have a trial de novo." 32 C4th at 989 n6. This issue was addressed by the supreme court in *Schatz v Allen Matkins Leck Gamble & Mallory, LLP* (2009) 45 C4th 557, 571, 87 CR3d 700, which held that the MFAA does not limit the ability of attorneys and clients to enter into binding contractual arbitration. The supreme court made it clear that the 1996 amendment to Bus & P C §6204(a), which permitted the parties to agree in writing to be bound by an arbitration award "at any time after the dispute over fees, costs, or both, has arisen," allows binding arbitration under a preexisting agreement to proceed once the MFAA arbitration process is over. The court explained that, if the client does not request nonbinding arbitration, or if it is held but does not resolve the dispute, then the MFAA "has played its role" and the matter may proceed by either party seeking judicial action or, if the parties had agreed to it, the dispute would go to binding arbitration. 45 C4th at 574. See *Ervin, Cohen & Jessup, LLP v Kassel* (2007) 147 CA4th 821, 828, 54 CR3d 685 (court held that amendment to §6204 did not invalidate predispute binding arbitration provision in retainer agreement, because §6204(a) applies only to predispute agreements to be bound by award of arbitrators appointed under MFAA).

Enforceability of predispute agreement to arbitrate malpractice disputes. Predispute agreements to arbitrate malpractice claims are enforceable. See §1.48.

Obtaining client's initials. Depending on factors such as the sophistication of the client, counsel may want to include space for the client to initial the paragraph to indicate that he or she understands that by agreeing to mandatory arbitration, the client gives up the right to trial by jury or judge and to appeal.

Judicial reference. See §1.48.

§1.50 5. Form: Agreement to Mediate Dispute

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1.50-1 Agreement to mediate dispute

If a dispute arises between Attorney and Client regarding an issue arising out of this agreement, except to the extent that a dispute between the Attorney and Client about attorney fees or costs may be subject to the provisions of Business and Professions Code §§6200-6206, then the dispute will be submitted to mediation before the dispute is arbitrated or taken to court. If either Attorney or Client commences an arbitration or court action without first attempting to resolve the issue through mediation, or refuses to mediate after a request has been made, then that party will not be entitled to recover any attorney fees or costs, even if they would otherwise be available under this agreement.

Comment: If a mediation clause is included in an agreement with a provision for attorney fees and costs, the attorney fees and costs provision should be modified to include a phrase referring to the mediation clause, e.g., "Except as provided in the agreement to mediate dispute, the prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded reasonable attorney fees and costs incurred in that action or proceeding or in efforts to negotiate the matter." For a case upholding the use of a mediation agreement in a real estate purchase agreement, see *Frei v Davey* (2004) 124 CA4th 1506, 22 CR3d 429. See also CCP §§1775-1775.15.

Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.51
Z. Form: Attorney Fees and Costs in Action on Agreement

§1.51 Z. Form: Attorney Fees and Costs in Action on Agreement

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1.51-1 Attorney fees and costs in action on agreement

The prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded reasonable attorney fees and costs incurred in that action or proceeding or in efforts to negotiate the matter.

Comment: On the award of attorney fees and costs under a specific contract provision in an action on the contract, see CC §1717. See also California Attorney Fee Awards, chap 6 (2d ed Cal CEB 1994). A party cannot recover contractual attorney fees under §1717 when the action is voluntarily dismissed. CCP §1717(b)(2); *Ford Motor Credit Co. v Hunsberger* (2008) 163 CA4th 1526, 1531, 78 CR3d 661. On the modification of this provision when the agreement contains a mediation agreement, see §1.50.

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Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/
§1.51A AA. Form: Professional Liability Insurance Disclosure

§1.51A AA. Form: Professional Liability Insurance Disclosure

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1.51A-1 Disclosure of lack of professional liability insurance

[Choose preferred alternative]

[Alternative 1: No professional liability insurance at time of engagement or reengagement]

Pursuant to California Rules of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance.

Comment: This provision should be included in a written fee agreement if attorneys do not maintain professional liability insurance whenever it is reasonably foreseeable that the total amount of time the attorney will spend on the matter will exceed 4 hours. Cal Rules of Prof Cond 3-410(A) (operative January 1, 2010). Exemptions are available for government attorneys and in-house counsel. Cal Rules of Prof Cond 3-410(C) (operative January 1, 2010). Effective January 1, 2010, uninsured lawyers are required to disclose the absence of professional liability insurance to their clients in writing at the time of their engagement. Cal Rules of Prof Cond 3-410 (operative January 1, 2010). The rule was approved by the California Supreme Court. See

<http://bog.calbar.org/docs/agendaitem/Public/agendaitem1000002907.pdf>. On development of the proposed rule, see <http://bog.calbar.org/docs/agendaitem/Public/agendaitem1000002173.pdf>.

[Alternative 2: Professional liability insurance no longer maintained during representation]

Pursuant to California Rules of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance.

Comment: This provision should be included in a written disclosure to the client within 30 days after the attorney no longer has professional liability insurance. Cal Rules of Prof Cond 3-410(B) (operative January 1, 2010). Effective January 1, 2010, uninsured lawyers are required to disclose the absence of professional liability insurance to their clients in writing at the time of their engagement. Cal Rules of Prof Cond 3-410 (operative January 1, 2010).

Source: General Interest/Fee Agreement Forms Manual/1 Fee Agreement--Sample Provisions and Commentary/§1.52
BB. Form: Governing Law

§1.52 BB. Form: Governing Law

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1.52-1 Governing law

This agreement is governed by, and must be interpreted under, California law, and any court proceedings relating to this agreement must be instituted in the County of _ _[specify county name]_ _.

Comment: This provision may be appropriate if the client is not in California at the time the fee agreement is entered into or if for some other reason a question may arise as to the governing law. If a dispute should arise between attorney and client, it can be useful for the parties to have agreed in advance that California law will apply.

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§1.53 CC. Form: Effective Date of Agreement

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1.53-1 Effective date of agreement

The effective date of this agreement will be _ _ [e.g., the date on which it is executed by the _ _ [e.g., second/last] _ _ of the parties to do so/the date on which Attorney is in receipt of one copy of the agreement executed by Client and the initial deposit required by Paragraph _ _ of this agreement/the date on which Attorney is in receipt of one copy of the agreement executed by Client and payment of attorney fees required under the terms of this agreement] _ _.

[If appropriate, add]

provided the executed copy _ _ [and the deposit/payment] _ _ _ [is/are] _ _ **received on or before** _ _ [date] _ _ **or Attorney accepts late receipt.**

[Continue]

The attorney-client relationship will commence on the effective date of this agreement. Attorney will not become Client's attorney nor will Attorney perform any legal services on behalf of Client before the effective date of this agreement.

*Comment: **Spell out agreement's effective date.*** Every contract for legal services should contain a clause specifying the date the agreement will become effective. This date establishes the beginning of the attorney-client relationship and marks the beginning of the attorney's fiduciary duties toward the client.

What the agreement's effective date is and how it is determined are unimportant, as long as the agreement clearly spells it out. Some attorneys like to have a fee agreement ready to sign at the first meeting with a prospective client. In this situation, the attorney may want to provide that the agreement will take effect on execution. Other attorneys draft the agreement after the initial meeting and send it to the client to be executed and returned. The agreement may provide that it will become effective when the attorney receives the executed agreement. Many attorneys make the initiation of the attorney-client relationship contingent on receipt of an agreed-on initial deposit for attorney fees. Whenever the effective date of an engagement is dependent on action by the prospective client, it is a good idea to set a deadline for receipt of the agreement and payment, after which the attorney is no longer obligated to accept the employment.

Avoid inadvertent establishment of attorney-client relationship. Attorneys should avoid performing services, giving legal advice, or promising specific actions before a written fee agreement takes effect. The attorney-client relationship is generally established by contract, but the contract can be formal or informal, express or implied. See *Fox v Pollack* (1986) 181 CA3d 954, 959, 226 CR 532. It is possible to create an attorney-client relationship without intending to. See California State Bar Formal Opinion No. 2003-161. For examples of inadvertently created attorney-client relationships, see *Miller v Metzinger* (1979) 91 CA3d 31, 39, 154 CR 22. For a sample nonengagement letter, see §16.3.

Services performed before agreement's effective date. Attorneys sometimes attempt to divorce the provision of legal services from the commencement of the attorney-client relationship by including a provision in their fee agreements that the attorney will be compensated under the agreement for services performed before its effective date. In a dispute between attorney and client, it is unclear that such a provision would have the intended effect; the provision might be viewed as an attempt by the attorney to obtain compensation without assuming fiduciary responsibilities. It seems more likely that such services would be ordered paid for at their reasonable value. For an example of such a clause, see App A.

An attorney who wants to do some preliminary investigation before deciding whether to accept a representation

should make certain the client understands the limited nature of the undertaking, preferably obtaining the client's consent in writing before looking into the matter. If the client's matter is one that requires the attorney's instant attention, the attorney should consider having attorney and client sign the fee agreement at the initial meeting and provide in the agreement that it will be effective immediately.

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§1.54 DD. Form: Signatures and Dates

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1.54-1 Signatures and dates

The foregoing is agreed to by:

[Add one of the following alternatives]

[Alternative 1: If only one client]

Date: _ _ _ _ _
_ _ *[Signature]* _ _
_ _ *[Typed name]* _ _
Client

Date: _ _ _ _ _
_ _ *[Signature]* _ _
_ _ *[Typed name]* _ _
Attorney for _ _ *[name]* _ _

[Alternative 2: If more than one client]

Date: _ _ _ _ _
_ _ *[Signature]* _ _
_ _ *[Typed name]* _ _
Client

Date: _ _ _ _ _
_ _ *[Signature]* _ _
_ _ *[Typed name]* _ _
Client

Date: _ _ _ _ _
_ _ *[Signature]* _ _
_ _ *[Typed name]* _ _
Attorney for _ _ *[names]* _ _

Comment: The attorney should make every reasonable effort to have the client execute the agreement because an executed agreement is expressly required by Bus & P C §§6147-6148 for agreements governed by those sections, and will facilitate enforcement if necessary.

2

Business Law—Sample Fee Agreements and Conflicts Letter

I. Scope of Chapter §2.1

II. FORM: SAMPLE FEE AGREEMENT FOR CORPORATE LEGAL SERVICES §2.2

III. FORM: SAMPLE FEE AGREEMENT FOR FORMING A CALIFORNIA LIMITED LIABILITY CORPORATION §2.3

IV. FORM: SAMPLE FEE AGREEMENT FOR FORMING A CALIFORNIA CORPORATION §2.4

V. FORM: SAMPLE CONFLICTS LETTER AND WRITTEN CONSENT §2.5

§2.1 I. Scope of Chapter

This chapter presents sample fee agreements that may be used in a business law engagement:

- A sample letter-style hourly fee agreement (see §2.2);
- A sample hourly fee agreement for forming a California limited liability corporation (see §2.3);
- A sample hourly fee agreement for forming a California corporation (see §2.4); and
- A sample conflicts letter and written consent (see §2.5).

The sample agreements in this chapter are illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. For discussion of practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§2.2 II. FORM: SAMPLE FEE AGREEMENT FOR CORPORATE LEGAL SERVICES

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2.2-1 Sample fee agreement for corporate legal services

[Law firm letterhead]

__ [Date] __

__ [Name and address of __ [sole client/first party of multiple clients] __] __

__ [Name and address of second party of multiple clients] __

Dear __ [name of client(s)] __:

As we have discussed, I have prepared this letter to set out the details of our relationship, our agreement for the legal services to be provided, and the fees and costs relating to such services. If this letter accurately describes the services we are to perform for you and the terms for payment of the resulting legal fees and expenses that you will incur, then please countersign one of the duplicate originals of this letter and return it to us. This agreement will not take effect, and we will have no obligation to provide legal services, until you return a fully executed copy of this agreement to us.

You have asked us to provide legal services on your behalf. The legal services to be provided by us consist of our representing you in __ [describe scope of legal services to be rendered, e.g., organization of a new entity for your proposed business venture, to be known as __ [name of proposed entity] __ (the Company)] __. These services include analysis and consultation to confirm the appropriateness of the company form for your business and to determine the structure of the Company. The services also include preparation of organization documents and related documents as well as preparation and filing of any documents or notices necessary to comply with federal or state securities laws and regulations applicable to the entity mutually decided on. Unless otherwise mutually agreed in writing, our services do not include advising on or obtaining business licenses, permits, bonds, or insurance; reviewing proposed leases, employment agreements, sales agreements, or other transactional documents; or drafting buy-sell agreements for the Company's owners.

If you wish that we provide any legal services not covered by this agreement, a separate written agreement between you and us may be required. Any such additional services will be provided on the terms and at the hourly rates described in this agreement unless covered by a separate written agreement.

We will perform the legal services called for under this agreement, keep you informed of progress and developments, and respond promptly to your inquiries and communications. You will cooperate with us to the extent necessary to complete the services described in this letter; keep us reasonably informed of developments, changes in your legal status, and your address, telephone numbers, and whereabouts; and timely make any payments required by this agreement.

DESIGNATION OF AUTHORIZED REPRESENTATIVE. You designate __ [name] __ as your authorized representative to direct us and be the primary person to communicate with us and bind you with respect to the services we will be rendering under the terms of this agreement. This designation is intended to establish a clear line of authority and minimize potential uncertainty, but not to preclude any communication between us and you under the terms of this agreement.

ATTORNEY FEES. You will pay us attorney fees for the legal services provided under this agreement at the respective hourly rates of the individuals providing the services. The rates fall within the following ranges: __ [dollar amount] __ to __ [dollar amount] __ per hour for partners; __ [dollar amount] __ to __ [dollar amount] __ per hour for associates; __ [dollar amount] __ to __ [dollar amount] __ per hour for law clerks; and __ [dollar amount] __ to __ [dollar amount] __ per hour for paralegals. We will charge in increments of __ [specify unit, e.g., one-tenth of an hour] __, rounded off for each particular activity to the nearest __ [specify unit, e.g., one-tenth of an hour] __. The minimum time charged for any particular activity will be __ [specify unit, e.g., one-tenth of an hour] __.

We will charge for all activities undertaken in providing legal services to you under this agreement including, but not limited to, the following: conferences (including preparation and participation), review and preparation of correspondence and legal documents, legal research, and telephone conversations. When two or

more of our firm's personnel are engaged in working on the matter at the same time, such as in conferences between them or with you, the time of each will be charged.

If, while this agreement is in effect, we increase the hourly rates being charged to clients generally for attorney fees, that increase may be applied to fees incurred under this agreement but only with respect to services provided 30 days or more after written notice of the increase is mailed to you. If you choose not to consent to the increased rates, you may terminate our services under this agreement by written notice effective when received by us.

COSTS. In addition to paying fees for legal services under this agreement, you will reimburse us for all costs we incur on your behalf in rendering such services. These costs include, but are not limited to, the following: all postage, telephone tolls, photocopying costs (at _ *[dollar amount]* _ per page for in-house copying and invoice cost for outside vendor copying charges), word-processing charges (at _ *[dollar amount]* _ per hour), express delivery charges, travel expenses, filing fees, and other similar costs.

ESTIMATED FEES AND COSTS. We estimate that the total amount of fees and costs for the services described in this letter will be approximately _ *[dollar amount]* _ if the organization is structured generally in the manner discussed in our meeting of _ *[date]* _. You understand that the amount of such fees may vary significantly from the estimate in the event of material changes to the transaction as it is currently proposed or as a result of unforeseen circumstances or developments. We will endeavor to keep you apprised if we anticipate any significant changes to such estimated fees during the course of the engagement, but we may not always be able to predict the timing or magnitude of such changes. Nevertheless, you acknowledge that we have not agreed to any maximum fee or any other promise about the total amount of legal fees and costs to be incurred by you under this agreement.

PAYMENT OF FEES AND COSTS. You will pay to us an initial deposit of _ *[dollar amount]* _, to be received by us before commencement of our engagement for legal services. This amount will be deposited by us in a trust account as an advance against fees and costs to be incurred. You authorize us to withdraw the principal from the trust account to pay attorney fees and costs as they are incurred by you. If, at the termination of services under this agreement, the total amount incurred by you for attorney fees and costs is less than the amount of the initial deposit, then the difference will be refunded to you. Whenever the full amount of any deposit has been applied to attorney fees or costs incurred by you, we may, at our option, request that you pay to us an additional deposit in an amount to be determined in our reasonable discretion. Deposit of such additional amounts will be made in the same manner as the initial deposit.

We will send monthly statements to you indicating attorney fees and costs incurred and their basis, any amounts applied from client trust account deposits, and any current balance owed. You will pay any balance in full within 30 days after the statement is mailed. Any balance remaining unpaid after 30 days will bear interest at the rate of _ *[number]* _ percent per annum but in no event higher than the maximum interest permitted by law.

ARBITRATION. If there is any disagreement between the parties to this agreement concerning fees, this agreement, or any other claim, including a claim of attorney malpractice, relating to your legal matter that arises out of your legal representation, then you agree to submit that dispute to binding arbitration under the rules of the _ *[name of arbitration provider]* _. The prevailing party will be entitled to reasonable attorney fees and costs incurred in enforcing any arbitration award or engaging in any court proceedings.

If any dispute arises between the parties to this agreement regarding allegations of attorney malpractice, the parties agree that the dispute will be resolved by arbitration in accordance with Code of Civil Procedure §§1280-1294.2. The matter will be arbitrated in _ *[city]* _, California, and will be decided by three arbitrators appointed as set forth below:

(1) Within _ *[number, e.g., 30]* _ days after notice by either party to the other requesting arbitration and stating the basis of the party's claim, one arbitrator will be appointed by each party. Notice of the appointment will be given by each party to the other when made. If the other party fails to designate an arbitrator within the agreed time, the arbitrator appointed by the first party shall serve as sole arbitrator.

(2) When each party has appointed an arbitrator, the two arbitrators will immediately choose a third arbitrator to act with them. If the two arbitrators fail to select a third arbitrator within _ *[number, e.g., 10]* _ days after the second arbitrator is appointed, at the request of either party, the additional arbitrator will be promptly appointed by _ *[e.g., the Superior Court for the County of _ [county] _ , in accordance with Code of Civil Procedure §1281.6/the chair of the local bar association fee arbitration panel/other named individual]* _. The party making the application will give the other party _ *[number, e.g., 10]* _ days' notice of the application.

_ *[Except as otherwise provided in this agreement, "service"/ "Service"]* _ will include personal delivery as provided in Code of Civil Procedure §§413.10-413.40 (governing service of a summons) or the deposit of a

writing in the United States mail in accordance with Code of Civil Procedure §§1010-1013a, except that Code of Civil Procedure §1013 (extending the time for exercising a right or performing an act) will not apply.

All reasonable expenses incurred in the arbitration proceedings or in subsequent court proceedings to enforce the arbitration award, consisting of all fees and costs attributable to the arbitration or enforcement proceedings (including attorney fees, fees of expert witnesses, and arbitrator fees), will be awarded to the prevailing party. If a party either dismisses or abandons its claim or counterclaim before the rendering of an arbitrator's award and after commencement of the arbitration hearing, then the other party will be considered to be the "prevailing party" under this agreement. If both parties receive an award on their respective claims, the party in whose favor the larger award is rendered will be considered to be the "prevailing party" under this agreement.

At any time after the initiation of proceedings under the arbitration provisions of this agreement and not less than 30 days before the date set for commencement of the hearing, any party may serve a written offer on any other party to allow an award to be entered in accordance with the terms and conditions stated in the written offer. If the offer is accepted, the offer (together with the written acceptance of the offer) will be submitted to the arbitrator and an award will be entered in the same manner and with the same effect as if the award had been rendered after a full hearing before the arbitrator. If no written acceptance of the offer is served within 15 days before the date set for the commencement of the hearing or within 20 days after the offer is mailed (whichever occurs first), the offer will be considered to have been withdrawn and cannot be given in evidence at the arbitration hearing. If the party receiving the written offer fails to obtain a larger monetary or more beneficial arbitration award than that contained in the offer, the party to whom the offer was made must pay to the offering party the offering party's fees and costs (including attorney fees, fees of expert witnesses, and arbitrator fees). The offering party's fees and costs must be included in the arbitration award except to the extent that the arbitrator determines, based on clear and convincing evidence, that such fees and costs are unconscionable.

CONSENT TO ARBITRATION

NOTICE: BY INITIALING IN THE SPACE BELOW, YOU ARE AGREEING TO HAVE ANY MALPRACTICE CLAIM ARISING FROM ANY AND ALL MATTERS RELATING TO THE LEGAL SERVICES RENDERED DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW, AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW, YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL UNLESS SUCH RIGHTS ARE SPECIFICALLY INCLUDED ABOVE. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

We have read and understand the foregoing and agree to submit disputes arising from the matters included in this paragraph to neutral arbitration.

CLIENT: ATTORNEY:

Initial _____ Initial _____

DOCUMENT RETENTION. It is our policy to retain and ultimately destroy all files, documents, records, and writings related to each engagement for which we have been retained without notifying clients or former clients of the destruction of these items. Therefore, to be certain that we have not retained any material that you may need or desire, we will return to you all original documents you made available to us (together with copies of any other files, documents, records, and writings relating to this engagement) if you instruct us in writing within 90 days after our mailing to you of our letter informing you that we have completed our services within the terms of this agreement.

TAX ADVICE. Our firm has not been retained to provide you with any tax advice concerning this matter. Therefore, you should consult with your tax advisers about this matter and have them contact us so that we can coordinate our services with theirs consistent with your stated objectives.

WITHDRAWAL AND TERMINATION. Our firm reserves the right to withdraw from representing you if you fail to follow the terms of this agreement, you have misrepresented or failed to disclose material facts to the firm, or you choose not to follow our advice. If we are required to file a motion to withdraw as your attorneys, you have agreed that any of the above will constitute good cause for withdrawal. Good cause for withdrawal will also be any circumstance that would render our continuing representation unlawful or unethical. You retain the right to terminate this firm as your attorney at any time, in which case we ask to be advised of your decision in writing. On our termination, you will be responsible for the balance due us for costs and services rendered to the time of termination.

CONFLICTS OF INTEREST

[Add one of the following alternatives]

[Alternative 1: Individual client]

As we have discussed with you, we do not believe, based on the information you have provided us, that our representation of you and the entity created by formation of the Company currently involves any objectionable conflicts of interest. You should be aware, however, that your individual interests and objectives on certain issues may become inconsistent with the interests and objectives of the Company.

[Alternative 2: Multiple clients]

As we have discussed with you, we do not believe, based on the information you have provided us, that our representation of the multiple _ *[e.g., owners of the Company]* _ and the entity created by formation of the Company currently involves any objectionable conflicts of interest. You should be aware, however, that your individual interests and objectives on certain issues may become inconsistent with the interests and objectives of the other _ *[e.g., owners of the Company]* _ and the entity itself.

[Continue]

Our representation of multiple interests has significant implications that you should consider. For example, rather than our vigorously asserting a single client's interest on an issue, there likely will be a balancing of interests. Because parties to a new business venture have different talents, energy, and financial acumen, aggressive advocacy for a party could result in more favorable treatment for that party as compared with the more even-handed approach we would follow in representing multiple interests.

[Explain general conflicts that may arise, such as the following]

Participants' interests and objectives in the organization, financing, and management of the Company may differ with respect to their capital investments, liquidity needs, control objectives, allocations of profits and losses, individual tax postures, or other factors. In the formation of any company, an inherent conflict exists between the interests of members who will be active managers and the interests of those who will be passive investors in the business. Those who actively manage the Company may seek to receive compensation based on a share of profits and may also receive separate salaries or fees for specific services. Those who have no active role in management typically depend solely on their share of the profits for a return on their investment. Accordingly, diverging interests among the members and other participants in the venture may arise at any point in the formation and operation of the Company. In particular, the participants in the venture have the following inherent conflicts of interests: _ *[Specify particular conflicts arising in connection with organization of company]* _.

Our multiple representation will also result in the loss of the attorney-client privilege for communications between each of you and members of our firm. Thus, any communication relating to this engagement received by our firm from any party to this agreement will not be kept confidential from the others. Otherwise, the communicating party could force the attorney to withdraw from representing all the parties. For example, this situation may arise if the communicating party admits to fraudulent activities involving the Company.

Further, in the event of a dispute among the Company members, partners, shareholders, and other participants, we may be precluded from further representing the Company or any individual party without first obtaining the consent of all concerned. In addition, any consenting party may withdraw his, her, or its consent to our multiple representation at any time, in which event we would be required to discontinue our representation of all parties to this agreement.

For these reasons, our normal practice is to represent only one party. You have advised us, however, that none of you currently wishes to seek other counsel and instead that you wish that we represent your multiple interests in the formation of the entity. As attorneys, we are governed by specific rules relating to our representation of clients when present or potential conflicts of interest exist. Some of these rules are described below:

(1) We may not accept or continue representation of a client without providing written disclosure to the client if we have a legal, business, financial, professional, or personal relationship with another party in the same matter or if we previously had such a relationship that would substantially affect our representation.

(2) We may not accept or continue representation of a client without providing written disclosure to the client if we have or had a legal, business, financial, professional, or personal relationship with another person or entity we know or reasonably should know would be substantially affected by resolution of the matter.

(3) We may not accept or continue representation of a client without providing written disclosure to the

client if we have or had a legal, business, financial, professional, or personal interest in the subject matter of the representation.

(4) We may not, without the informed written consent of each client, (a) accept representation of more than one client in a matter in which the interests of the clients potentially conflict; (b) accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or (c) represent a client in a matter and, at the same time in a separate matter, accept as a client a person or entity whose interest in the first matter is adverse to the client in the second matter.

(5) We may not, without the informed written consent of a client or former client, accept employment adverse to a client or former client if, by reason of the representation of the client or former client, we have obtained confidential information material to the employment.

In representing an organization, certain special rules apply:

(1) We must conform our representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(2) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, we must explain the identity of the client for whom we act whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent or constituents with whom we are dealing.

(3) We must not mislead a constituent into believing that it may communicate information to us in a way that will keep the information confidential from the organization or other constituents being represented by the firm.

ACKNOWLEDGMENT AND CONSENT REGARDING MULTIPLE PARTY REPRESENTATION. In order to comply with these rules that are designed to protect the separate interests of participants in the Company, we request that each of you sign and return to us a copy of this letter acknowledging that:

(1) You have been advised of the conflicts associated with your respective interests and of your right to obtain independent legal counsel regarding these conflicts;

(2) You have had an opportunity to obtain independent counsel regarding this consent; and

(3) You, nevertheless, want us to represent you in connection with the matters discussed above.

Request for Authorization of Representative. On formation of the Company, we will be representing the entity rather than each of you individually. Therefore, we will look to the __ [partners/directors/managers/members] __ of the Company for our instructions regarding both the legal services to be performed for the Company and the resolution of any issues that may arise in the course of such services. For the convenience of all involved, we suggest that the __ [partners/directors/managers/members] __ authorize one or more of you to represent and act for the Company in communicating instructions to us.

Permission to Seek Independent Counsel. We want to stress that each of you remains completely free to seek independent counsel at any time even if you decide to sign the consent set forth below. We strongly urge you to do so if you have any questions concerning your individual interests. Should you have any questions concerning this letter or the consent, please discuss them with us, or seek the advice of independent counsel, before signing and returning the enclosed copy of this letter.

COMMENCEMENT OF LEGAL SERVICES. On receipt of the above fees and costs deposit and an executed duplicate original copy of this agreement, we will commence rendering the legal services outlined above. We look forward to working with you on your new business venture.

Sincerely yours,

__ [Name of firm] __

By: __ [Signature] __

__ [Typed name] __

Attorney for __ [name] __

CONSENT

[Add one of the following alternatives]

[Alternative 1: Individual client]

The undersigned has read the foregoing terms for the provision of legal services by __ *[name of law firm]* __ and agrees to these terms and conditions.

Date: _____ __ *[Signature of client]* __
 __ *[Typed name]* __
 __ *[Capacity]* __

[Alternative 2: Multiple clients]

__ *[Name of attorney]* __ of __ *[name of law firm]* __ (Law Firm) has explained to each of the undersigned the present and future conflicting interests in the formation of __ *[name of proposed business entity]* __ (Company) and has informed each of us of the possible consequences of these conflicts and the fact that there is no attorney-client privilege protecting confidential communications between the Law Firm, the Company, and all the undersigned.

We acknowledge and understand that, on the formation of the Company, the Law Firm will represent the Company and will not represent the individual interests of any of us. We understand that we have the right, and acknowledge that we have had the opportunity, to seek independent counsel before signing this consent. We also understand that we have the right to seek independent counsel at any time in the future. Each of the undersigned nevertheless desires and consents to representation by the Law Firm to the extent described above.

Date: _____ __ *[Signature of first party]* __
 __ *[Typed name]* __
 __ *[Capacity]* __

Date: _____ __ *[Signature of second party]* __
 __ *[Typed name]* __
 __ *[Capacity]* __

Source: Selecting and Forming Business Entities §§1.27-1.42 (2d ed Cal CEB 2007).

Comment: On arbitration clauses, see discussion in §§1.46-1.49; Bus Entities §1.19. On malpractice claims and mandatory fee arbitration, see §§1.46-1.47; Bus Entities §1.19. On arbitration of claims other than fee disputes, see §§1.48-1.49. On retaining client files, see §1.41. On the problems of conflicts and representing multiple clients, see §§1.34-1.35.

Tax attorneys. Attorneys who practice before the IRS may want to include a clause advising the client that absent a separate written agreement, the representation does not include covered opinions; see IRS Circular 230 discussion in §1.21.

§2.3 III. FORM: SAMPLE FEE AGREEMENT FOR FORMING A CALIFORNIA LIMITED LIABILITY CORPORATION

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2.3-1 Sample fee agreement for forming a California limited liability corporation

[Law firm letterhead]

__ [Date] __

__ [Name and address of __ [sole client/first party of multiple clients] __] __

__ [Name and address of second party of multiple clients] __

Re: Fee Agreement for Legal Services

Dear __ [name of client(s)] __:

As we have discussed, this letter sets out the details of our relationship and our agreement for the legal services to be provided and the fees and costs relating to such services. If this letter accurately describes the services we are to perform for you and the terms for payment of the resulting legal fees and expenses that you will incur, please countersign one of the duplicate originals of this letter and return it to us.

You have asked us, __ [name of law firm] __ (Law Firm), to provide legal services on behalf of __ [name of client] __ (Client). The legal services to be provided by Law Firm to Client are to consist of representation of Client in forming a California limited liability company. These services include analysis and consultation to confirm the appropriateness of the limited liability company form for Client's business and to determine the structure of the company. The services also include preparation of articles of organization, preparation of an operating agreement, and preparation and filing of any documents or notices necessary to comply with federal or state securities laws and regulations applicable to the issuance of membership interests. It does not include advising on or obtaining business licenses, or permits; reviewing proposed leases, employment agreements, sales agreements, or other transactional documents; or drafting member buy-sell agreements.

Law Firm will perform the legal services called for under this agreement, and any other matters in which this firm may represent you. Law Firm will keep Client informed of progress and developments, and respond promptly to Client's inquiries and communications. Client will cooperate with Law Firm to the extent necessary to complete the services described in this letter; keep Law Firm reasonably informed of developments and of Client's address, telephone numbers, and whereabouts; and timely make any payments required by this agreement.

Client will pay Law Firm attorney fees for the legal services provided under this agreement at the respective hourly rates of the individuals providing the services. The rates fall within the following ranges: __ [dollar amount] __ to __ [dollar amount] __ per hour for partners; __ [dollar amount] __ to __ [dollar amount] __ per hour for associates; __ [dollar amount] __ to __ [dollar amount] __ per hour for law clerks; and __ [dollar amount] __ to __ [dollar amount] __ per hour for paralegals. Law Firm will charge in increments of one-tenth of an hour, rounded up for each particular activity to the nearest one-tenth of an hour. The minimum time charged for any particular activity will be __ [specify unit, e.g., one-tenth of an hour] __.

Law Firm will charge for all activities undertaken in providing legal services to Client under this agreement including, but not limited to, the following: conferences (including preparation and participation), review and preparation of correspondence and legal documents, legal research, and telephone conversations. When two or more of Law Firm's personnel are engaged in working on the matter at the same time, such as in conferences between them or with Client, the time of each will be charged.

If, while this agreement is in effect, Law Firm increases the hourly rates being charged to clients generally for attorney fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided 15 days or more after written notice of the increase is mailed to Client. If Client chooses not to consent to the increased rates, Client may terminate Law Firm's services under this agreement by written notice effective when received by Law Firm.

In addition to paying fees for legal services under this agreement, Client will reimburse Law Firm for all

costs incurred by Law Firm on Client's behalf in rendering such services. These costs include, but are not limited to, the following: all postage, telephone tolls, photocopying costs (at __[dollar amount]__ per page for in-house copying and invoice cost for outside vendor copying charges), word processing charges (at __[dollar amount]__ per hour), express delivery charges, travel expenses, filing fees, and other similar costs.

Law Firm estimates that the total amount of fees and costs for the services described in this letter will be approximately __[dollar amount]__ if the organization is structured generally in the manner discussed in our meeting of __[date]__. Client understands that the amount of such fees may vary significantly from the estimate in the event of material changes to the transaction as it is currently proposed, or as a result of unforeseen circumstances or developments. Law Firm will endeavor to keep Client apprised in the event it anticipates any significant changes to such estimated fees during the course of the engagement, but it is understood that Law Firm may not always be able to predict the timing or magnitude of such changes. Nevertheless, Client acknowledges that Law Firm has not agreed to any maximum fee or any other promise about the total amount of legal fees and costs to be incurred by Client under this agreement.

Client will pay to Law Firm an initial deposit of __[dollar amount]__, to be received by Law Firm on or before __[date]__. This amount will be deposited by Law Firm in a trust account as an advance against fees and costs to be incurred. Client authorizes Law Firm to withdraw funds from the trust account to pay attorney fees and costs as they are incurred by Client. If, at the termination of services under this agreement, the total amount incurred by Client for attorney fees is less than the amount of the initial deposit, the difference will be refunded to Client. Whenever the full amount of any deposit has been applied to attorney fees or costs incurred by Client, Law Firm may, at its option, request client to pay to Law Firm an additional deposit in an amount to be determined in Law Firm's reasonable discretion. Deposit of such additional amounts will be made in the same manner as the initial deposit.

Law Firm will send Client monthly statements indicating attorney fees and costs incurred and their basis, any amounts applied from client trust account deposits, and any current balance owed. Client will pay any balance in full within 30 days after the statement is mailed. Any balance remaining unpaid after 30 days will incur a late payment charge of __[number]__ percent of the outstanding balance.

If a dispute arises between Law Firm and Client regarding attorney fees, and Law Firm files suit in any court other than small claims court, then Client will have the right to stay that suit by timely electing to arbitrate the dispute under Business and Professions Code §§6200-6206, in which event Law Firm must submit the matter to nonbinding arbitration.

We look forward to working with you on your new business venture.

Sincerely yours,

Date: _ _ _ _ _

__[Name of firm]__

By: __[Signature]__

__[Typed name]__

Attorney for __[name]__

CONSENT

The undersigned has read the foregoing terms for the provision of legal services by Law Firm and agrees to such terms and conditions.

Date: _ _ _ _ _

__[Signature of client]__

__[Typed name]__

__[Capacity, if appropriate]__

Source: Forming and Operating California Limited Liability Companies §2.16 (2d ed Cal CEB 2007).

Comment: On mandatory fee arbitration, see §§1.46-1.47. On hourly fee arrangements, see §1.23. On deposits and client trust accounts, see §1.30.

§2.4 IV. FORM: SAMPLE FEE AGREEMENT FOR FORMING A CALIFORNIA CORPORATION

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2.4-1 Sample fee agreement for forming a California corporation

[Law firm letterhead]

__ [Date] __

__ [Name and address of __ [sole client/first party of multiple clients] __] __

__ [Name and address of second party of multiple clients] __

Re: Respective Responsibilities and Fees

Dear __ [name of client(s)] __:

To avoid future confusion, this letter constitutes the written fee agreement that California law requires attorneys to have with their clients. Business and Professions Code §6148 lists the elements that must appear in a fee agreement, and this letter agreement is intended to fulfill the requirements of that section. If this letter accurately describes the services we are to perform for you and the fee that you will pay for those services, please countersign one of the duplicate originals of the letter and return it to me.

1. IDENTIFICATION OF PARTIES. This agreement is made between __ [name of firm] __ (Law Firm) and __ [name of client] __ (Client).

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Law Firm to Client are as follows: representation of Client in forming a California corporation. This includes analysis and consultation to determine the structure of the corporation, including the appropriateness of an Internal Revenue Code S corporation election; preparation of articles of incorporation, bylaws, and minutes of the first meeting of directors;

[Add if appropriate]

preparation and filing of documents necessary to comply with applicable federal or state securities regulations;

[Continue]

and obtaining a corporate minute book, share certificates, and a corporate seal. It does not include advising on or obtaining business licenses, permits, bonds, or insurance; obtaining a federal Employer Identification Number; reviewing proposed leases; or drafting employment agreements, sales agreements, or shareholder buy-sell agreements.

If Client wishes Law Firm to provide any legal services not covered by this agreement, a separate written agreement between Law Firm and Client will be required.

3. RESPONSIBILITIES OF LAW FIRM AND CLIENT. Law Firm will perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries and communications. Client will be truthful and cooperative with Law Firm; keep Law Firm reasonably informed of developments and of Client's address, telephone numbers, and whereabouts; and timely make any payments required by this agreement.

4. ATTORNEY FEES. Client will pay Law Firm for attorney fees for the legal services provided under this agreement at the respective hourly rates of the individuals providing the services. The rates fall within the following ranges: __ [dollar amount] __ to __ [dollar amount] __ per hour for partners, __ [dollar amount] __ to __ [dollar amount] __ per hour for associates, __ [dollar amount] __ to __ [dollar amount] __ per hour for law clerks, and __ [dollar amount] __ to __ [dollar amount] __ per hour for paralegals. Law Firm will charge in increments of one-tenth of an hour, rounded off for each particular activity to the nearest one-tenth of an hour. The minimum time charged for any particular activity will be __ [specify unit, e.g., one-tenth of an hour] __.

Law Firm will charge for all activities undertaken in providing legal services to Client under this agreement

§2.5 V. FORM: SAMPLE CONFLICTS LETTER AND WRITTEN CONSENT

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2.5-1 Sample conflicts letter and written consent

[Law firm letterhead]

__ *[Date]* __

__ *[Name and address of first party]* __

__ *[Name and address of second party]* __

Re: __ *[name of proposed company]* __, a proposed California limited liability company

Dear __ *[names of first and second parties]* __:

You have asked that we serve as counsel in connection with the organization of a new entity for your proposed business venture, a California limited liability company to be known as __ *[name of proposed company]* __ (Company).

As we have discussed, based on the information you have provided to us, we do not believe that our representation of both you and the Company in connection with its formation currently involves any conflicts of interest. However, the interests and objectives of each of you individually on certain issues may, at some time, become inconsistent with the interests and objectives of the Company and the other members of the Company.

The participants in the Company may have different goals with respect to their capital investments, different liquidity needs, and different control objectives. The allocations of profits and losses, and individual tax postures, will also vary. In limited liability companies, an inherent conflict exists between the interests of members who are to be active managers and those who may be passive investors in the business. Members who actively manage the limited liability company business may seek to receive compensation based on a share of profits and may also receive separate salaries or fees for specific services, while passive investors with no active role in management generally depend solely on their share of the profits for a return on their investment. Accordingly, diverging interests among the members and other participants in the venture may arise at any point in the formation and operation of the Company.

[Add if appropriate]

In particular, in connection with the organization of the Company, the participants in the venture have inherent conflicts of interests in that __ *[indicate particular conflicts]* __.

[Continue]

With respect to information that our firm receives from you during the course of our representation of you in this matter, the attorney-client privilege, which normally protects your communications to us from disclosure, will not be applicable among the __ *[number]* __ participants with respect to this matter. Thus, we are permitted to tell one party anything that another party has told us about this matter. The attorney-client privilege will continue to protect your communications to us from disclosure to those whom we are not representing in this matter (unless you otherwise waive the attorney-client privilege).

If there is a dispute among the Company, its members, or other participants, we may be precluded from representing the Company or any individual party without first obtaining the consent of all concerned. In that event, you would be required to hire new counsel. Also, at any time, any consenting party may withdraw its consent to our multiple representation, in which event we would be required to discontinue our representation.

For these reasons, our normal practice in these circumstances is to represent only one party. However, you have advised us that in this matter, neither of you currently wishes to seek other counsel, and instead you desire that we represent your multiple interests in the formation of the Company.

In representing the Company, certain special rules apply. The client is the Company itself, acting through its

manager, and not the individual members or managers. In dealing with the Company's employees, members, or other constituents, we must explain the identity of the client for whom we act whenever it is or becomes apparent that the Company's interests are or may become adverse to those with whom we are dealing.

Accordingly, in order to comply with these rules, we request that each of you sign and return to us a copy of this letter acknowledging that:

1. You have been advised of the conflicts associated with your respective interests and of your right to obtain independent legal counsel regarding these conflicts;
2. You have had an opportunity to obtain independent counsel regarding this consent; and
3. You, nevertheless, want us to represent you in connection with the matters discussed above.

On formation of the Company we will be representing the entity rather than each of you individually, and therefore we will look to the managers of the Company for our instructions regarding both the legal services to be performed for the Company and the resolution of any issues that may arise in the course of such services. For the convenience of all involved, we suggest that the _ [partners/directors/managers/members] _ authorize one or more of you to represent and act for the Company in communicating instructions to us.

We want to stress that each of you remains completely free to seek independent counsel at any time even if you decide to sign the consent set forth below, and we strongly urge you to do so in the event you have any questions concerning your individual interests. Should you have any questions concerning this letter or the consent, please discuss them with us before signing and returning the enclosed copy of this letter.

Sincerely yours,

Date: _ _ _ _ _ _ [Name of firm] _

By: _ [Signature] _
 _ [Typed name] _
Attorney for _ [name] _

CONSENT

_ [Name of law firm] _ (Law Firm) has explained to each of the undersigned that there exist present and future conflicting interests in the formation of _ [name of proposed business entity] _ (Company) and has informed each of us of the possible consequences of these conflicts.

We acknowledge and understand that on the formation of the Company, the Law Firm will represent the Company and will not represent the individual interests of any of us.

We understand that we have the right, and acknowledge that we have had the opportunity, to seek independent counsel before signing this consent and at any time in the future should we wish to do so. Each of the undersigned nevertheless desires representation by the Law Firm to the extent described above, and consents to such representation.

Date: _ _ _ _ _ _ [Signature of first party] _
 _ [Typed name] _
 _ [Capacity] _

Date: _ _ _ _ _ _ [Signature of second party] _
 _ [Typed name] _
 _ [Capacity] _

Source: Forming and Operating California Limited Liability Companies §2.15 (2d ed Cal CEB 2007).

Comment: On the problems of conflicts and representing multiple clients, see §§1.34-1.35.

3

Civil Litigation—Sample Fee Agreement and Consent to Fee Splitting

I. SCOPE OF CHAPTER §3.1

II. FORM: SAMPLE FEE AGREEMENT BASED ON HOURLY RATE FOR CIVIL LITIGATION §3.2

III. FORM: SAMPLE DISCLOSURE AND CONSENT ON FEE SPLITTING §3.3

§3.1 I. SCOPE OF CHAPTER

This chapter presents sample forms designed to illustrate fee agreements for legal representation in a civil litigation matter:

- A sample hourly fee agreement (see §3.2); and
- A sample fee agreement on disclosure and consent on fee splitting (see §3.3).

On contingent fee agreements in general, see §1.26. For sample contingent fee agreements, see §§11.2, 12.2.

The sample agreements in this chapter are illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. For discussion of practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§3.2 II. FORM: SAMPLE FEE AGREEMENT BASED ON HOURLY RATE FOR CIVIL LITIGATION

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3.2-1 Sample fee agreement based on hourly rate for civil litigation

LEGAL SERVICES AGREEMENT

1. IDENTIFICATION OF PARTIES. This agreement, executed in triplicate with each party receiving an executed original, is made between [name] , hereafter referred to as "Law Firm," and [name] , hereafter referred to as "Clients."

This agreement is required by Business and Professions Code §6148 and is intended to fulfill the requirements of that section.

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Law Firm to Clients are as follows: representation of Clients through judgment in [specify name or case and case number, if known] .

3. RESPONSIBILITIES OF LAW FIRM AND CLIENTS. Law Firm will perform the legal services called for under this agreement, keep Clients informed of progress and developments, and respond promptly to Clients' inquiries and communications. Clients will be truthful and cooperative with Law Firm; keep Law Firm reasonably informed of developments and of Clients' address, telephone numbers, and whereabouts; and timely make any payments required by this agreement.

4. ATTORNEY FEES. Clients will pay Law Firm attorney fees for the legal services provided under this agreement at the respective hourly rates of the individuals providing the services. The rates fall within the following ranges: [dollar amount] to [dollar amount] per hour for partners, [dollar amount] to [dollar amount] per hour for associates, [dollar amount] to [dollar amount] per hour for law clerks, and [dollar amount] to [dollar amount] per hour for paralegals. Law Firm will charge in increments of one-tenth of an hour, rounded off for each particular activity to the nearest one-tenth of an hour. The minimum time charged for any particular activity will be [specify unit, e.g., one-tenth of an hour] .

Law Firm will charge for all activities undertaken in providing legal services to Clients under this agreement, including, but not limited to, the following: conferences, court sessions, and depositions (preparation and participation); correspondence and legal documents (review and preparation); legal research; and telephone conversations. When two or more of Law Firm's personnel work on the matter at the same time, such as in conferences between them, the hourly rate of each will be charged.

If, while this agreement is in effect, Law Firm increases the hourly rates being charged to clients generally for attorney fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided 30 days or more after written notice of the increase is mailed to Clients. If Clients choose not to consent to the increased rates, Clients may terminate Law Firm's services under this agreement by written notice effective when received by Law Firm, as long as Clients execute and return a substitution-of-attorney form immediately on its receipt from Law Firm if Law Firm is Clients' attorney of record in any proceeding.

Clients acknowledge that Law Firm has made no promises about the total amount of attorney fees to be incurred by Clients under this agreement.

5. COSTS. Clients will pay all "costs" in connection with Law Firm's representation of Clients under this agreement. Costs will be advanced by Law Firm and then billed to Clients unless the costs can be met out of client deposits that are applicable toward costs. Costs include, but are not limited to, court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees.

6. DEPOSIT FOR FEES. Clients will pay to Law Firm an initial deposit of [dollar amount] , to be received by Law Firm by [date] , and to be applied against attorney fees incurred by Clients. Law Firm will deposit the amount in a trust account. Clients authorize Law Firm to withdraw the principal from the trust account to pay attorney fees as they are incurred by Clients. If, at the termination of services under this agreement, the total amount incurred by Clients for attorney fees is less than the amount of the initial deposit, then the difference will be refunded to Clients.

Law Firm will notify Clients whenever the full amount of any deposit has been applied to attorney fees incurred by Clients. Within 15 days after each notification is mailed, Clients will pay to Law Firm an additional deposit in the same amount as the initial deposit, which will be deposited in a trust account in the same manner as was the initial deposit. Clients authorize Law Firm to withdraw the principal from the trust account to pay attorney fees as they are incurred by Clients. If, at the termination of services under this agreement, the total amount incurred by Clients for attorney fees is less than the total amount of all deposits, then the difference will be refunded to Clients.

7. DEPOSIT FOR COSTS. Clients will pay to Law Firm an initial deposit of [dollar amount] , to be received by Law Firm by [date] , and to be applied against costs incurred by Clients. This amount will be deposited by Law Firm in a trust account. Clients authorize Law Firm to withdraw the principal from the trust account to pay costs as they are incurred by Clients. The initial deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Clients for costs is less than the amount of the initial deposit, then the difference will be refunded to Clients.

Law Firm will notify Clients whenever the full amount of any deposit has been applied to costs incurred by Clients. Within 15 days after each notification is mailed, Clients will pay to Law Firm an additional deposit in the same amount, and to be applied in the same manner, as the initial one. Deposit of such additional amounts will be made in the same manner as was the initial deposit. Clients authorize Law Firm to withdraw the principal from the trust account to pay costs as they are incurred by Clients. Such additional deposits will also be refundable. If, at the termination of services under this agreement, the total amount incurred by Clients for costs is less than the total amount of all deposits, then the difference will be refunded to Clients.

8. STATEMENTS AND PAYMENTS. Law Firm will send Clients monthly statements indicating attorney fees and costs incurred and their basis, any amounts applied from deposits, and any current balance owed. If no attorney fees or costs are incurred for a particular month, or if they are minimal, the statement may be held and combined with that for the following month. Any balance must be paid in full within 30 days after the statement is mailed.

9. ATTORNEY'S LIEN. By signing and returning this fee agreement to Law Firm, Clients grant Law Firm a lien for all unpaid attorney fees and costs advanced on all claims and causes of action that are the subject of Law Firm's representation of Clients under this agreement and on all proceeds of any recovery obtained, whether by settlement, award, order, or judgment.

Clients are aware, and acknowledge, that this lien may significantly impair Clients' interest because Law Firm may be able to delay payment of any recovery or settlement funds to Clients until any disputes with Law Firm about unpaid attorney fees and costs advanced have been resolved. Clients acknowledge that Clients have been advised to seek independent legal advice about granting Law Firm this lien and have had a reasonable opportunity to do so. By signing this fee agreement and returning it to Law Firm, Clients represent that Clients have either obtained legal advice about this lien or have decided that it was unnecessary to do so.

10. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date when it is executed by the third party to do so.

The foregoing is agreed to by:

Date: _ _ _ _ _

_ [Signature] _
_ [Typed name] _

Date: _ _ _ _ _

[Signature]
[Typed name]

Date: _____ *[Name of firm]* _____

By: __[Signature]__
__[Typed name]__
Attorney for __[name]__

Source: California Civil Procedure Before Trial §3.45 (4th ed Cal CEB 2004).

Comment: On hourly fee agreements in general, see §1.23. See also Civ Proc Before Trial §§3.29-3.32. On attorney's lien, see §1.38. On client deposits and client trust accounts, see §1.30.

§3.3 III. FORM: SAMPLE DISCLOSURE AND CONSENT ON FEE SPLITTING

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DISCLOSURE AND CONSENT

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4

Consumer Chapter 7 Bankruptcy—Sample Fee Agreement with Exhibits

I. SCOPE OF CHAPTER §4.1

II. CONSUMER CHAPTER 7 BANKRUPTCY

- A. Form: Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case §4.2
- B. Form: Exhibit A to Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case §4.3
- C. Form: Exhibit B to Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case §4.4
- D. Form: Exhibit C to Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case §4.5

Source: General Interest/Fee Agreement Forms Manual/4 Consumer Chapter 7 Bankruptcy--Sample Fee Agreement with Exhibits/§4.1 I. SCOPE OF CHAPTER

§4.1 I. SCOPE OF CHAPTER

This chapter presents a sample fee agreement, including required exhibits, designed to illustrate an agreement for representation in a consumer Chapter 7 bankruptcy case (see §§4.2-4.5).

The sample agreement in this chapter is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. For discussion of practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

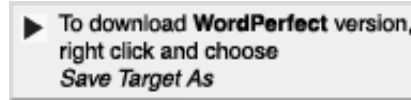
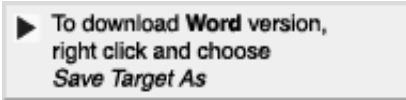
CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

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Source: General Interest/Fee Agreement Forms Manual/4 Consumer Chapter 7 Bankruptcy--Sample Fee Agreement with Exhibits/ II. CONSUMER CHAPTER 7 BANKRUPTCY/§4.2 A. Form: Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case

II. CONSUMER CHAPTER 7 BANKRUPTCY

§4.2 A. Form: Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case



4.2-1 Sample fee agreement for legal services in Chapter 7 bankruptcy case

VIA PERSONAL DELIVERY

__ [Date] __

__ [Name(s) of client(s)] __

__ [Address of client(s)] __

Re: Agreement for Legal Services—Consumer Chapter 7 Bankruptcy Case

Dear __ [name(s) of client(s)] __:

This letter confirms the terms and conditions on which __ [name of law firm] __ (Firm) will provide legal services to you as a client of the Firm. A written agreement such as the one set forth in this letter is required by California Business and Professions Code §6148 for most attorney engagements, and is advisable in any event to minimize the possibility of any misunderstanding between the Firm and its clients.

Please read with care the terms and conditions on which the Firm is willing to agree to act as your attorney and to represent your interests. If the terms and conditions are acceptable to you, please sign this letter and Exhibit A attached to this letter where indicated below and return it to the undersigned. By executing this letter, you are entering into a contract that is binding on both the Firm and you. The purpose of this letter is to set forth the scope of our engagement as legal counsel to you, to confirm that you and we are in mutual agreement about the scope of our engagement, to set forth the financial arrangements of our engagement, and to verify your approval of these financial arrangements.

The terms and conditions of this agreement for legal services (this Agreement) are:

PARTIES TO AGREEMENT. The parties to this Agreement are __ [name of law firm] __ (Firm) and __ [name(s) of client(s)] __ ("Client(s)" or "you").

CONDITIONS. This Agreement will not take effect, and the Firm will have no obligation to provide any legal services or perform any work for you, until you return a signed copy of this Agreement and pay the legal fees required below.

SCOPE OF ENGAGEMENT AND SERVICES. The Client retains and employs the Firm to represent Client in a Chapter 7 bankruptcy case to be filed in the United States Bankruptcy Court for the __ [name of district] __ District of California, but only to the extent specifically set forth in Exhibit A attached to this Agreement, and for no other services.

DUTIES OF CLIENT. You agree to be truthful with us, to cooperate, to keep us informed of developments, to abide by this Agreement, and to keep us and the bankruptcy court advised of your current address, telephone number, and whereabouts. Further, it is your responsibility to provide us with (1) a full list of all of your creditors, including their names, addresses, account numbers, and the amounts of their claims; (2) copies of all of your tax returns filed within the last 2 years; and (3) copies of your last two paychecks, if you are an employee. If you are self-employed, you must provide us with bank statements or income and expense statements for the last 2 months. You also agree to review your bankruptcy papers to ensure that they are

factually correct and that they disclose fully all of your assets and other financial information. The Firm is not responsible for determining whether there are other assets or claims that are or may be relevant to your bankruptcy case if you fail to inform us of them.

LEGAL FEES. The fees for the services covered by this Agreement shall be __[dollar amount]__, plus a __[dollar amount]__ court filing fee, for a total of __[dollar amount]__, payable on your signing of this letter. All fees paid by you to the Firm are earned on their receipt by the Firm and are not refundable for any reason, including the termination of this Agreement. This compensates the Firm for opening your file, taking any calls from creditors, doing an analysis of your matter, and beginning to prepare your paperwork. It also compensates the Firm for reserving sufficient time and other resources to handle your case.

TERMINATION OF THE FIRM BY THE CLIENT. The Client shall have the right to terminate and discharge the Firm at any time. Any such termination or discharge of the Firm must be in writing. In such event, the Client authorizes the Firm to make and retain a duplicate of the Client's file. The Client further agrees to bear all reasonable costs of transferring the Client's file to any new counsel chosen by the Client.

WITHDRAWAL FROM REPRESENTATION BY THE FIRM. The attorney-client relationship is one of mutual trust and confidence. If you have any questions at all about the provisions of this Agreement, we invite your inquiries. We encourage our clients to inquire about any matter relating to this Agreement.

In addition, the Client agrees that the Firm may withdraw from representing the Client on written notice sufficient to enable the Client to retain new counsel. The Firm can withdraw as counsel (1) if the Firm decides to cease the practice of law, (2) if evidence discloses that the Client's case is without legal merit, (3) if the Firm determines that it does not wish to further represent the Client, (4) if the Client does not reasonably cooperate with the Firm regarding the Client's case, (5) if the Client is in material breach of this Agreement, or (6) for any reason authorized by law or the California Rules of Professional Conduct.

DOCUMENT STORAGE POLICY. The Firm's policy with regard to documents at the conclusion of a matter is to maintain documents in storage for a period of 5 years. At the conclusion of that period, *all documents* in a file are destroyed and discarded. Accordingly, if there are any documents or papers you wish removed from your file at the conclusion of a matter, you must advise us in writing to ensure that the documents are not destroyed. In the event that, after the matter has been concluded, your files have been sent to off-site storage, the firm will request that you pay for the costs of retrieval of the files prior to any retrieval of your files. In its discretion, the Firm may return documents and files to you at your last known address.

DISCLAIMER OF GUARANTY. The Client understands that the Firm has made no representation or guaranty concerning the favorable termination of this matter or the favorable outcome of any legal proceedings (including any bankruptcy proceedings) that may be filed or defended on behalf of the Client.

OPEN FILE, REFERRAL OF CREDITORS. Unless other arrangements are made, you agree that we can close your file and refer creditors back to you if you do not proceed with your bankruptcy within 6 months after the date of this Agreement. Further, if you later request that we reopen your file, it may be necessary for us to renegotiate our fee agreement with you.

REQUIRED DISCLOSURES. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requires that every client be given certain mandatory disclosures. These disclosures are attached as Exhibits B and C to this Agreement. By signing this Agreement, you acknowledge that you have received and read Exhibits B and C attached.

GENERAL. This Agreement has been executed, and is intended to be performed, in the State of California, and governed by the laws of the State of California and, to the extent applicable, federal bankruptcy law.

NO PROMISES OR WARRANTIES. No promise, representation, or warranty has been made by or for the Firm in respect of this Agreement, except as set forth in this document. The Client acknowledges having had the opportunity to seek the advice of separate counsel with respect to this Agreement and Client has availed himself or herself of that opportunity to the extent that Client deemed appropriate.

DISCLOSURE OF TRUSTEE REPRESENTATION. The firm has represented various Chapter 7 trustees in this district in the past. In recent years, the Chapter 7 trustees __[name]__ and __[name]__ were represented by the Firm. The Firm will work to actively and aggressively represent your interest in your case, regardless of

who is appointed trustee. This disclosure is made to inform you of the Firm's role as trustee's counsel from time to time.

[There may be other possible conflicts which should be identified in the letter, too, such as regular firm clients who are creditors.]

[Optional arbitration clause]

DISPUTE RESOLUTION. If any dispute arises between you and the Firm regarding our fees or services rendered in connection with this Agreement, such disputes shall be submitted to binding arbitration. Such a dispute would include any claim against the Firm for breach of contract, negligence, breach of fiduciary duty, or other wrongdoing. The arbitration shall be conducted before the American Arbitration Association. The arbitrator(s) appointed to hear the case shall be an attorney(s) or retired judge(s). The California Rules of Evidence shall apply at the arbitration hearing. The decision of the arbitrator(s) shall be final. We both shall have the right to conduct discovery pursuant to the California Rules of Civil Procedure for 120 days after the filing of a response to the request for arbitration. At the conclusion of the arbitration hearing, the award rendered by the arbitrator(s) shall be sealed for 60 days while the parties attempt to mediate the dispute. The mediation shall be administered by the American Arbitration Association under its applicable mediation rules. The mediator shall not be the arbitrator(s) previously appointed to hear the dispute unless both parties mutually agree that the arbitrator(s) may serve in that capacity. If the mediation is successful, the parties agree that the arbitration award will be canceled and will have no further force or effect. If the mediation is unsuccessful, the award of the arbitrator(s) shall be issued and transmitted to the parties and judgment on the award may be entered in any court having jurisdiction thereof.

[Continue]

MODIFICATION IN WRITING ONLY. No change or modification of this Agreement shall be effective until confirmed in a writing signed by the Firm and the Client that expressly refers to this Agreement. This document and Exhibits A, B, and C attached to this Agreement embody the entire agreement of the parties concerning the subject matter of this Agreement. There are no promises, terms, conditions, or obligations other than those contained in this Agreement and in Exhibits A, B, and C; and this Agreement and Exhibits A, B, and C to this Agreement shall supersede all previous communications, representations, or other agreements, either verbal or written, between the Firm and the Client.

CONFIDENTIAL COMMUNICATIONS. You authorize the Firm to communicate with you and to send and receive confidential communications to you and from you via Telecopier, e-mail, and cellular telephone, even though these methods of communication have been shown to have some risk in that they can be accessed by unauthorized third parties.

PRIVACY POLICY. The following is an explanation of the Firm's privacy policy regarding your personal or financial information. The Firm may collect nonpublic personal or financial information about you, either from you directly or from an outside source, in the course of representing you as contemplated by this Agreement. The Firm will disclose any such nonpublic information only to individuals or entities as necessary to provide you with the legal services contemplated by this Agreement. Examples of such individuals or entities include members of the Firm's staff, the United States Bankruptcy Court, the United States Trustee, and the bankruptcy trustee appointed in your case, and may also include your accountant, your realtor, or your insurance company if you have given the Firm their names. The Firm does not disclose any such nonpublic information to anyone except as (and to the extent necessary in the course of representing you as) contemplated by this Agreement. If for any reason you do not want us to disclose any such nonpublic information to any person or entity, please notify us in writing and designate the nonpublic information that you wish not to be disclosed. Please note that certain otherwise nonpublic personal and financial information is required by law to be disclosed to the United States Bankruptcy Court in connection with the filing of your Chapter 7 bankruptcy case.

COUNTERPARTS, FACSIMILE SIGNATURES. This Agreement may be signed in counterpart. Facsimile signatures of the Firm and the Client shall be effective as original signatures.

Thank you for choosing [name of law firm] as your counsel with respect to the matter set forth in Exhibit A. If you wish to seek the advice of other counsel in respect to this Agreement, please feel free to do so. If this Agreement (including Exhibit A) correctly sets forth your understanding of the scope of the services to be rendered to you and if the terms of the engagement are satisfactory, then please sign the enclosed copy of this letter and the enclosed copy of Exhibit A and return them to us, along with the required payment of

legal fees. You may retain Exhibits B and C for your information and files. If the scope of services described in this letter are not satisfactory to you, please let us know in writing.

We look forward to working with you and thank you once again for the opportunity to serve you.

Date: _ _ _ _ _ _ _ [Name of firm] _ _
By: _ _ [Signature] _ _
 _ _ [Typed name] _ _
Attorney for _ _ [name] _ _

ACCEPTED AND AGREED TO:

Date: _ _ _ _ _ _ _ [Signature of client] _ _
 _ _ [Typed name] _ _

Date: _ _ _ _ _ _ _ [Signature of client] _ _
 _ _ [Typed name] _ _

Source: Personal and Small Business Bankruptcy Practice in California, App B (Cal CEB 2003).

Comment: On fixed or flat fees, see §1.25. On nonrefundable fees, see §1.30.

Source: General Interest/Fee Agreement Forms Manual/4 Consumer Chapter 7 Bankruptcy--Sample Fee Agreement with Exhibits/§4.3 B. Form: Exhibit A to Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case

§4.3 B. Form: Exhibit A to Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case

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4.3-1 Exhibit A to sample fee agreement for legal services in Chapter 7 bankruptcy case

EXHIBIT A

Agreement for Legal Services—Chapter 7 Bankruptcy Case

__ _[Date]__ _

SERVICES INCLUDED. The Firm's representation of you will include *only* the following described services:

1. Consulting with and advising you before the filing of your Chapter 7 bankruptcy case, at a maximum of two in-person meetings and a reasonable number of telephone calls;

2. Preparing and filing, in the United States Bankruptcy Court for the __ _[name of district]__ _ District of California, __ _[name of division]__ __, a voluntary Chapter 7 bankruptcy petition and the required schedules and statement of financial affairs;

3. Appearing with you at one meeting of creditors in your bankruptcy case; and

4. After your Chapter 7 case has been filed, consulting with you regarding the progress of your case, and handling inquiries from the United States Trustee, the bankruptcy trustee appointed in your case, and any creditors, for a period of 60 days after the first meeting of creditors in your bankruptcy case.

SERVICES NOT INCLUDED. The Firm's representation of you will *not* include any legal or other services other than those described above, including:

1. The briefing from an approved nonprofit budget and credit counseling agency as required by Title 11, Section 109(h) of the United States Code before you may file a bankruptcy petition.

2. The instructional course in personal financial management as required after filing your bankruptcy petition by Title 11, Sections 111 and 727(a)(11) of the United States Code.

3. Amending your bankruptcy petition, schedules, or statement of financial affairs to add creditors or other information not included in the original filing.

4. Representing you in any lawsuit, adversary proceeding, or contested matter in your bankruptcy case, or in any other court. Examples of the kind of actions and proceedings that our representation of you does *not* include are the following:

a. Defense of any motions for relief from the automatic stay or initiating or defending any other actions or proceedings to protect your home from foreclosure;

b. Defense of any motions or complaints for turnover of property;

c. Initiating or defending any motions to avoid liens;

d. Initiating or defending any motion to extend any time set by applicable law; and

e. Defending you in any adversary proceedings seeking a declaration of nondischargeability of any debt or

objecting to your discharge.

5. Representing you in any administrative proceeding, or any proceeding before any regulatory or licensing agency, or filing any reports or disclosures before any securities exchange or regulatory agency.

6. Representing you at any examination conducted under Federal Rule of Bankruptcy Procedure 2004.

7. Reviewing, compiling, or copying documents to be produced either pursuant to a request by the United States Trustee, the bankruptcy trustee, or pursuant to an order to appear at an examination under Federal Rule of Bankruptcy Procedure 2004.

8. Appearing with you at any continued meetings of creditors after the Firm has appeared with you at one meeting of creditors.

9. _ _ *[Advising you or expressing an opinion as to whether any of your federal or state income tax liabilities will be discharged in your bankruptcy case.]* _ _

[10.] Undertaking any credit repair work for you.

[11.] Supplying any legal services not specifically set out in this letter.

ADDITIONAL SERVICES. If the Firm agrees to perform any further legal services for Client that are not part of this representation, all such services shall be arranged for by separate agreement with the Firm, which agreement shall require payment of additional legal fees. The Firm shall be under no obligation whatsoever to perform any further legal services for Client unless any such separate agreement has been signed by Client and such additional fees paid. For Client's information, the Firm's current fixed rate for attending any continued meetings of creditors is _ _ *[dollar amount]* _ _.

Date: _ _ _ _ _ _ _ *[Name of firm]* _ _
By: _ _ *[Signature]* _ _
_ _ *[Typed name]* _ _
Attorney for _ _ *[name]* _ _

ACCEPTED AND AGREED TO:

Date: _ _ _ _ _ _ _ *[Signature of client]* _ _
_ _ *[Typed name]* _ _

Date: _ _ _ _ _ _ _ *[Signature of client]* _ _
_ _ *[Typed name]* _ _

Source: Personal and Small Business Bankruptcy Practice in California, App B (Cal CEB 2003).

Source: General Interest/Fee Agreement Forms Manual/4 Consumer Chapter 7 Bankruptcy--Sample Fee Agreement with Exhibits/§4.4 C. Form: Exhibit B to Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case

§4.4 C. Form: Exhibit B to Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case

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4.4-1 Exhibit B to sample fee agreement for legal services in Chapter 7 bankruptcy case

EXHIBIT B

[Counsel should develop and set forth the disclosures required by 11 USC §342(b) here. Much of the information required for these disclosures can be found in Personal and Small Business Bankruptcy Practice in California (Cal CEB 2003) §§4.31-4.35 (regarding types of bankruptcy) and §4.11 (regarding credit counseling agencies). Further, counsel should check the website of the U.S. Courts, <http://www.uscourts.gov>, as well as the websites of local bankruptcy courts and the regional U.S. Trustee (see Bankruptcy Prac, App L) to determine whether any of these agencies have issued a standard set of disclosures conforming with 11 USC §342(b).]

Source: Personal and Small Business Bankruptcy Practice in California, App B (Cal CEB 2003).

Source: General Interest/Fee Agreement Forms Manual/4 Consumer Chapter 7 Bankruptcy--Sample Fee Agreement with Exhibits/§4.5 D. Form: Exhibit C to Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case

§4.5 D. Form: Exhibit C to Sample Fee Agreement for Legal Services in Chapter 7 Bankruptcy Case

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4.5-1 Exhibit C to sample fee agreement for legal services in Chapter 7 bankruptcy case

EXHIBIT C

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requires that every client be given the following disclosure:

**IMPORTANT INFORMATION ABOUT
BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY
OR BANKRUPTCY PETITION PREPARER.**

If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. **THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST.** Ask to see the contract before you hire anyone.

The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules, and Statement of Financial Affairs as well as, in some cases, a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a "trustee" and by creditors.

If you choose to file a Chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

If you choose to file a Chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your Chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

If you select another type of relief under the Bankruptcy Code other than Chapter 7 or Chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.

Source: Personal and Small Business Bankruptcy Practice in California, App B (Cal CEB 2003).

5

Criminal Defense—Sample Fee Agreement and Substitution of Counsel Letter

I. SCOPE OF CHAPTER §5.1

II. FORM: SAMPLE CRIMINAL DEFENSE Legal Fee Agreement §5.2

III. FORM: SAMPLE LETTER NOTIFYING DEFENSE COUNSEL OF SUBSTITUTION OF COUNSEL AND AUTHORIZING RELEASE OF INFORMATION §5.3

§5.1 I. SCOPE OF CHAPTER

This chapter presents sample agreements related to an agreement to provide legal services in a criminal defense:

- A sample criminal defense legal fee agreement (see §5.2); and
- A sample fee agreement letter notifying defense counsel of substitution of counsel and authorizing release of information (see §5.3).

The sample agreements in this chapter are illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. For discussion of practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§5.2 II. FORM: SAMPLE CRIMINAL DEFENSE Legal Fee Agreement

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5.2-1 Sample criminal defense legal fee agreement

**NOTICE: FEES IN THIS CONTRACT ARE NEGOTIABLE;
ATTORNEY FEES ARE NOT SET BY LAW**

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between __ *[name of attorney]* __, hereafter referred to as "Attorney," and __ *[name of client]* __, hereafter referred to as "Client."

This agreement is required by Business and Professions Code §6148 and is intended to fulfill the requirements of that section.

[Option 1: One fee for case through sentencing]

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: Representation in Case No. __ *[number]* __, __ *[name of court, e.g., San Bernardino County Superior Court]* __, now set for arraignment on __ *[date]* __, through disposition, whether by trial, sentencing, or otherwise. No promises or representations have been made, express or implied, regarding the results in this case.

3. LEGAL SERVICES SPECIFICALLY EXCLUDED. Legal services that are not to be provided by Attorney under this agreement specifically include, but are not limited to, the following: __ *[List services excluded, e.g., representation following a mistrial or granting of a motion for a new trial, appellate work, work on any petition for an extraordinary writ, and representation on any other case (including cases related to this case, such as any later probation or parole revocation).]* __

If Client wishes Attorney to provide any legal services not included under this agreement, a separate written agreement between Attorney and Client will be required.

4. ATTORNEY FEES. Client will pay to Attorney the fixed sum of __ *[dollar amount]* __ for attorney fees for the legal services to be provided under this agreement, payable in full on or before __ *[date]* __. This payment is nonrefundable even if Client pleads guilty or the case is dismissed. Attorney's hourly rate is __ __ __.

[Option 2: Fee structure for case up to trial]

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: making court appearances concerning client's release from custody, plea negotiations, and setting a trial date; preparation of case for trial; and work on plea negotiations, including discussions with prosecution. No promises or representations have been made, express or implied, regarding the results in this case.

3. LEGAL SERVICES SPECIFICALLY EXCLUDED. This contract does not cover payment for attorney services for the following:

a. Appeals to __ *[the Superior Court appellate department/the court of appeal/the California Supreme Court/any federal court]* __;

b. Writs or similar proceedings to any court;

c. Representation in any administrative hearing, even if related to this case;

d. Representation in any __ *[probation/parole]* __ violation arising out of any case, even if the revocation is

triggered by this case;

- e. *[Representation at the preliminary hearing in this case]* ;
- f. Representation at the trial in this case;
- g. Representation at the evidentiary hearings in this case;
- h. Representation at the sentencing hearing in this case;
- i. Representation at a retrial of this case; nor
- j. Representation if this case is dismissed and then recharged.

As the case progresses, Attorney will notify Client of any proceedings not covered by this contract that require a new contract and the payment of additional fees.

4. ATTORNEY FEES. Client will pay to Attorney the sum of *[dollar amount]* for attorney fees for the legal services to be provided under this agreement, payable in full on or before *[date]* . This payment is nonrefundable even if Client pleads guilty or the case is dismissed on the first day Attorney makes a court appearance. Attorney's hourly rate is .

[Continue]

5. RESPONSIBILITIES OF ATTORNEY AND CLIENT. Attorney will perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries. Client will be truthful and cooperative with Attorney; keep Attorney reasonably informed of developments and of Client's address, telephone number, and whereabouts; and timely make any payments required by this agreement. Communications between the Client and counsel, his or her staff, and a third party whose services are necessary to enable the lawyer to carry out the provisions of the representation are all privileged.

6. COSTS. Client will pay all "costs" in connection with Attorney's representation of Client under this agreement. Costs are separate from attorney fees. Costs include, but are not limited to, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees. Costs will be advanced by Attorney and then billed to Client, unless the costs can be met out of client deposits that are intended to cover costs.

7. DEPOSIT. Client will pay to Attorney an initial deposit of *[dollar amount]* to be received by Attorney on or before *[date]* , and to be applied against costs incurred by Client. This amount will be deposited by Attorney in an interest-bearing trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. If, at the termination of services under this agreement, the total amount incurred by Client for costs is less than the amount of the initial deposit, the difference will be refunded to Client.

Attorney will notify Client whenever the full amount of any deposit has been applied to costs incurred by Client. Within 15 days after each notification is mailed, Client will pay to Attorney an additional deposit in the same amount, and to be applied in the same manner, as the initial one. Deposit of such additional amounts and payment of any interest earned will be made in the same manner as for the initial deposit. Client authorizes Attorney to withdraw the principal from the trust account to pay costs as they are incurred by Client. If, at the termination of services under this agreement, the total amount incurred by Client for costs is less than the total amount of all deposits, the difference will be refunded to Client.

8. STATEMENTS AND PAYMENTS. Attorney will send Client a monthly statement indicating costs incurred and their basis, any amounts applied from deposits, and any current balance owed. If no costs are incurred for a particular month or if they are minimal, the statement will be held and combined with that for the following month unless a statement is requested by Client. Any balance will be paid in full within 30 days after the statement is mailed.

9. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date when, having been executed by Client, one copy of the agreement is received by Attorney and Attorney receives the payment required by Paragraph 4 of this agreement and the initial deposit required by Paragraph 7, provided that the copy, payment, and deposit are received on or before _ _[date]_ _ , or Attorney accepts late receipt.

The foregoing is agreed to by:

Date: _ _ _ _ _ _ _[Signature]_ _
 _ _[Typed name]_ _
 Client

Date: _ _ _ _ _ _ _[Signature]_ _
 _ _[Typed name]_ _
 Attorney for _ _[name]_ _

Source: California Criminal Law Forms Manual §3.1 (2d ed Cal CEB 2005).

Comment: Attorney fees. The language in Paragraph 4 of this sample agreement establishes a flat or fixed fee and informs the client that the attorney fee will not be refunded if the client's criminal case has a negative outcome. On fixed fees in general, see §1.25. On trust accounts and problems involving nonrefundable fees or deposits, see §1.30.

Cautionary statement. When there is potential federal interest in a case, counsel should place in the agreement a *cautionary statement* stating that Bus & P C §6149 makes the fee agreement a "privileged document." Nonetheless, federal courts have routinely ignored this limitation and have ordered fee agreements produced in spite of the California statute. See California Criminal Law Procedure and Practice §§3.14, 9.16, 51.5, 57.33 (Cal CEB Annual).

On fee agreements in general, see chap 1 of this book and Crim Law §3.14.

State Bar forms. The State Bar of California sample written fee agreement forms are reproduced in App A, and can be obtained from the State Bar of California website (<http://calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.doc>).

CAUTION: A court may look at the entire criminal history when sentencing a defendant. Therefore, a client's file and documents relating to previous crimes become potentially relevant no matter how long ago the conviction occurred. This makes having a document retention provision in a fee agreement vital. For a general form pertaining to document retention, see §1.41.

Source: General Interest/Fee Agreement Forms Manual/5 Criminal Defense--Sample Fee Agreement and Substitution of Counsel Letter/§5.3 III. FORM: SAMPLE LETTER NOTIFYING DEFENSE COUNSEL OF SUBSTITUTION OF COUNSEL AND AUTHORIZING RELEASE OF INFORMATION

§5.3 III. FORM: SAMPLE LETTER NOTIFYING DEFENSE COUNSEL OF SUBSTITUTION OF COUNSEL AND AUTHORIZING RELEASE OF INFORMATION

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5.3-1 Sample letter notifying defense counsel of substitution of counsel and authorizing release of information

SUBSTITUTION OF COUNSEL

TO: My former attorney, _ _[name]_ _

FROM: _ _[Name of client]_ _

This RELEASE relates solely to Court Docket No(s). _ _ _ _ _

My NEW ATTORNEY is _ _[name]_ _.

I authorize and instruct you to turn over to my NEW ATTORNEY, named above, all discovery and pleadings in the _ _[case/cases]_ _ identified above _ _[including the police and other official reports, together with any transcripts, and other court documents therein]_ _.

I also authorize and instruct you to permit my NEW ATTORNEY to inspect and copy all reports, transcripts, or recordings of any witnesses interviewed by employees of _ _[name of former attorney]_ _ in the _ _[case/cases]_ _ identified above.

To the extent necessary to accomplish these instructions, I release you from the attorney-client privilege.

I have read the above release and have signed my authorization below at the date and place indicated.

Date: _ _ _ _ _ _ _[Signature of client]_ _

Location: _ _ _ _ _ _ _[Typed name]_ _

Witnessed by: _ _[Signature of witness]_ _

_ _[Typed name]_ _

Source: California Criminal Law Forms Manual §3.3 (2d ed Cal CEB 2005).

Comment: **Discharge of counsel.** A criminal defendant has the right to discharge *retained* counsel and substitute a new attorney with or without cause, if the substitution is timely and it does not result in significant prejudice to the defendant. See *People v Ortiz* (1990) 51 C3d 975, 983, 275 CR 191. To discharge appointed counsel and substitute another appointed attorney, an indigent defendant must show either that counsel is providing inadequate representation or that there is an irreconcilable conflict between attorney and client. *People v Marsden* (1970) 2 C3d 118, 84 CR 156. See *People v Gutierrez* (2009) 45 C4th 789, 803, 89 CR3d 225 (trial court made adequate inquiry under *Marsden* as to existence of conflict between defendant and counsel, and as to adequacy of representation; court did not abuse its discretion by concluding that it was unnecessary to substitute counsel).

Return of client documents. On the attorney's duty to return client papers and property, see §1.41; California Criminal Law Procedure and Practice §§3.24-3.29 (Cal CEB Annual).

6

Debt Collection—Sample Fee Agreements

I. SCOPE OF CHAPTER §6.1

II. FORM: SAMPLE DEBT COLLECTION CONTINGENT FEE AGREEMENT WITH NONCONTINGENT
RETAINER §6.2

III. FORM: SAMPLE DEBT COLLECTION HOURLY FEE AGREEMENT §6.3

§6.1 I. SCOPE OF CHAPTER

This chapter presents sample forms designed to illustrate an agreement to perform legal representation to collect a debt:

- A sample contingent fee agreement with a noncontingent retainer (see §6.2); and
- A sample hourly fee agreement (see §6.3).

The sample agreements in this chapter are illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. On practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§6.2 II. FORM: SAMPLE DEBT COLLECTION CONTINGENT FEE AGREEMENT WITH NONCONTINGENT RETAINER

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6.2-1 Sample debt collection contingent fee agreement with noncontingent retainer

__ *[Law firm letterhead]* __

__ *[Date]* __

__ *[Name of client]* __

__ *[Address]* __

Dear __ *[name of agent for client]* __:

The fees this office will charge to handle a collection item are partially noncontingent retainers and partially contingent fees. The contingent percentages change depending on whether a lawsuit has been filed and, if so, whether it has been assigned to trial or arbitration, regardless of whether it actually goes to trial or arbitration. Fees for retail transactions, defined as purchases primarily for home or personal use, are different from fees for commercial transactions, which cover everything that is not retail.

Typical retail transactions include credit card transactions, professional services bills from doctors or other health professionals, lawyers' or accountants' bills when services rendered were for an individual's personal use, and insurance premiums for personal insurance. Commercial transactions typically include the sale of goods or services to a business or by a business to anyone using the product in another business. They include legal and accounting fees rendered to a business for business purposes as well as business insurance premiums.

For a retail transaction, this office charges a noncontingent retainer of __ *[number]* __ percent of the amount of the receivable against a total contingent fee of __ *[number]* __ percent before suit is filed. If suit is filed, an additional __ *[number]* __ percent noncontingent retainer plus a deposit for court costs is required and the total contingent fee rises to __ *[number]* __ percent. If the matter is set for trial or arbitration (regardless of whether it actually goes to trial or arbitration), the total contingent fee increases to __ *[number]* __ percent, but there is no additional retainer.

For a commercial transaction, this office charges a noncontingent retainer of __ *[number]* __ percent of the amount of the receivable, which is applied against a total contingent fee of __ *[number]* __ percent before suit is filed. If a lawsuit becomes necessary, an additional __ *[number]* __ percent noncontingent retainer plus a deposit for court costs is charged and the total contingent fee increases to __ *[number]* __ percent. If the case is assigned to trial or arbitration (regardless of whether it actually goes to trial or arbitration), the total contingent fee increases to __ *[number]* __ percent, but no additional retainer is required.

If you have already obtained a judgment, it is irrelevant whether the underlying transaction was commercial or retail, or whether the judgment is from a California court or a court of another jurisdiction. The noncontingent retainer to collect a judgment is __ *[number]* __ percent of the unsatisfied balance of the judgment against a total contingent fee of __ *[number]* __ percent. In addition, you shall advance necessary costs for enforcement proceedings and for any registration proceedings.

These contingent percentages are not set by law but are negotiable between us. You are responsible for costs, even if they exceed the amount requested as an advance.

In some situations, it is possible to obtain extraordinary prejudgment relief by a writ of attachment or a writ of possession. Either remedy requires further legal work not generally performed in a collection lawsuit. If an extraordinary remedy is requested, a separate fee will be negotiated on a case-by-case basis.

These quoted fees apply only to the collection of a receivable. If a cross-complaint is filed against you, or if an attack is made on the validity of the underlying judgment being enforced, a separate fee must be negotiated before any appearance is made. This fee may be based on a flat fee or an hourly fee. In certain circumstances, this office may decline to quote any fee for cross-complaints that are outside our field of expertise and for

which you need to hire counsel with that expertise. If, during our representation on a collection action, you ask this office to perform other legal work for you, or work for a different legal entity, then this office will make a separate fee agreement for that additional work. The separate fee agreement may be based on an hourly fee, a flat fee, a contingent fee, or any other arrangement we mutually agree on.

You may have insurance coverage that will be obligated to pay for your representation on a cross-complaint. Such coverage gives you the right of reimbursement from the insurance carrier, subject to whatever limitations the policy may have, but it does not relieve you of the responsibility of paying our fees. If the carrier has the right to name counsel of its choice to represent you, this office will cooperate with them. If the cross-complaint is based on a cause of action outside the scope of our practice, this office may request that you obtain other counsel. If, in this situation, you do not retain other counsel, this office may be forced to ask the court to allow us to be relieved as attorneys of record. If this action must be taken, it will be done in a way that does not jeopardize your rights.

If the debtor files for bankruptcy, this office will file a proof of claim on your behalf, but we will not attend bankruptcy court hearings. If a debtor in bankruptcy objects to your claim or lien, the matter will be handled on a case-by-case basis with a decision made depending on the facts as to whether this office will represent you in the bankruptcy court and whether an additional fee will be charged.

Often, debtors make partial payments on account. When a debtor makes a payment, we calculate the current fee due on that payment. We credit half of that fee against the amount of money you have paid as a retainer to that point, and we remit the other half to you. If only partial collections are made, this procedure sometimes results in the overall fee being higher than the quoted percentages. Naturally, if no money is collected, the fees will also be higher than the quoted contingent percentages because the retainers are noncontingent. No contingent fee is taken on the recovery of costs advanced by you. When collections are made by levy or other enforcement mechanism provided for by law, the enforcement costs are deducted from the amount collected, and the fee is then calculated on the net balance. At the final collection, all other costs are deducted from the amount collected and the fee is calculated on the net balance. The advanced costs are also returned to you at that time if they have been collected from the debtor. If the costs expended exceed the amount advanced, the excess is deducted from the total before the fee is calculated.

Some claims are based on written agreements stating that the prevailing party is entitled to an award of attorney fees. Some courts have an approved schedule of attorney fees and some courts award "reasonable" attorney fees. In either event, our contingency is calculated on the total of principal, interest, and attorney fees actually collected.

When a debtor makes payments on account by noncertified funds, this office deposits the debtor's check in our client trust account and allows 21 days for it to clear through the banking system. After that, this office automatically deducts our share of the fees and remits the balance to you. If the debtor pays in certified funds, we remit as soon as possible. Often, because the debtor makes checks payable directly to you, we will need to endorse the check in your name for deposit into our trust account. You grant us the authority to do so for all claims submitted to us under this fee agreement.

This office will have grounds to ask you to obtain other counsel if you or the creditor have misrepresented or failed to disclose material facts, or if you or the creditor fail to follow our advice in this matter. If this office asks you to obtain other counsel, you agree to do so and to execute a substitution of attorneys. You further agree to pay all outstanding fees and costs. If, in this situation, you do not retain other counsel, this office may be forced to ask the court to allow us to be relieved as attorney of record. If this must be done, it will be done in a way that does not jeopardize your rights.

By agreeing to the terms of this agreement, you grant this office a lien on the claim or cause of action, on any sum recovered by settlement, and on any judgment that may be recovered, for the fees and costs mentioned above. You further agree that we shall have all general, possessory, or retaining liens, and all special or charging liens known to the common law. If you have a judgment against any third party as a result of work performed by this office, we shall be considered to be an Assignee of Record under Code of Civil Procedure §673 and shall have the right to enforce the judgment as Assignee of Record to the extent necessary to satisfy any unpaid fees and costs.

By consenting to the terms of this agreement, you agree that you are aware, and acknowledge, that the lien described above may significantly impair your interest because we may be able to delay payment of any recovery or settlement funds to you until any disputes with us about unpaid attorney fees and costs advanced have been resolved. You acknowledge that you have been advised to seek independent legal advice about granting us this lien and have had a reasonable opportunity to do so. By signing this fee agreement and returning it to us, you represent that you have either obtained legal advice about this lien or have decided that it was unnecessary to do so.

Any suit by this office against you to recover attorney fees or costs shall give rise to the right of the prevailing party to collect reasonable attorney fees and costs incurred in any such action, including postjudgment attorney fees incurred in the enforcement process.

You have the right to seek arbitration of any and all fee disputes through the _ _ [name of county] _ _ County Bar Association or the State Bar of California. This agreement shall be construed under the laws of the State of California and is considered to have been entered into in _ _ [name of county] _ _ County, California.

You understand that no one at this office has made any representations about the successful termination of this action or the favorable outcome of any legal action that may be filed, and no one at this office has guaranteed that we will obtain reimbursement to you of any of the fees, costs, or expenses resulting from the prosecution or defense of this action. You further understand that we have made no representations about the collectability of the debt. You further expressly acknowledge that all our statements on these matters are statements of opinion only.

For claims that are within the geographic region where we maintain our office, currently _ _ [name of region] _ _ , which includes the counties of _ _ [names of counties] _ _ , we handle the claims directly. For claims elsewhere in California, we reserve the right to forward the claim to other collection attorneys in the area where the debtor is located. For claims outside of California, we will forward the claims to other collection attorneys in the area where the debtor is located. In any case, the fees from you remain the same; there is no additional fee for the other attorneys involved.

This is the complete agreement between this office and you. No change may be made and no waiver of any provision shall be valid or binding unless the change or waiver is in writing and signed by this office and you.

If any provision of this agreement is found by a court or an arbitrator of competent jurisdiction to be invalid and unenforceable, the other provisions of this agreement shall be valid and binding on the parties to this agreement.

Date: _ _ _ _ _
_ _ [Name of firm] _ _
By: _ _ [Signature] _ _
Name: _ _ [Typed name] _ _
Its: _ _ [Title] _ _

I acknowledge receiving a copy of this fee agreement and agree to its terms. I understand that this agreement will remain in effect for all matters submitted to your office until notified by your office that a new fee agreement will be necessary. Based on these terms and conditions, I retain The Law Office of _ _ [name of firm] _ _ . I warrant that I have the requisite authority to sign on behalf of the client.

Date: _ _ _ _ _
_ _ [Signature] _ _
_ _ [Typed name] _ _

Legal name of client: _____

Name of person signing (please print): _____

Address of client: _____

If outside United States, country and postal code: _____

Telephone number of client: _____

Facsimile number of client: _____

E-mail address of client: _____

Nature of client's legal entity: _____

If corporation, in good standing? _____

If fictitious business name, is FBN statement current? _____

Are you licensed by any government agency? _____

If yes, is your license current?_____

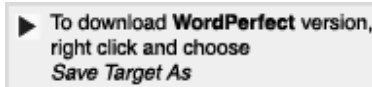
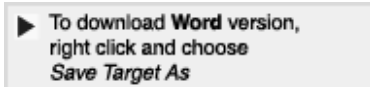
Agency name:_____

Source: Debt Collection Practice in California §1.36 (2d ed Cal CEB 1999).

Comment: On requirements when an attorney takes a lien on the proceeds of the action, see §1.38. On contingent fee agreements, see §1.26. On retainer agreements, see §1.32.

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§6.3 III. FORM: SAMPLE DEBT COLLECTION HOURLY FEE AGREEMENT



6.3-1 Sample debt collection hourly fee agreement

__ *[Law firm letterhead]* __

__ *[Date]* __

__ *[Name of client]* __

__ *[Address]* __

Dear __ *[name of client]* __:

You have requested that this office provide you with legal representation. The general nature of the legal services to be provided is __ *[specify]* __.

Our fees to handle this matter will be based on hourly charges of __ *[dollar amount]* __ per hour. We will request a retainer of __ *[dollar amount]* __, against which the hourly fee will be charged. In addition to this retainer, we will also request a deposit of __ *[dollar amount]* __ for costs. It is reasonably foreseeable that the total expense to you, including attorney fees, will exceed __ *[dollar amount, e.g., \$1000]* __.

This office bills in increments of __ *[specify, e.g., one-tenth]* __ of an hour, with a __ *[specify]* __-hour minimum. For court appearances and other matters that take us out of the office, our time charges run from the time we leave the office until the time we return. This office does not charge a different rate for travel time or for waiting time at courthouses. This office occasionally performs legal research on computer databases that have charges. This research time will be billed at regular rates, and the costs will be billed as charged with no markup. If the costs exceed the amount advanced, the excess will be added to the total on the statement. You are responsible for the total costs expended as well as fees charged.

If it becomes necessary to hire consultants or experts, their employment will be cleared with you before they are hired. This office will request retainers or cost advancements for their services.

If, during the course of representation as described in the first paragraph of this letter, you ask this office to perform other legal work for you or to work for any different legal entity, then a separate fee agreement must be made for this additional work. This separate agreement may be based on an hourly fee, a flat fee, a contingent fee, or any other arrangement we mutually agree on.

If the debtor files for bankruptcy, this office will file a proof of claim on your behalf but we will not attend bankruptcy court hearings. If a debtor in bankruptcy objects to your claim or lien, the matter will be handled on a case-by-case basis with a decision made depending on the facts as to whether this office will represent you in the bankruptcy court and whether an additional fee will be charged.

This office periodically examines our hourly rates. If the rate changes, you will be given 60 days' notice of the change. If you do not wish to continue to retain our services at the new rates, you will have the opportunity during that 60-day period to so notify us and to obtain new counsel. If you do not notify us of your objection to the new rates or do not obtain new counsel, the new rates will be effective at the end of the 60-day period for all work performed after the effective date of the new rates.

If a matter is to be assigned to trial or arbitration, we will request an additional retainer equal to the estimated charges for the actual time of the trial or arbitration. This retainer must be received by us at least 45 days before the trial date; it will be due immediately if the total notice of time for trial is less than 45 days.

You may have insurance coverage that will be obligated to pay for your representation. Such coverage gives you the right of reimbursement from the insurance carrier, subject to whatever limitations the insurance policy may have, but it does not relieve you of the responsibility of paying our fees. If the carrier has the right to name counsel of its own choice to represent you, this office will cooperate with them.

Statements are sent monthly, around the __ *[number, e.g., 3rd]* __ day of each month. Balances are due on

receipt. You agree that the balance as stated on the billing is correct, conclusive, and binding on you unless, within 20 days after the date the statement was mailed, you notify us in writing of the item that you believe is incorrect. When you have a retainer balance that has not been used, the statement will reflect a negative balance due. Once the retainer has been used and other charges added, the statement will reflect a positive balance due. This office reserves the right to request an additional retainer in the same amount as the original retainer at any time. Statements are only mailed in months in which there is activity or, if no activity, when there is a balance due.

An account is considered delinquent if it is not paid in full within 30 days. If an account becomes delinquent for legal fees, this office will have grounds to ask you to obtain other counsel. This office will also have grounds to ask you to obtain other counsel if you or the creditor have misrepresented, or failed to disclose, material facts, or if you or the creditor fail to follow our advice in this matter. If this office asks you to obtain other counsel, you agree to do so and to execute a substitution of attorneys. You further agree to pay all outstanding fees and costs. If, in this situation, you do not retain other counsel, then this office may be forced to ask the court to allow us to be relieved as attorney of record. If this must be done, it will be done in a way that does not jeopardize your rights.

This office may retain any accrued fees and costs advanced from the amount finally collected by suit, settlement, or judgment. When a debtor makes payments on account by noncertified funds, this office deposits the debtor's check in our client trust account and allows 21 days for it to clear through the banking system. After that, this office automatically deducts our share of the fees and remits the balance to you. If the debtor pays in certified funds, we remit as soon as possible. Often, because the debtor makes the check payable directly to you, we will need to endorse the check in your name for deposit into our trust account. You grant us the authority to do so for all claims submitted to us under this fee agreement.

By agreeing to the terms of this agreement, you grant this office a lien on the claim or cause of action, on any sum recovered by settlement, and on any judgment that may be recovered for the fees and costs mentioned above. You further agree that we shall have all general, possessory, or retaining liens, and all special or charging liens known to the common law. If you have a judgment against any third party as a result of work performed by this office, we shall be considered to be an Assignee of Record under Code of Civil Procedure §673, and shall have the right to enforce the judgment as Assignee of Record to the extent necessary to satisfy any unpaid fees and costs.

By consenting to the terms of this agreement, you agree that you are aware, and acknowledge, that the lien described above may significantly impair your interest because we may be able to delay payment of any recovery or settlement funds to you until any disputes with us about unpaid attorney fees and costs advanced have been resolved. You acknowledge that you have been advised to seek independent legal advice about granting us this lien and have had a reasonable opportunity to do so. By signing this fee agreement and returning it to us, you represent that you have either obtained legal advice about this lien or have decided that it was unnecessary to do so.

Any suit by this office against you to recover any attorney fees or costs shall give rise to the right of the prevailing party to collect reasonable attorney fees and costs incurred in such action, including any postjudgment attorney fees incurred in the enforcement process.

You have the right to seek arbitration of any and all fee disputes through the __[name of county]__ County Bar Association or the State Bar of California. This agreement shall be construed under the laws of the State of California and is considered to have been entered into in __[name of county]__ County, California.

You understand that no one at this office has made any representations about the successful termination of this action or the favorable outcome of any legal action that may be filed, and no one at this office has guaranteed that this office will obtain reimbursement to you of any of the fees, costs, or expenses resulting from the prosecution or defense of this action. You further understand that we have made no representations about the collectability of the debt. You expressly acknowledge that all our statements on these matters are statements of opinion only.

For claims that are within the geographic region where we maintain our office, currently __[name of region]__, which includes the counties of __[names of counties]__, we handle the claims directly. For claims elsewhere in California, we reserve the right to forward the claim to other collection attorneys in the area where the debtor is located. For claims outside of California, we will forward the claims to other collection attorneys in the area where the debtor is located. In any case, the fees from you remain the same; there is no additional fee for the other attorneys involved.

This is the complete agreement between this office and you. No change may be made and no waiver of any provision shall be valid or binding unless the change or waiver is put in writing and signed by this office and you.

If any provision of this agreement is found by a court or an arbitrator of competent jurisdiction to be invalid and unenforceable, the other provisions of this agreement shall be valid and binding on the parties to this agreement.

Date: _ _ _ _ _ _ _ [Name of firm] _ _
By: _ _ [Signature] _ _
Name: _ _ [Typed name] _ _
Its: _ _ [Title] _ _

I acknowledge receiving a copy of this fee agreement and agree to its terms. I understand that this fee agreement will remain in effect for all matters submitted to your office until notified by your office that a new fee agreement will be necessary. Based on these terms and conditions, I retain The Law Office of _ _ [name of firm] _ _ . I warrant that I have the requisite authority to sign on behalf of the client.

Date: _ _ _ _ _ _ _ [Signature] _ _
 _ _ [Typed name] _ _

Legal name of client: _____

Name of person signing (please print): _____

Address of client: _____

If outside United States, country and postal code: _____

Telephone number of client: _____

Facsimile number of client: _____

E-mail address of client: _____

Nature of client's legal entity: _____

If corporation, in good standing? _____

If fictitious business name, is FBN statement current? _____

Are you licensed by any government agency? _____

If yes, is your license current? _____

Agency name: _____

Source: Debt Collection Practice in California §1.37 (2d ed Cal CEB 1999).

Comment: On requirements when an attorney takes a lien on the proceeds of the action, see §1.38. On hourly fee agreements, see §1.23. On retainer agreements, see §1.32.

7

Elder Law Litigation—Sample Fee Agreement

I. SCOPE OF CHAPTER §7.1

II. FORM: SAMPLE FEE AGREEMENT FOR LITIGATION AGAINST HEALTH CARE FACILITY §7.2

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§7.1 I. SCOPE OF CHAPTER

This chapter presents a sample fee agreement for use in an elder law litigation matter (see §7.2).

The sample agreement in this chapter is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. On practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§7.2 II. FORM: SAMPLE FEE AGREEMENT FOR LITIGATION AGAINST HEALTH CARE FACILITY

► To download **Word** version,
right click and choose
Save Target As

► To download **WordPerfect** version,
right click and choose
Save Target As

7.2-1 Sample fee agreement for litigation against health care facility

This agreement between _ [name] _ (Attorneys) and _ [name] _ by and through _ [his/her] _ guardian ad litem, _ [name] _ (Clients), is made this _ [date] _.

1. Agreement to Represent Clients. Subject to any approval of the court required by law, Attorneys agree to represent Clients in the matters pertaining to damages arising from the care of _ [name] _ while _ [he/she] _ was a patient at the _ [name of facility] _ (the Health Care Facility) during the period beginning approximately _ [date] _ , and ending approximately _ [date] _ (the Matter).

2. Disclosures to Clients. In handling the Matter, it may be necessary to file legal proceedings (the Action) in Superior Court against the Health Care Facility and other defendants who played a role in the organization and management of the Health Care Facility as well as employees of the Health Care Facility. Such defendants may be "licensed health care providers" within the meaning of Business and Professions Code §6146(c)(2); such Action may be based in part on alleged "professional negligence" within the meaning of Business and Professions Code §6146(c)(3). A copy of Business and Professions Code §6146 is attached as Exhibit A, and Clients are directed to review its provisions. *[For text of §6146, see App B]*

3. Notice to Clients. An action for "professional negligence" against a "licensed health care provider" is subject to Business and Professions Code §6146(a), which *sharply* limits the fees that Attorneys can charge Clients.

The limits on legal fees that can be charged under Business and Professions Code §6146 do not apply in the following situations: (a) when the Defendant is alleged to have acted "intentionally" as opposed to negligently; (b) when the Defendant is shown to have breached a duty of "ordinary care" as opposed to a duty of "professional care"; or (c) when the Defendant proves not to have been licensed as a health care provider. Accordingly, if the Action is brought against the Health Care Facility (or defendants or their employees who are responsible for the Health Care Facility's conduct) for intentional conduct, or if the Health Care Facility's liability is based on its breach of the duty of "ordinary care," or if the Health Care Facility is shown to have been unlicensed, then attorney fees will be sharply higher than if the Action was brought only for professional negligence and the Health Care Facility proves to be licensed. However, the actual recovery by way of settlement or judgment should likewise be higher if the Action is brought and maintained as one for intentional conduct as opposed to negligent conduct. Punitive damages may be awarded in an action for intentional conduct, but they are not awardable in an action based solely on allegations of negligent conduct.

4. The Action. Attorneys and Clients agree that the Action will be initiated as one seeking damages for negligence as well as intentional conduct and, therefore, the attorney fees in this case may sharply exceed those prescribed in Business and Professions Code §6146. The Action does not include any appeal or other review proceeding following entry of judgment in the Action. In the event of an appeal, Attorneys may elect to represent Clients in the appeal, but they have no duty to do so.

5. Contingent Fee. Attorneys and Clients agree that the contingent fee in this case will be as follows:

(a) If the recovery by judgment is based solely on allegations of professional negligence against a "licensed health care provider," then the contingent fee shall be the maximum allowed by law at the time the Action is settled (or judgment is final) or that is provided in Business and Professions Code §6146 effective as of the date of this agreement, whichever is larger.

(b) If the recovery by judgment is based in part on allegations of intentional conduct, or is received from a defendant who is not a "licensed health care provider," then the contingent fee shall be as follows: (i) if

reached at or prior to the first Mandatory Settlement Conference held in this case, then __[percentage, e.g., 33]__ percent of the gross recovery; or (ii) if reached after the first Mandatory Settlement Conference, then __[percentage, e.g., 40]__ percent of any amounts recovered.

(c) If the Matter goes to trial, unless the Attorneys in their judgment determine otherwise, Attorneys will seek to submit Clients' case to the jury on Special Verdict; in that manner, Attorneys and Clients will learn whether the recovery in the Matter is based on allegations of professional negligence or of intentional conduct. If the matter does not go to trial but is instead settled, it is agreed between Clients and Attorneys that the recovery will be deemed to have been one for intentional, not negligent, conduct, and that attorney fees in this case will be calculated as set forth in Subparagraph (b) above.

6. Handling of Disbursements and Costs Incurred. If this Action is one to any extent governed as one for "professional negligence" against a "licensed health care provider," as described above, then Business and Professions Code §6146(c)(1) will apply and govern the handling of disbursements and costs. Subject to the limitation of Business and Professions Code §6146(c)(1), if applicable, no disbursements or costs will affect Attorneys' contingent fee, but will be debited from the Clients' net recovery after payment of the attorney fee.

7. Fee for Related Matters. Attorneys will not charge additional fees for work that Attorneys deem necessary to the proper prosecution of the Action. Attorneys may charge clients for other additional matters arising from the parties' relationship, but not without a separate written Attorney-Client fee agreement spelling out Attorneys' duties and fees.

8. Fee Negotiable. TO THE EXTENT THAT THIS ACTION IS NOT GOVERNED BY BUSINESS AND PROFESSIONS CODE §6146, THE FEE CHARGED BY ATTORNEYS IS NOT GOVERNED BY LAW, BUT IS NEGOTIABLE BETWEEN ATTORNEYS AND CLIENTS. TO THE EXTENT THAT THIS ACTION IS GOVERNED BY BUSINESS AND PROFESSIONS CODE §6146, THE FEES DESCRIBED IN THAT SECTION ARE THE MAXIMUM ALLOWED, AND THE CLIENTS AND ATTORNEYS MAY NEGOTIATE A LOWER FEE.

9. Costs and Expenses. Clients agree to pay Attorneys all costs and expenses incurred in performing legal services in connection with the Action. Such costs and expenses may include, but are not limited to, long-distance phone calls; messenger and other delivery fees; postage; charges for computer research and outside assisted legal research; travel expenses such as mileage, parking, airfare, meals, and hotel accommodations; photocopying and other reproduction charges; clerical staff overtime; word processing charges; charges for computer time; process servers' fees; filing fees and other charges assessed by courts and other public agencies; court reporter's fees; jury fees; witness fees; investigator's fees; expert's fees or consultant's fees; and other similar items. All such items will be charged to Clients at Attorneys' cost.

10. Grant of Lien. Clients grant to Attorneys a lien on any recovery by settlement or judgment in the Action to secure their right to receive attorney fees and payment of costs incurred or advanced and not reimbursed, and agree to execute all documents necessary to perfect said lien.

Clients are aware, and acknowledge, that this lien may significantly impair Clients' interest because Law Firm may be able to delay payment of any recovery or settlement funds to Clients until any disputes with Law Firm about unpaid attorney fees and costs advanced have been resolved. Clients acknowledge that Clients have been advised to seek independent legal advice about granting Law Firm this lien and have had a reasonable opportunity to do so. By signing this fee agreement and returning it to Law Firm, Clients represent that Clients have either obtained legal advice about this lien or have decided that it was unnecessary to do so.

11. Termination of Services.

(a) Clients shall have the right at any time to terminate Attorneys' services on written notice to Attorneys, and Attorneys shall immediately after receiving such notice cease to render additional services. Such termination shall not, however, relieve Clients of the obligation to pay the fees due for services and costs incurred prior to such termination.

(b) If Clients fail to meet any of Clients' obligations under this Agreement, Attorneys shall have the right to terminate this Agreement, and Clients shall take all steps necessary to free Attorneys of any obligation to perform further, including the execution of any documents necessary to complete Attorneys' discharge or withdrawal. The right of Attorneys under this Agreement is in addition to those rights created by statute or Rules of Professional Conduct.

8

Estate Planning—Sample Fee Agreement

I. SCOPE OF CHAPTER §8.1

II. FORM: SAMPLE INITIAL FEE AGREEMENT FOR ESTATE PLAN FOR USE WITH MARRIED COUPLE
§8.2

§8.1 I. SCOPE OF CHAPTER

This chapter presents a sample form designed to illustrate an agreement to provide estate planning advice to a married couple (see §8.2).

The sample agreement in this chapter is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. On practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§8.2 II. FORM: SAMPLE INITIAL FEE AGREEMENT FOR ESTATE PLAN FOR USE WITH MARRIED COUPLE

► To download **Word** version,
right click and choose
Save Target As

► To download **WordPerfect** version,
right click and choose
Save Target As

8.2-1 Sample initial fee agreement for estate plan for use with married couple

__ *[Law firm letterhead]* __

__ *[Date]* __

__ *[Names and address(es) of clients]* __

Dear __ *[names of clients]* __:

1. ESTATE PLANNING INFORMATION. In accordance with our recent telephone conversation, I am sending you the enclosed set of partially completed estate planning information sheets, requesting certain personal and family information plus information relating to your assets and liabilities. If you would complete the information sheets to the extent reasonably possible and either return them to me in advance of, or bring them with you to, our initial meeting in my office at __ *[address]* __ on __ *[date]* __, starting at __ *[time]* __, it would be extremely helpful to us in preparing new wills and related instruments for you and counseling you about your estate plan. Because our fees for estate planning are based primarily on the time spent in personal and telephone conferences as well as in preparing documents, etc., the more information you can provide us ahead of time, the less time it will take and the lower the cost will be.

Also enclosed are __ *[specify educational materials enclosed]* __.

The enclosed asset and liability sheets consist of a one-page summary of the approximate or estimated present market values of your assets and liabilities by general categories, followed by a number of schedules relating to specific items. You should specify the way in which you hold title to each of your significant assets and liabilities on the appropriate schedule. (If any item is held in a custodial, agency, or revocable trust account, simply list the account on the appropriate schedule and attach a copy of the most recent statement.) Please check the deed, passbook, certificate, note, policy, or other document of title and indicate whether you hold title in either of your names alone, in both of your names, or in the names of either or both of you and another or others as trustees of your revocable living trust, as community property, as joint tenants, as tenants in common, or otherwise. The rights associated with a particular asset and the tax consequences with respect to it generally are determined by the way in which the title is held.

The information relating to your present marriage, requested in Part C of the Personal and Family Information sheets as well as the financial information will be used to distinguish any separate or quasi-community property that either of you may have from your community property. For a brief discussion of the importance of determining the characterization of your property and the ways in which the title may be held, see the enclosed educational materials. That discussion should be helpful to you in completing the information sheets. During our conference, we can determine the character of the property now owned by the two of you and discuss in more detail your respective interests in and rights with respect to it. If you have not already done so, it may be desirable for you to enter into an agreement establishing the character of your property to minimize the possibility of a later dispute with the taxing authorities, between yourselves, or among the beneficiaries of your respective estates.

In addition to the data to be included on the estate planning information sheets, it would be very helpful if you would have available at our initial meeting the originals or copies of the following: (1) your present wills, revocable trust instrument, and powers of attorney, if any; (2) the grant deeds or title insurance policies relating to all real property owned by either or both of you; (3) life insurance policies owned by either of you; (4) the Summary Plan Description of each employer-sponsored retirement plan in which either of you is a Participant or Beneficiary; (5) relevant instruments and agreements relating to closely held partnerships, corporations, or

limited liability companies of which either of you is a general or limited partner, a shareholder, or a member; (6) relevant instruments and agreements relating to intellectual property, such as copyrights and patents; (7) any agreements you have ever entered into regarding the separate or community character of your property; (8) any marital settlement agreement and/or divorce decree relating to a previous marriage of either of you with respect to any continuing rights or obligations; (9) your most recent federal income and gift tax returns; (10) all trusts, custodianships, educational savings accounts, and private foundations or supporting organizations now in existence that either or both of you have created or in which either or both of you or your issue (*i.e.*, lineal descendants) have an interest; and (11) any other instruments or documents having a bearing on your estate plan.

2. ESTATE PLAN. Before the initial meeting, you should each give some thought to how you generally would like to dispose of your estate when you die. In determining the beneficiaries, please bear in mind that an individual may not survive you. In that event, you should consider whether anyone else should receive the proposed gift instead, such as the individual's surviving spouse or issue. Also, if you make an outright gift to someone, the beneficiary can later give what is left of the property to whomever he or she chooses; however, if the gift is in trust, then the trust instrument can specify who ultimately receives the property or successive beneficial interests in it. A gift in trust also may save estate taxes on the beneficiary's death and can protect the trust assets from the claims of creditors and predators. Finally, if all of your specified beneficiaries should die before your estate has become fully distributable, how would you like to dispose of any remaining property? We usually include a general provision leaving any such property to your heirs at law determined as of that time, but you might prefer to leave it to others, including one or more charitable organizations, particularly if your heirs at law are likely to be people you do not even know.

Also, you should bear in mind that the size and composition of your estate may be very different at the time of your deaths from what it is now. Therefore, it usually is better to dispose of assets in general terms rather than referring to specific items, and to dispose of the bulk of your estate in shares rather than specific dollar amounts.

A fundamental decision that you will need to make (if you have not already done so) is whether to establish a revocable living (or *inter vivos*) trust, along with a "pour-over" will, as opposed to a will with or without trust provisions. The former arrangement is more expensive to draft and implement than the latter, and a revocable trust can be somewhat burdensome to fund and administer, but it could result in significant savings in time and estate settlement costs and would better protect your privacy in the event of the death or incompetence of either of you. However, you should realize that, in general, no tax savings will result from the use of a revocable living trust as opposed to a will containing trust provisions.

If your estate plan involves the establishment of a testamentary trust under your wills following your deaths rather than a revocable living trust, you generally should not hold title to your property in joint tenancy form, since a joint tenancy can also give rise to unintended and often unfavorable tax consequences. Furthermore, the trust named as the beneficiary of the residue of your probate estate generally should be named as the primary or contingent beneficiary of your life insurance policies, employee benefit plans (including IRAs), and pay-on-death (POD) accounts, so as to better coordinate the disposition of your entire estate, but without subjecting it all to probate.

You also should consider whom you would like to appoint as the executor(s) of your wills and the guardian(s) of the person and estate for your minor child(ren), and, because we are likely to determine that a trust is advisable, you will need to appoint the trustee(s). In addition, if you have not already done so, you may want to appoint an agent (or attorney-in-fact) to act on your behalf, particularly in the event you become incompetent, for property matters, health care, and other personal decisions. You may name each other, another adult individual, or a qualified institution (such as a bank or trust company) to serve separately or jointly in each of these fiduciary capacities, although an institution cannot serve as guardian of the person of a minor and generally should not be named as a health care agent. You should consider naming at least one successor for any individual appointed as a fiduciary, in case he or she should fail to qualify or cease to act for any reason.

3. DUAL REPRESENTATION. Although you are married and generally have common legal interests and obligations, conflicts of interest may arise between the two of you with respect to various matters during or following the estate planning process, such as the character of your property (*i.e.*, whether it is separate, community, or quasi-community property) and how to dispose of it during your lifetimes and at your deaths. Despite the possibility of potential conflicts, you have requested this firm to represent both of you with respect

to your estate plan. However, if you anticipate that such conflicts would be serious, it may be better for each of you to have separate independent counsel at the outset to avoid the possibility that our advice to one of you is unduly influenced by our dual representation. Under such circumstances, one attorney ordinarily may not represent both of you.

If you decide to go forward with our dual representation of you, and one or more conflicts arise between the two of you of such a nature that it is impossible in our judgment for us to perform our obligations to each of you in accordance with this letter, we will withdraw at that time from all further dual representation of both of you and advise either or both of you to obtain independent counsel.

Finally, you have each agreed that all information that we receive from either or both of you in the course of our dual representation of you is nonconfidential between you regardless of the manner in which it is obtained (e.g., in conferences with both of you or in private telephone or personal conferences with only one of you, including any conferences that may have taken place before the date of this letter). However, this agreement would not prevent either of you from changing or revoking your will or other estate planning instruments after we have completed your estate plan, without the knowledge or consent of the other.

4. WAIVER OF FUTURE CONFLICT. Our agreement to provide estate planning services to you is conditioned upon the understanding that we are free to provide legal services to any clients (including your adversaries) and take positions adverse to you in any matters (whether involving the same substantive area(s) of law for which you have retained us or some other unrelated area(s), and whether involving transactions, counseling, litigation, or otherwise) that are not substantially related to your estate plan or other matters for which you may hereafter retain us. In this connection, you should be aware that we provide services on a wide variety of legal subjects to a large number of clients. (A summary of our current practice areas and the industries in which we represent clients can be found on our website at __ *[specify website address]* __.) You acknowledge that you have had the opportunity to consult with other counsel about the consequences of this waiver.

5. BILLING POLICIES AND PROCEDURES. For your information, I also am enclosing a copy of our firm's general Billing Policies and Procedures statement to our clients, covering the manner in which we compute our fees, the relevance of hourly rates and other factors used in the determination of a reasonable fee for our services, the payment of disbursement items, the timing and content of billing statements, and the expected payment period. Please review this statement carefully before our initial meeting and do not hesitate to ask any questions you may have regarding billing matters at any time. We maintain errors and omissions insurance coverage applicable to the services to be provided to you.

While hourly rates are not the sole determinant of our fees, they are a major factor to which we refer in determining our monthly billings. Our firm's hourly rates presently range from __ *[dollar amount]* __ for our newer associates to __ *[dollar amount]* __ or more for our most senior and experienced partners. We presently anticipate that the primary services relating to your estate plan will be performed by me (at a current hourly rate of __ *[dollar amount]* __), by one or more of our estate planning associates (whose current hourly rates range from __ *[dollar amount]* __ to __ *[dollar amount]* __), and/or by one or more of our estate planning legal assistants (whose current hourly rates range from __ *[dollar amount]* __ to __ *[dollar amount]* __). Staffing decisions will be made by me as the partner in charge of the engagement, with the objective of providing services to you on the most efficient and cost-effective basis. We reassess our hourly rate schedules from time to time, generally on an annual basis.

As I mentioned to you during our telephone conversation, the legal fees and disbursements for a fairly basic but complete estate plan frequently total __ *[dollar amount]* __ to __ *[dollar amount]* __, and it will vary depending on whether the plan involves a revocable living trust with "pour-over" wills as opposed to reciprocal wills with or without trust provisions, the complexity of the plan generally, and the extent to which the wills and any other instruments vary from the norm. If you wish, I will give you an estimate of the total amount of the fees and disbursements for the services we agree to perform for you at the end of the initial meeting, but please bear in mind that the total bill could be substantially more or less than the estimate due to the uncertainties involved. Bills generally are sent out monthly and payment is expected within 30 days after receipt.

[If applicable, add the following option]

We request that you give us a retainer in the amount of __ *[dollar amount]* __ at the outset of this engagement. We will deposit your retainer in a trust account on your behalf and will return it to you at the end of the engagement, or simply apply it to the amount you owe us if our work is completed within __ *[specify number, e.g., 3]* __ months. The firm in its discretion, as a condition to further work during the course of this

engagement or further engagements, may require a further or increased retainer. You further agree that, in the event a fee statement is not paid in a timely manner, the firm in its discretion may apply the retainer to any outstanding balance. You would then be required to deposit replacement funds into your trust account to bring its balance back up to the agreed-on retainer level, if our work has not been completed.

[Continue]

Subject, of course, to our ethical and professional obligations, you agree that the firm may terminate its legal services and withdraw from this engagement in the event our fee statements are not paid in a timely manner.

If you agree that, because of the limited scope of our representation, we are free to represent clients or take positions that might be adverse to you in matters that are not substantially related to your estate plan, if you agree to the terms of our dual representation of you, and if our billing policies and procedures are acceptable to you, then please sign and date the enclosed copy of this letter and return it to me __ [along with your check for __ [dollar amount]__]__ in the enclosed, self-addressed, stamped envelope so as not to impede the commencement of our work on your behalf.

6. U.S. TREASURY DEPARTMENT CIRCULAR 230. As a result of new rules promulgated under U.S. Treasury Department Circular 230, effective June 20, 2005, any written advice rendered by our firm concerning a federal tax issue is subject to certain requirements concerning form and content. Depending on the nature of the federal tax issue or issues addressed by the advice, it is possible that you may not be able to rely on the advice to avoid federal income tax penalties with respect to issues addressed therein. Alternatively, you may not be able to rely on the advice to avoid federal income tax penalties with respect to issues or conclusions not specifically addressed by the written advice. The extent to which our written advice is intended to provide protection against federal income tax penalties, and the cost of providing such advice, will be discussed with you from time to time as appropriate.

Sincerely yours,

__ [Name of firm]__

Date: _ _ _ _ _

__ [Signature]__

__ [Typed name]__

Attorney for __ [names]__

ACCEPTED AND AGREED TO:

Date: _ _ _ _ _

By: __ [Signature]__

__ [Typed name]__

Client

Date: _ _ _ _ _

By: __ [Signature]__

__ [Typed name]__

Client

Source: California Estate Planning §1.62 (Cal CEB 2002).

Comment: On the problems of conflicts and representing multiple clients, see §§1.34-1.35. On client trust accounts and obtaining deposits, see §1.30. On avoiding the inadvertent establishment of an attorney-client relationship and the necessity of including an effective date of the agreement, see §1.53.

9

Limited Scope Representation—Sample Fee Agreements and Checklists

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II. LIMITED SCOPE REPRESENTATION

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IV. SAMPLE FORMS: GENERAL CIVIL MATTERS

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- B. Form: Sample Fee Agreement—Consulting Services Agreement §9.12
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- E. Form: Sample Change in Scope Letter §9.15
- F. Checklist: Tasks to Be Apportioned (Use as Attachment to Limited Scope Fee Agreement) §9.16
- G. Checklist: Tickler (Keep on Top of File) §9.17

§9.1 I. SCOPE OF CHAPTER

This chapter briefly describes limited scope representation (an attorney's undertaking to perform a discrete legal task for a client; see §§9.2-9.3) and sets out sample fee agreements that counsel may use when entering into an agreement for such representation. The sample fee agreements cover the following types of limited scope engagement:

- A single consultation with no expectation of further services being rendered (see §9.4);
- An ongoing coaching relationship in which the attorney offers coaching, advice, and counsel, and document assistance (see §9.5);
- An ongoing coaching relationship in which the attorney's duties may include document assistance, drafting, strategy, scripting questions, analyzing discovery, drafting discovery, or any other function that stops short of making a formal court appearance on behalf of the client (see §9.6); and
- Services that include appearing at a settlement conference, hearing, or other formal court proceeding, which require that the attorney becomes attorney of record for a limited purpose (see §9.7).

The chapter also includes sample checklists to help the attorney and client clarify which tasks the attorney will perform (or which issues the attorney will address) and which tasks the client will perform (or which issues the client will address). See §§9.9-9.10. Such a checklist should be attached to the fee agreement. For a sample fee agreement designed to have a checklist attached, see §9.7. For a sample letter to use when the scope of representation changes, see §9.8.

CAUTION: A letter alone is not sufficient to document a change in the scope of representation. A new fee agreement or attachment indicating the client's acceptance of the change in scope is essential. The letter documenting a change in scope is intended as a transmittal of a new fee agreement, and not a substitute for it.

These sample fee agreements and checklists are tools counsel can use to ensure that the client and attorney each agree and understand the limitations on the scope of the attorney's involvement.

The agreements in this chapter are illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

II. LIMITED SCOPE REPRESENTATION

§9.2 A. Dividing Tasks or Issues Between Attorney and Client

Unbundling. Limited scope representation (sometimes called "unbundling") is a "relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person." Cal Rules of Ct 3.35(a). In limited scope representation, the attorney and the client agree on which specific tasks each will perform, which tasks will be within the scope of the representation, and that the client represents him- or herself as to services that the attorney does not agree to provide. Less commonly, attorney and client agree that the attorney will handle one or more discrete issues from start to finish and the client will assume responsibility for the other issues.

NOTE: California Rules of Court 3.35-3.37 and accompanying Judicial Council Forms MC-950, MC-955, MC-956, and MC-958, applicable to general civil matters, became effective January 1, 2007. Similar rules for family law (Cal Rules of Ct 5.70 and 5.71 and accompanying Judicial Council Forms FL-950, FL-955, FL-956, and FL-958) became effective July 1, 2003. Note that both MC-950 and FL-950 are mandatory forms that must be filed and served in any case in which an attorney makes a limited scope representation court appearance.

Although limited scope representation has been most common in family law (see, e.g., Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§3.38-3.42 (Cal CEB Annual)), it can be useful in general business representation, landlord-tenant, small claims assistance, homeowner's rights, consumer and insurance disputes, and other types of civil litigation. Legal services performed on a limited scope basis include, e.g., providing legal advice, preparing or reviewing documents, coaching a client to appear in court, negotiating on behalf of a client who will make all court appearances him- or herself, assisting with the collection and organization of exhibits, scripting testimony, research and drafting briefs, or making a limited court appearance (either for a hearing or at a settlement conference).

NOTE: Because it is necessary to specifically define the scope of the attorney's services in writing, counsel should not use a regular full service fee agreement when providing limited scope representation. The sample forms and checklists in this chapter offer several examples of ways to define the limitations on scope for the attorney and the client.

Checklists. Many attorneys use checklists to memorialize their discussions with the client and define the scope of the limited representation. For sample checklists, see §§9.9-9.10. The checklists can then be attached to and incorporated into the fee agreement. See §9.7. If the parties make a change in the scope of representation after entering into the initial agreement, the checklist should also be revised or replaced to document the changes that have been made. If the scope of the engagement changes, counsel should memorialize the change of scope in a writing signed by the client *before* doing any work not within the originally agreed-on scope. Failure to enter into a revised agreement or checklist memorializing the change in scope may invalidate the limitation on scope.

NOTE: For a compilation of resources on limited scope representation, see the California Courts website at <http://www.courtinfo.ca.gov/programs/equalaccess/ethiss.htm#limited>.

§9.3 B. Recognizing Legal and Ethical Responsibilities

An attorney entering into a limited scope representation should be aware that he or she is subject to the same legal requirements that apply to any fee agreement. On individual fee agreement provisions and accompanying ethical and legal issues, see chap 1.

Although important in every fee agreement, it is essential that a limited scope agreement clearly define the scope of the representation and the exclusions from representation. See, e.g., *Kane, Kane & Kritzer, Inc. v Altagen* (1980) 107 CA3d 36, 165 CR 534 (attorney had only limited duty when respective responsibilities of attorney and client sufficiently delineated by course of dealing); *Ishmael v Millington* (1966) 241 CA2d 520, 529, 50 CR 592 (attorney's failure to disclose limitation on representation established triable issue of negligence). See §1.21.

Counsel should also realize that despite the limited nature of the representation, the attorney still has the responsibility to advise the client of matters that may result in adverse consequences if not considered, even though these matters are beyond the scope of the services the attorney is to provide. *Nichols v Keller* (1993) 15 CA4th 1672, 1683, 19 CR2d 601 ("[the attorney] should also volunteer opinions when necessary to further the client's objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered."). See §1.21.

NOTE: On the ethical issues that arise in a limited scope representation, see State Bar of California Committee on Professional Responsibility and Conduct, *An Ethics Primer on Limited Scope Representation* (2004), available on the State Bar of California website at http://calbar.ca.gov/calbar/pdfs/ethics/COPRAC/COPRAC_02-0005_11-17-04.pdf. For risk management materials designed for use in a limited scope representation, see Limited Representation Committee of the California Commission on Access to Justice, *Family Law Limited Scope Representation Risk Management Materials* (2004), available on the State Bar of California website at http://calbar.ca.gov/calbar/pdfs/accessjustice/Risk-Management-Packet_2004-01-12.pdf. Limited Scope Representation Risk Management Materials designed for general civil litigation are available at http://www.courtinfo.ca.gov/programs/equalaccess/documents/Risk_Management_Materials_Civil.pdf. A free training on how to use the risk management materials is posted on the ABA's website at http://www.abanet.org/legalservices/delivery/downloads/trainthetrainer_flashvid1.html. Although this training focuses on family law, the materials parallel the civil risk management materials.

Source: General Interest/Fee Agreement Forms Manual/9 Limited Scope Representation--Sample Fee Agreements and Checklists/ III. SAMPLE FORMS: FAMILY LAW MATTERS/§9.4 A. Form: Sample Fee Agreement--Single Consultation Agreement

III. SAMPLE FORMS: FAMILY LAW MATTERS

§9.4 A. Form: Sample Fee Agreement—Single Consultation Agreement

► To download **Word** version,
right click and choose
Save Target As

► To download **WordPerfect** version,
right click and choose
Save Target As

9.4-1 Sample fee agreement—single consultation agreement

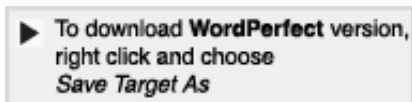
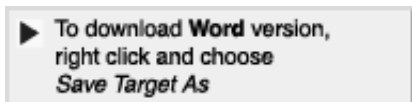
On _____, 200_, _____ (Client) consulted with _____ (Attorney), who performed a conflicts check on _____ for limited scope assistance and advice. At that time, attorney provided the following services:	
	Review of court documents (describe):
	Information about document preparation:
	Assistance with document preparation:
	Advice regarding Client's rights and responsibilities:
	Advice about the law and strategy relevant to issues as identified by Client:
	Preparation of computer-support guideline calculations:
	Information about fact gathering and discovery:
	Guidance about procedural information, filing, and service of documents:
	Advice about negotiation and the preparation and presentation of evidence:
	Advice about law and strategy related to an ongoing mediation/negotiation or litigation:
	Legal research:
	Advice on trial or negotiating techniques:
	Advice regarding property rights:
	Review and analysis of Client's case or trial strategy:
	Other (specify):
Client has paid Attorney for _ _[her/his]_ _ time. All tasks which Client requested of Attorney have been completed and no further services are requested or expected from Attorney. Neither Client nor Attorney contemplates or expects a further	

professional relationship. Client acknowledges that __[he/she]__ has been advised of the Client's right to seek separate legal advice from other counsel of the Client's choice with regard to all legal matters that are outside the scope of the specific limited services provided by Attorney under this agreement. Dated: _____	
Client signature	Attorney signature

Comment: This sample form can be adapted and used when the attorney has one consultation with the client and completes the engagement at the end of that meeting without the expectation that further services will be requested or performed. In this situation, if counsel uses this agreement, it will not be necessary to send a disengagement or nonretention letter (see §§16.2-16.3). A common use of this form occurs when a litigant self-represents at a hearing and then consults an attorney to draft the order after the hearing and wage assignment. This form can also be adapted to include a blank to indicate that the attorney advised the client of the existence of related issues, and that the client understands that those issues are excluded from the scope of the representation (see §9.3). See §9.11 for a sample form for use in a general civil matter when the attorney has one consultation with the client.

This sample agreement is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation.

§9.5 B. Form: Sample Fee Agreement—Consultation Agreement



9.5-1 Sample fee agreement—consultation agreement

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between _ *[name]* _, hereafter referred to as "Attorney," and _ *[name]* _, hereafter referred to as "Client."

2. NATURE OF CASE. Client consulted Attorney in the following matter: _ *[Describe circumstances]* _.

3. CLIENT RESPONSIBILITIES AND CONTROL. Client will remain responsible for and in control of _ *[his/her]* _ own case at all times. This means that Client will be responsible for understanding the issues, resolution options, and potential consequences of those resolution options. In addition, Client agrees to:

- a. Cooperate with Attorney or _ *[his/her]* _ office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;
- b. Inform Attorney of the specific parts of the case with which Client requests Attorney's assistance;
- c. Review and evaluate all information provided by Attorney;
- d. Keep Attorney or _ *[his/her]* _ office advised of Client's concerns and any information pertinent to Client's case;
- e. Provide Attorney with copies of all correspondence to and from Client relevant to the case;
- f. Notify Attorney of any pending negotiations, hearings, contractual deadlines, or litigation;
- g. Keep all documents related to the case in a file for review by Attorney;
- h. Sign all relevant papers, agreements, or findings relative to the case;
- i. Immediately notify Attorney of any changes of work or home addresses or telephone numbers of Client; and
- j. Immediately notify Attorney if Client receives any new pleading, motion, letter, or other document(s) from the other party, the other party's lawyer, any expert, appraiser, or evaluator hired by either party or appointed by the Court, or any Special Master, or the Court, and provide Attorney with a copy of the item received as well as the date it was received by Client.

4. SCOPE OF SERVICES. Client requests Attorney to perform or *not to perform* the following services related to the issues identified here or on the following page or attachment hereto:

[For sample scope checklists to use as attachments, see §§9.9-9.10]

(Indicate **Yes** or **No** in box)

a.		Advice about law and strategy related to an ongoing mediation, negotiation, or litigation
b.		Information about document preparation
c.		Assistance with document preparation

d.		Information about fact gathering and discovery
e.		Assistance with drafting discovery requests
f.		Assistance with computer-support programs
g.		Guidance and procedural information regarding filing and serving documents
h.		Advice about negotiations and the preparation and presentation of evidence
i.		Legal research
j.		Coaching on trial or negotiating techniques
k.		Review and analysis of Client's trial strategy
l.		Advice about an appeal
m.		Procedural assistance with an appeal
n.		Assistance with substantive legal argument
o.		Other:

5. LIMITATION OF ATTORNEY'S RESPONSIBILITIES. Attorney will perform the specific legal tasks identified by the word "Yes" in Paragraph 4, consistent with Attorney's ethical and professional responsibilities, including observing strict confidentiality, and based on the information available to Attorney. In providing those services, Attorney *will not*:

- a. Represent, speak for, or appear for Client, or sign papers on Client's behalf;
- b. Provide services in Paragraph 4 that are identified with the word "No";
- c. Make decisions for Client about any aspect of the case;
- d. Determine the assets and obligations of Client's marriage, their character, or their value;
- e. Determine an appropriate division of the assets and obligations of Client's marriage;
- f. Litigate Client's case on Client's behalf; or
- g. Protect Client's property by means of restraining orders while discovery and/or negotiations are in progress.

Attorney *will not* perform any services identified by the word "No" in Paragraph 4. Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services must be specifically listed in an amendment to this agreement, and initiated and dated by both parties. The date that both Attorney and Client initial any such list of additional services to be provided will be the date on which Attorney becomes responsible for providing those additional services. If Client decides to retain Attorney as Client's attorney of record for handling the entire case on Client's behalf, Client and Attorney will enter into a new written agreement setting forth that fact as well as Attorney's additional responsibilities in Client's case.

6. RIGHT TO SEEK ADVICE OF OTHER COUNSEL. Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in Paragraph 4 that are identified with the word "No" at any time during or following this limited consulting services agreement.

7. METHOD OF PAYMENT FOR SERVICES.

a. **Hourly Fee:** The current hourly fee charged by Attorney for services under this agreement is __[*dollar amount*]___. Unless a different fee arrangement is established in Paragraph 7b, the hourly fee will be payable at the time of service. Attorney will charge in increments of __[*specify fraction, e.g., one-tenth*]__ of an hour, rounded off for each particular activity to the nearest __[*specify fraction, e.g., tenth*]__ of an hour. The hourly fee will be payable at the time of the service.

b. **Payment from Deposit:** For a continuing consulting role, Client will pay to Attorney a deposit of __[*dollar amount*]___, to be received by Attorney on or before __[*date*]__ and to be applied against Attorney fees and costs incurred by Client. This amount will be deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney fees and costs is less than the amount of the deposit, then the difference will be refunded to Client.

c. **Costs:** All costs payable to third parties in connection with Client's case including, e.g., filing fees, investigation fees, and deposition fees shall be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney fees to be incurred by Client under this agreement.

8. **DISCHARGE OF ATTORNEY.** Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services after receipt of the notice. Notwithstanding the discharge, Client will remain obligated to pay Attorney at the agreed rate for all services provided prior to such discharge.

9. **WITHDRAWAL OF ATTORNEY.** Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following:

- a. The Client consents,
- b. The Client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively, and
- c. The Client fails to pay Attorney's fees or costs as required by __[*his/her*]__ agreement with the Attorney.

Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided. At the termination of services under this agreement, Attorney will release promptly to Client on request all of Client's papers and property.

10. **DISCLAIMER OF GUARANTY.** Although Attorney may offer an opinion about possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guaranty.

11. **ARBITRATION OF FEE DISPUTE.** If a dispute arises between Attorney and Client regarding Attorney's fees or costs under this agreement and Attorney files suit in any court other than small claims court, Client will have the right to stay that suit by timely electing to arbitrate the dispute under Business and Professions Code §§6200-6206, in which event Attorney must submit the matter for such arbitration.

12. **ENTIRE AGREEMENT.** This agreement is the complete agreement between Client and Attorney. If Client and Attorney decide to change or amend this agreement in any way, the change must be in writing and attached to this agreement.

13. **EFFECTIVE DATE OF AGREEMENT.** The effective date of this agreement will be the date when, having been executed by Client, one copy of the agreement is received by Attorney and Attorney receives the deposit required by Paragraph 7b. Once effective, this agreement will, however, apply to services provided by Attorney

on this matter before its effective date.

The undersigned has read the foregoing terms for the provision of legal services by __ __[*name of law firm*]__ __ and agrees to these terms and conditions.

Date: _ _ _ _ _ __[*Signature*]__
 __[*Typed name*]__ __
 Client

Date: _ _ _ _ _ __[*Signature*]__
 __[*Typed name*]__ __
 Attorney

Comment: This sample agreement may be adapted for use when a client retains the attorney for advice and counsel, but not for, e.g., court appearances (see "Scope of Services" in Paragraph 4) on a limited scope basis. The scope of services may be defined in the body of the fee agreement or it can be defined in a checklist attached as an exhibit to the fee agreement (see §§9.9-9.10). This form can also be adapted to include a blank to indicate that the attorney advised the client of the existence of related issues, and that the client understands that those issues are excluded from the scope of the representation (see §9.3). See §9.12 for a sample form for use in a general civil matter when the attorney provides advice and counsel to the client.

CAUTION: Regardless of whether the scope of services is defined in the body of the agreement or in a checklist attached as an exhibit, if the scope of the engagement changes, then counsel should memorialize the change of scope in a writing signed by the client *before* doing any work not within the originally agreed upon scope.

This sample agreement is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation.

§9.6 C. Form: Sample Fee Agreement—Ongoing Consultation Agreement

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9.6-1 Sample fee agreement—ongoing consultation agreement

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between _ [name] _, hereafter referred to as "Attorney," and _ [name] _, hereafter referred to as "Client."

2. NATURE OF CASE. Client is requesting ongoing consulting services from Attorney in the following matter: _ [Describe circumstances] _.

3. CLIENT RESPONSIBILITIES AND CONTROL. Client shall remain responsible for the conduct of the case and understands that _ [he/she] _ will remain in control of and be responsible for all decisions made in the course of the case. Client agrees to:

- a. Cooperate with Attorney or _ [his/her] _ office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;
- b. Keep Attorney or _ [his/her] _ office advised of Client's concerns and any information that is pertinent to Client's case;
- c. Provide Attorney with copies of all pleadings and correspondence to and from Client regarding the case;
- d. Immediately provide Attorney with any new pleadings or motions received from the other party; and
- e. Keep all documents related to the case in a file for review by Attorney.

4. SERVICES TO BE PERFORMED BY ATTORNEY. Client and Attorney have agreed that Attorney will provide the following services, indicated by writing "Yes" or "No" (Attorney will not perform any services indicated by the word "No"):

- a. _____ Legal advice: office visits, telephone calls, fax, mail, e-mail;
- b. _____ Advice about availability of alternative means to resolving the dispute, including mediation and arbitration;
- c. _____ Evaluation of Client's self-diagnosis of the case and advising Client about legal rights and responsibilities;
- d. _____ Guidance and procedural information for filing or serving documents;
- e. _____ Review pleadings and other documents prepared by Client;
- f. _____ Suggest documents to be prepared;
- g. _____ Draft pleadings, motions, and other documents;
- h. _____ Factual investigation: contacting witnesses, public record searches, in-depth interview of Client;
- i. _____ Assistance with computer-support programs;

- j. _____ Legal research and analysis;
 - k. _____ Evaluate settlement options;
 - l. _____ Discovery: interrogatories, depositions, requests for document production;
 - m. _____ Planning for negotiations, including simulated role-playing with Client;
 - n. _____ Planning for court appearances, including simulated role-playing with Client;
 - o. _____ Standby telephone assistance during negotiations or settlement conferences;
 - p. _____ Backup and troubleshooting during hearing or trial;
 - q. _____ Referring Client to expert witnesses, Special Masters, or other counsel;
 - r. _____ Counseling Client about an appeal;
 - s. _____ Procedural assistance with an appeal and assisting with substantive legal argument in an appeal;
 - t. _____ Provide preventive planning and/or schedule legal checkups; and
 - u. _____ Other: _____
-

5. ATTORNEY'S RESPONSIBILITIES. Attorney will exercise due professional care and observe strict confidentiality in providing the services identified by the word "Yes" in Paragraph 4. In providing those services, Attorney *will not*:

- a. Represent, speak for, or appear for Client, or sign papers on Client's behalf;
- b. Become attorney of record on any court papers or litigate on Client's behalf;
- c. Provide services that are not identified by the word "Yes" in Paragraph 4;
- d. Make decisions for Client about any aspect of the case; nor
- e. Protect Client's property by means of restraining orders while discovery and/or negotiations are in progress.

Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services must be specifically listed in an amendment to this agreement, and initialed and dated by both parties. The date that both Attorney and Client initial any such list of additional services to be provided will be the date on which Attorney becomes responsible for providing those additional services. If Client decides to retain Attorney as Client's attorney of record for handling the entire case on Client's behalf, Client and Attorney will enter into a new written agreement setting forth that fact and Attorney's additional responsibilities in Client's case.

6. RIGHT TO SEEK ADVICE OF OTHER COUNSEL. Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in Paragraph 4 which are identified with the word "No" at any time during or following this Ongoing Consulting Agreement.

7. METHOD OF PAYMENT FOR SERVICES.

a. *Hourly Fee:* The current hourly fee charged by Attorney for services under this agreement is __[dollar amount]___. Unless a different fee arrangement is established in Paragraph 7b, the hourly fee shall be payable at the time of the service. Attorney will charge in increments of __[specify fraction, e.g., one-tenth]__ of an hour, rounded off for each particular activity to the nearest __[specify fraction, e.g., one-tenth]__ of an hour.

If, while this agreement is in effect, Attorney increases the hourly rate(s) being charged to Client generally for Attorney's fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided __[number, e.g., 30]__ days or more after written notice of the increase is mailed to Client. If Client chooses not to consent to the increased rate(s), Client may terminate Attorney's services under this agreement by written notice effective when received by Attorney.

b. *Payment from Deposit:* For a continuing consulting role, Client will pay to Attorney a deposit of __[dollar amount]___, to be received by Attorney on or before __[date]___, and to be applied against Attorney's fees and costs incurred by Client. This amount will be deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney's fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

c. *Costs:* Client will pay Attorney's out-of-pocket costs incurred in connection with this agreement, including long-distance telephone and fax costs, photocopy expenses, and postage. All costs payable to third parties in connection with Client's case including filing fees, investigation fees, deposition fees, and the like will be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney's fees to be incurred by Client under this agreement.

d. *In Legal Action to Enforce this Agreement:* Should it be necessary to institute any legal action for the enforcement of this agreement, the prevailing party shall be entitled to receive all court costs and reasonable attorney fees incurred in such action from the other party.

8. DISCHARGE OF ATTORNEY. Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. Notwithstanding the discharge, Client will remain obligated to pay Attorney at the agreed rate for all services provided and to reimburse Attorney for all costs incurred prior to such discharge.

9. WITHDRAWAL OF ATTORNEY. Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: (a) Client consents, (b) Client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively, and (c) Client fails to pay Attorney's fees or costs as required by __[his/her]__ agreement with the Attorney.

Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided, and to reimburse Attorney for all costs incurred before the withdrawal.

At the termination of services under this agreement, Attorney will promptly release all of Client's papers and property to Client on request.

10. RESOLVING DISPUTES BETWEEN CLIENT AND ATTORNEY.

a. *Notice and Negotiation:* If any dispute between Client and Attorney arises under this agreement regarding the payment of fees, Attorney's professional services rendered to or for the Client, or any other disagreement (regardless of the nature of the facts or legal theories involved), then both Attorney and Client agree to meet and confer within __[number, e.g., 10]__ days of written notice (by either Client or Attorney) that the dispute exists. The purpose of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.

b. **Mediation:** If the dispute is not resolved through negotiation, Client and Attorney will attempt, within __[number, e.g., 15]__ days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within __[number, e.g., 15]__ days. If Attorney and Client cannot agree on a neutral mediator, they will request that the __[name]__ County Bar Association select a mediator. The mediation shall occur within __[number, e.g., 15]__ days after the mediator is selected. Attorney and Client shall share the costs of the mediation, provided that the payment of costs and any attorney fees may be mediated. Nothing in this provision shall constitute a waiver of Client's rights to State Bar fee arbitration or a trial de novo after a State Bar fee arbitration.

11. AMENDMENTS AND ADDITIONAL SERVICES. This written agreement governs the entire relationship between Client and Attorney. All amendments shall be in writing and attached to this agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraphs 4-5, then a photocopy of Paragraph 4 (which clearly denotes which extra services are to be provided, is signed and dated by both Attorney and Client, and is attached to this agreement) shall qualify as an amendment.

12. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

13. STATEMENT OF CLIENT'S UNDERSTANDING. I have carefully read this agreement and I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

- a. _____ I have accurately described the nature of my case in Paragraph 2.
- b. _____ I will be responsible for the conduct of my case and will be in control of my case at all times as described in Paragraph 3.
- c. _____ The services Attorney has agreed to perform in my case are identified by the word "Yes" in Paragraph 4. I take responsibility for all other aspects of my case.
- d. _____ I understand and agree to the limitations on the scope of Attorney's responsibilities identified in Paragraphs 4-5 and understand that Attorney will not be responsible for my conduct in handling my case.
- e. _____ I will pay Attorney for services as described in Paragraph 7.
- f. _____ I will resolve any disputes I may have with Attorney under this agreement in the manner described in Paragraph 10.
- g. _____ I understand that any amendments to this agreement must be in writing, as described in Paragraph 11.
- h. _____ I acknowledge that I have been advised by Attorney that I have the right to consult with another independent attorney to review this agreement and to advise me on my rights as a client before I sign this agreement.

The undersigned has read the foregoing terms for the provision of legal services by __[name of law firm]__ and agrees to these terms and conditions.

Date: _ _ _ _ _

__ [Signature] __
__ [Typed name] __
Client

Date: _ _ _ _ _

__ [Signature] __
__ [Typed name] __
Attorney

Comment: This sample agreement may be adapted and used when the attorney and the client have an ongoing relationship that encompasses more than advice and consultation, such as preparation of documents, research, analysis, and negotiation, but not appearing in court. This agreement contemplates a greater degree of attorney involvement than the agreement in §9.5. This is the most common type of limited scope arrangement. See §9.13 for a sample form for use in a general civil matter when the attorney provides ongoing consultation to the client.

The scope of services may be defined in the body of the fee agreement (see Paragraph 4) or it can be defined in a checklist attached as an exhibit to the fee agreement (see §§9.9-9.10). This form can also be adapted to include a blank to indicate that the attorney advised the client of the existence of related issues, and that the client understands that those issues are excluded from the scope of the representation (see §9.3).

CAUTION: Regardless of whether the scope of services is defined in the body of the agreement or in a checklist attached as an exhibit, if the scope of the engagement changes, then counsel should memorialize the change of scope in a writing signed by the client *before* doing any work not within the originally agreed upon scope.

This sample agreement is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation.

§9.7 D. Form: Sample Fee Agreement—Court Appearance

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9.7-1 Sample fee agreement—court appearance

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between _ *[name]* _, hereafter referred to as "Attorney," and _ *[name]* _, hereafter referred to as "Client."

2. NATURE OF CASE. Client is requesting ongoing consulting services from Attorney in the following matter: _ *[Describe circumstances]* _.

These services are likely to require Attorney to appear of record for a limited issue.

3. CLIENT RESPONSIBILITIES AND CONTROL. Client intends to retain control over all aspects of the case except those specifically assigned to Attorney, and understands that _ *[he/she]* _ will remain in control of the case and be responsible for all decisions made in the course of the case. Client agrees to:

- a. Cooperate with Attorney or _ *[his/her]* _ office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;
- b. Keep Attorney or _ *[his/her]* _ office advised of Client's concerns and any information that is pertinent to Client's case;
- c. Provide Attorney with copies of all pleadings and correspondence to and from Client regarding the case;
- d. Immediately provide Attorney with any new pleadings or motions received from the other party; and
- e. Keep all documents related to the case in a file for review by Attorney.

4. SERVICES TO BE PERFORMED BY ATTORNEY.

a. **Scope of Services:** Client seeks the services from Attorney as set forth in the "Tasks and Issues to Be Apportioned" checklist attached as Exhibit A *[for sample checklists see §§9.9-9.10]*. Client and Attorney shall designate the services to be rendered by Attorney by writing the word "Yes" in the "Attorney Shall Do" column next to the services they agree Attorney will do, and shall designate the services Client shall undertake _ *[himself/herself]* _ by writing the word "Yes" under the "Client to Do" column next to those services. If a service is to be rendered by another attorney or some other third person, the words "Other Attorney" or other similar designation shall be written in the blank opposite the service. Attorney and Client shall each retain an original of this agreement and the designation of services in Exhibit A attached.

b. **Modification of Scope:** Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services must be specifically listed in an amendment to this agreement and initialed and dated by both parties. The date that both Attorney and Client initial any such list of additional services to be provided will be the date on which Attorney becomes responsible for providing those additional services. If Client decides to retain Attorney as Client's attorney of record for handling the entire case on Client's behalf, Client and Attorney will enter into a new written agreement setting forth that fact as well as Attorney's additional responsibilities in Client's case.

c. **Right to Seek Advice of Other Counsel:** Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in Paragraph 3, Exhibit A, and successor exhibits detailing the scope of representation that are identified with the words "No" or "Client to Do" at any time during or following this Limited Representation Agreement.

5. ATTORNEY OF RECORD. It is the intention of Attorney and Client that Attorney shall only perform those services specifically requested of Attorney. Some of those services may require Attorney to become attorney of record or make a court appearance in Client's case in order to perform the service requested. Attorney and Client specifically agree that Attorney's becoming attorney of record for such purposes shall not authorize or require Attorney to expand the scope of representation beyond the specific services designated. In the event that any court requires Attorney, as attorney of record for one or more authorized issues or tasks, to assume the responsibility for other tasks or issues reserved to Client or a third party professional, Attorney may, at __[his/her]__ option, elect to withdraw from representation, and Client agrees to execute any substitution of attorney forms reasonably requested by Attorney.

6. METHOD OF PAYMENT FOR SERVICES.

a. Hourly Fee: The current hourly fees charged by Attorney for services under this agreement are as follows:

- 1) Attorney \$ __[dollar amount]__
- 2) Associate \$ __[dollar amount]__
- 3) Paralegal \$ __[dollar amount]__
- 4) Law Clerk \$ __[dollar amount]__

Unless a different fee arrangement is established in Paragraph 6b, the hourly fee shall be payable at the time of the service. Attorney will charge in increments of __[specify fraction, e.g., one-tenth]__ of an hour, rounded off for each particular activity to the nearest __[specify fraction, e.g., one-tenth]__ of an hour.

If, while this agreement is in effect, Attorney increases the hourly rate(s) being charged to clients generally for Attorney's fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided __[number, e.g., 30]__ days or more after written notice of the increase is mailed to Client. If Client chooses not to consent to the increased rate(s), Client may terminate Attorney's services under this agreement by written notice effective when received by Attorney.

b. Payment from Deposit: For a continuing consulting role, Client will pay to Attorney a deposit of __[dollar amount]__, to be received by Attorney on or before __[date]__, and to be applied against Attorney's fees and costs incurred by Client. This amount will be deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney's fees and costs as they are incurred by Client.

Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

c. Costs: Client will pay Attorney's out-of-pocket costs incurred in connection with this agreement, including long-distance telephone and fax costs, photocopy expenses, and postage. All costs payable to third parties in connection with Client's case including filing fees, investigation fees, deposition fees, and the like will be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney's fees to be incurred by Client under this agreement.

7. RESOLVING DISPUTES BETWEEN CLIENT AND ATTORNEY.

a. Notice and Negotiation: If any dispute between Client and Attorney arises under this agreement, both Attorney and Client agree to meet and confer within __[number, e.g., 10]__ days of written notice by either Client or Attorney that the dispute exists. The purpose of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.

b. Mediation: If the dispute is not resolved through negotiation, Client and Attorney shall attempt, within

__ [number, e.g., 15] __ days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within __ [number, e.g., 15] __ days. If Attorney and Client cannot agree on a neutral mediator, they shall request that the local bar association or community-based nonprofit mediation center select a mediator. The mediation shall occur within __ [number, e.g., 15] __ days after the mediator is selected. Attorney and Client shall share the costs of the mediation, provided that the payment of costs and any attorney fees may be mediated. Nothing in this provision shall constitute a waiver of Client's rights to State Bar fee arbitration or a trial de novo after a State Bar fee arbitration.

8. AMENDMENTS AND ADDITIONAL SERVICES. This written agreement governs the entire relationship between Client and Attorney. All amendments must be in writing and attached to this agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraph 4a, a photocopy of Exhibit A (which clearly denotes which extra services are to be provided, is signed and dated by both Attorney and Client, and is attached to this Agreement) shall qualify as an amendment.

9. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

10. ACKNOWLEDGMENT. I have carefully read this agreement and I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

- a. _____ I have accurately described the nature of my case in Paragraph 2.
- b. _____ I will be responsible for the conduct of my case and will be in control of my case at all times as described in Paragraph 3.
- c. _____ The services that I want Attorney to perform in my case are described in Paragraph 4 and are identified by the word "Yes" in Exhibit A. I take responsibility for all other aspects of my case.
- d. _____ I understand and accept the limitations on the scope of Attorney's responsibilities identified in Paragraph 5 and understand that Attorney will not be responsible for my conduct in handling my own case.
- e. _____ I will pay Attorney for services as described in Paragraph 6.
- f. _____ I will resolve any disputes I may have with Attorney under this agreement in the manner described in Paragraph 7.
- g. _____ I understand that any amendments to this agreement must be in writing, as described in Paragraph 8.
- h. _____ I acknowledge that I have been advised by Attorney that I have the right to consult with another independent attorney to review this agreement and to advise me on my rights as a client before I sign this agreement.

The undersigned has read the foregoing terms for the provision of legal services by __ [name of law firm] __

and agrees to these terms and conditions.

Date: _ _ _ _ _ _ [Signature] _
 _ [Typed name] _
 Client

Date: _ _ _ _ _ _ [Signature] _
 _ [Typed name] _
 Attorney

Comment: This sample agreement may be used when the attorney will be making an appearance as the client's attorney of record, e.g., at a court hearing or settlement conference. See §9.14 for a sample form for use in a general civil matter when the attorney will be making an appearance on behalf of the client.

Counsel *must* use this form of sample agreement in conjunction with a checklist to define the scope of services that must be attached as an exhibit to the fee agreement. This form will be ineffective in establishing a limitation on scope without an attached checklist or other exhibit that accurately describes the agreed limitation on scope. For sample checklists, see §§9.9-9.10.

PRACTICE TIP: When a court appearance is included in the scope of representation, better practice is to obtain a substitution of attorney as soon as the agreed-on representation is concluded. A more cumbersome method for withdrawal is set out in Cal Rules of Ct 3.36 and Judicial Council Forms MC-955, MC-956, and MC-958.

CAUTION: Regardless of whether the scope of services is defined in the body of the agreement or in a checklist attached as an exhibit, if the scope of the engagement changes, counsel should memorialize the change of scope in a writing signed by the client before doing any work not within the originally agreed-on scope.

This sample agreement is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation.

NOTE: On entering a limited scope appearance for a civil matter, see Cal Rules of Ct 3.36(a) and Judicial Council Form MC-950; on withdrawing on completion of representation, see Cal Rules of Ct 3.36(c)-(g) and Judicial Council Forms MC-955, MC-956, and MC-958. On entering a limited scope appearance for a family law matter, see Cal Rules of Ct 5.70 and 5.71 and Judicial Council Form FL-950; on withdrawing on completion of representation, see Cal Rules of Ct 5.71 and Judicial Council Forms FL-955, FL-956, and FL-958.

§9.8 E. Form: Sample Change in Scope Letter

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9.8-1 Sample change in scope letter

[Law firm letterhead]

__ *[Date]* __

__ *[Name and address of client]* __

Re: Limited Scope Representation

Dear __ *[name]* __:

Per our __ *[telephone]* __ conversation on __ *[date]* __, you have asked me to perform additional tasks for you that are not included in our original agreement for Limited Scope Representation dated __ *[date]* __ __ *[and modified __ *[date]* __]* __ (copies enclosed).

You have requested and I have agreed to do the following: __ *[Enumerate the specific tasks/issues that you have agreed to undertake for the client, e.g., to prepare _____ in response to the motion recently filed]* __.

I understand that you wish to continue handling all other matters yourself as set forth in our original agreement.

It is essential that we both have the same understanding of our respective responsibilities in connection with your case. I am unable to begin work on the new task(s) until one copy of the signed revised checklist has been returned to me.

[If appropriate, add]

Some of the tasks you want me to undertake have significant time constraints which could seriously impact your legal rights.

[Continue]

It is, therefore, extremely important that you complete and initial a new __ *[Tasks/Issues]* __ checklist to memorialize the new scope of my involvement in your case. I've prepared and enclosed two copies of a new checklist, which I believe covers the changes to the prior agreement for Limited Scope Representation. If time is of the essence in taking the necessary steps to protect your rights in this new area, you should consider either coming to my office to sign the checklist, or fax me a signed copy so I can start.

PLEASE REVIEW IT CAREFULLY AND, IF YOU AGREE, INITIAL *BOTH* COPIES, AND RETURN ONE TO ME IN THE ENVELOPE PROVIDED. The other copy is for your records and should be attached to your copy of our agreement for Limited Scope Representation.

I encourage you to seek the advice of other counsel in connection with __ *[tasks/issues]* __ that I have not undertaken. Also, please feel free to consult with another attorney of your choice regarding this revised agreement before signing and returning it to me.

I look forward to working with you on this new matter.

Very truly yours,

_____[Signature]_____
_____[Typed name]_____
Attorney

Enclosures: Two copies of revised Tasks/Issues checklist; return envelope for your convenience.

Comment: This letter by itself is not a substitute for a new written fee agreement. See Caution in §9.1. Counsel should include with the letter two copies of the revised checklist delineating how the tasks or issues in the case are to be apportioned between the attorney and the client. The client should sign and return the revised checklist to the attorney. See §9.15 for a sample form for use in a general civil matter when the attorney has to send a letter confirming a change in scope of representation.

CAUTION: Counsel should not begin work on an expanded or revised scope before receiving the client's signed revised Tasks/Issues checklist.

For "Tasks to Be Apportioned" checklist, see §9.9. For "Issues to Be Apportioned" checklist, see §9.10.

§9.9 F. Checklist: Tasks to Be Apportioned (Use as Attachment to Limited Scope Fee Agreement)

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Task	Attorney to Do	Date Completed	Client to Do
Draft papers to start divorce			
File and serve papers			
Draft motions			
Draft affidavits and declarations			
Analyze case and advise of legal rights			
Procedural advice			
Formulate strategy and tactics			
Investigate facts; which issues?			
Obtain documents; which ones?			
Draft correspondence			
Review correspondence and pleadings			
Appear in court			
Run computer-support programs			
Prepare subpoenas for documents			
Take depositions			
Review depositions and documents obtained from others			

Attorney initials _____ Client initials _____

Page 2 of 2

Tasks to Be Apportioned, cont'd

Task	Attorney to Do	Date Completed	Client to Do
Legal research and analysis			
Contact witnesses			
Draft or analyze settlement proposals			
Contact expert witnesses			

Draft orders and judgments			
Outline testimony			
Trial or negotiation preparation			
Review orders and judgments that Client drafts			
Draft orders			
Draft disclosure documents			
Advise regarding appeal			
Enforce orders			
Draft other papers as necessary			
Other:			
Other:			
Other:			
Dated:	Dated:		
Attorney signature	Client signature		

Comment: This sample checklist, which was drafted for use in a family law matter, may be used to allocate tasks between attorney and client. In allocation of tasks, the client, *e.g.*, instructs the attorney not to do discovery and undertakes the information-gathering role him- or herself, or the client asks the attorney to draft moving or responsive pleadings for a hearing the client attends in pro per. See §9.16 for a sample checklist form for use in a general civil matter.

This checklist can be attached to a fee agreement as an exhibit (see §9.8).

This checklist is offered for illustration only. Counsel should modify it as needed to reflect the agreement with the client in each case. The checklist can also be adapted to include a blank to indicate that the attorney advised the client of the existence of related issues, and that the client understands that those issues are excluded from the scope of the representation (see §9.3).

NOTE: If the attorney assists in the drafting of court documents but does not make an appearance (sometimes referred to as "ghostwriting" documents for a client), neither the attorney nor the client is required to disclose that the attorney was involved in preparing the documents (Cal Rules of Ct 3.37(a)), unless the client later seeks a court order awarding attorney fees incurred as a result of the document preparation (Cal Rules of Ct 3.37(b)). Depending on the agreed-on tasks, the attorney may or may not enter a formal appearance with the court. On entering a limited scope appearance using Judicial Council Form FL-950 or MC-950, see §9.7.

Source: General Interest/Fee Agreement Forms Manual/9 Limited Scope Representation--Sample Fee Agreements and Checklists/§9.10 G. Checklist: Issues to Be Apportioned (Use as Attachment to Limited Scope Fee Agreement)

§9.10 G. Checklist: Issues to Be Apportioned (Use as Attachment to Limited Scope Fee Agreement)

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right click and choose
Save Target As

► To download **WordPerfect** version,
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Save Target As

Page 1 of 2

Issue	Attorney to Do	Date Completed	Client to Do
Custody/visitation dispute			
Set or modify child support			
Collect past-due child support			
Collect past-due spousal support			
Real property valuation and division			
Personal property division			
Business interests			
Bank accounts			
Investments			
Pension rights			
Stocks and bonds			
Stock options			
Value and divide employee benefits			
Health insurance			
Life insurance			
Value or divide other assets/debts			

Attorney initials _____

Client initials _____

Page 2 of 2

Issues to Be Apportioned, cont'd

Issue	Attorney to Do	Date Completed	Client to Do
Enforce orders (describe)			
Pursue an appeal			
Other:			
Other:			
Other:			
Dated:	Dated:		
Attorney signature	Client signature		

Comment: This sample checklist, which was drafted for use in a family law matter, may be used to allocate issues between attorney and client. When issues rather than tasks are divided between attorney and client, the attorney handles one or more discrete issues from start to finish and the client assumes responsibility for the other issues. For example, the attorney might represent the client in connection with matters raised in a cross-complaint, and the client might handle the defense of the underlying lawsuit. Or, the attorney might advise the client on possible settlement alternatives and coach the client on negotiation strategy, and the client might attend the settlement conference in pro per with the attorney on telephone standby. See §9.16 for a sample checklist form for use in a general civil matter.

This checklist can be attached to a fee agreement as an exhibit (see §9.8).

This checklist is offered for illustration only. Counsel should modify it as needed to reflect the agreement with the client in each case. The checklist can also be adapted to include a blank to indicate that the attorney advised the client of the existence of related issues, and that the client understands that those issues are excluded from the scope of the representation (see §9.3).

Source: General Interest/Fee Agreement Forms Manual/9 Limited Scope Representation--Sample Fee Agreements and Checklists/ IV. SAMPLE FORMS: GENERAL CIVIL MATTERS/§9.11 A. Form: Sample Fee Agreement--Single Consultation Agreement

IV. SAMPLE FORMS: GENERAL CIVIL MATTERS

§9.11

A. Form: Sample Fee Agreement—Single Consultation Agreement



**FEE AGREEMENT #1
SINGLE CONSULTATION AGREEMENT**

On _____, 200_, _____ (Client) consulted with _____ (Attorney), who performed a conflicts check on _____ for limited scope assistance and advice. At that time, attorney provided the following services:

Review of court documents (describe)

Information about document preparation:

Assistance with document preparation:

Advice regarding client's rights and responsibilities

Advice about the law and strategy relevant to issues as identified by Client

Information about fact gathering and discovery

Guidance about procedural information, filing and service of documents

Advice about negotiation and the preparation and presentation of evidence

Advice about law and strategy related to an ongoing mediation/negotiation or litigation

Legal Research

Advising on trial or negotiating techniques

Advising regarding property rights

Review and analysis of Client's case or trial strategy

Other (specify):

Client has paid Attorney for her/his time. All tasks which Client requested of Attorney have been completed and no further services are requested or expected from Attorney. Neither Client nor Attorney contemplates or expects a further professional relationship. Client acknowledges that he/she has been advised of the Client's right to seek separate legal advice from other counsel of the client's choice with regard to all legal matters that are outside the scope of the specific limited services provided by Attorney under this agreement.

Dated: _____

Client signature

Attorney signature

Source: General Interest/Fee Agreement Forms Manual/9 Limited Scope Representation--Sample Fee Agreements and Checklists/§9.12 B. Form: Sample Fee Agreement--Consulting Services Agreement

§9.12 B. Form: Sample Fee Agreement—Consulting Services Agreement



FEE AGREEMENT #2
CONSULTING SERVICES AGREEMENT

Identification of Parties: This agreement, executed in duplicate with each party receiving an executed original, is made between _____,
hereafter referred to as "Attorney," and _____,
hereafter referred to as "Client."

Nature of Case: Client consulted Attorney in the following matter:

- 1. Client Responsibilities and Control:** Client will remain responsible for and in control of his/her own case at all times. This means that Client will be responsible for understanding the issues, resolution options and potential consequences of those resolution options. In addition, Client agrees to:
- a. Cooperate with Attorney or his/her office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services.
 - b. Inform Attorney of the specific parts of the case that Client requests Attorney's assistance with.
 - c. Review and evaluate all information provided by Attorney.
 - d. Keep Attorney or his/her office advised of Client's concerns and any information pertinent to Client's case.
 - e. Provide Attorney with copies of all correspondence to and from Client relevant to the case.
 - f. Notify Attorney of any pending negotiations, hearings, contractual deadlines or litigation.
 - g. Keep all documents related to the case in a file for review by Attorney.
 - h. Sign all relevant papers, agreements or findings relative to the case.
 - i. Immediately notify Attorney of any changes of work or home addresses or telephone numbers of the Client.
 - j. Immediately notify Attorney if the Client receives any new pleading, motion, letter, or other documents from the other party, the other party's lawyer, any expert, appraiser, or evaluator hired by either party or appointed by the Court, or any Special Master, or any documents from the Court, or from any other court, such as a bankruptcy court, and provide the Attorney with a copy of the item received, as well as the date it was received by the Client.

2. Scope of Services: Client requests Attorney to perform or *not to perform* the following services related to the legal issues identified here or on the following page or attachment hereto:

(Indicate *Yes* or *No* in box)

a.		Advice about law and strategy related to an ongoing mediation, negotiation or litigation
b.		Information about document preparation
c.		Assistance with document preparation
d.		Information about fact gathering and discovery
e.		Assistance with drafting discovery requests
f.		Assistance with law and motion matters
g.		Guidance and procedural information regarding filing and serving documents
h.		Advice about negotiations and the preparation and presentation of evidence
i.		Legal research
j.		Coaching on trial or negotiating techniques
k.		Review and analysis of Client's trial strategy
l.		Advice about an appeal
m.		Procedural assistance with an appeal
n.		Assistance with substantive legal argument
o.		Other:

3. Limitation of Attorney's Responsibilities: Attorney will perform the specific legal tasks identified by the word "**Yes**" in paragraph 2 above consistent with Attorney's ethical and professional responsibilities, including observing strict confidentiality, and based on the information available to Attorney. In providing those services, Attorney *will not*:

- a. Represent, speak for, appear for, or sign papers on Client's behalf.
- b. Provide services in paragraph 2 which are identified with the word "No."
- c. Make decisions for Client about any aspect of the case.
- d. Determine likely outcomes of disputed matters in court
- e. Determine an appropriate settlement of the case.
- f. Litigate Client's case on Client's behalf
- g. Protect Client's property or position by means of restraining orders while discovery and/or negotiations are in progress.

Attorney will NOT perform any services identified by the word "NO" in paragraph 2 above. The Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services will be specifically listed in an amendment to this Agreement, and initiated and dated by both parties. The date that both the Attorney and the Client initial any such list of additional services to be provided will be the date on which the Attorney becomes responsible for providing those additional services. If the Client decides to retain the Attorney as the Client's Attorney of record for handling the entire case on the Client's behalf, the Client and the Attorney will enter into a new written Agreement setting forth that fact, and the Attorney's additional responsibilities in the Client's case.

Right to Seek Advice of Other Counsel: Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in paragraph 2 which are identified with the word "**no**" at any time during or following this limited consulting services agreement.

4. Method of Payment for Services:

- a. **Hourly Fee:** The current hourly fee charged by Attorney for services under this agreement is \$_____. Unless a different fee arrangement is established in clause 4b of this Paragraph, the hourly fee will be payable at the time of service. Attorney will charge in increments of one tenth of an hour, rounded off for each particular activity to the nearest tenth of an hour. The hourly fee will be payable at the time of the service.

- b. Payment from Deposit:** For a continuing consulting role, Client will pay to Attorney a deposit of \$_____, to be received by Attorney on or before _____, and to be applied against Attorney's fees and costs incurred by Client. This amount will be deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney's fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.
- c. Costs:** All costs payable to third parties in connection with Client's case including filing fees, investigation fees, deposition fees and the like shall be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney's fees to be incurred by Client under this agreement.

- 5. Discharge of Attorney:** Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services after receipt of the notice. Notwithstanding the discharge, Client will remain obligated to pay Attorney at the agreed rate for all services provided prior to such discharge.
- 6. Withdrawal of Attorney:** Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following:
- a. The Client consents,
 - b. The Client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively, and
 - c. The Client fails to pay Attorney's fees or costs as required by his or her agreement with the Attorney.
- Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided. At the termination of services under this agreement, Attorney will release promptly to Client on request all of Client's papers and property.
- 7. Disclaimer of Guarantee:** Although Attorney may offer an opinion about possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guarantee.
- 8. Arbitration of Fee Dispute:** If a dispute arises between Attorney and Client regarding Attorney's fees or costs under this agreement and Attorney files suit in any court other than small claims court, Client will have the right to stay that suit by timely electing to arbitrate the dispute under Business and Professions Code sections 6200-6206, in which event Attorney must submit the matter for such arbitration.

- 9. Entire Agreement:** This Agreement is the complete Agreement between the Client and the Attorney. If the Client and the Attorney decide to change or amend this Agreement in any way, the change must be in writing and attached to this Agreement.
- 10. Effective Date of Agreement:** The effective date of this agreement will be the date when, having been executed by Client, one copy of the agreement is received by Attorney and Attorney receives the deposit required by Paragraph 4b. Once effective, this agreement will, however, apply to services provided by Attorney on this matter before its effective date.

The foregoing is agreed to by:

(Client)

(Attorney)

(Date)

(Date)

Source: General Interest/Fee Agreement Forms Manual/9 Limited Scope Representation--Sample Fee Agreements and Checklists/§9.13 C. Form: Sample Fee Agreement--Ongoing Consulting Agreement

§9.13 C. Form: Sample Fee Agreement—Ongoing Consulting Agreement



FEE AGREEMENT #3
ONGOING CONSULTING AGREEMENT

Identification of Parties: This agreement, executed in duplicate with each party receiving an executed original, is made between _____, hereafter referred to as "Attorney," and _____, hereafter referred to as "Client."

- 1. Nature of Case:** The Client is requesting ongoing consulting services from Attorney in the following matter:
- _____
- _____

- 2. Client Responsibilities and Control.** Client shall remain responsible for the conduct of the case and understands that he/she will remain in control of and be responsible for all decisions made in the course of the case. Client agrees to:

- a. Cooperate with Attorney or office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;
- b. Keep attorney or office advised of Client's concerns and any information that is pertinent to Client's case;
- c. Provide Attorney with copies of all pleadings and correspondence to and from Client regarding the case;
- d. Immediately provide Attorney with any new pleadings or motions received from the other party;
- e. Keep all documents related to the case in a file for review by Attorney.

- 3. Services to be performed by Attorney.** Client and Attorney have agreed that Attorney will provide the following services, indicated by writing YES or NO (Attorney will not perform any services indicated by the word NO):

- a. _____ Legal advice: office visits, telephone calls, fax, mail, email;
- b. _____ Advice about availability of alternative means to resolving the dispute, including mediation and arbitration;
- c. _____ Evaluation of Client's self-diagnosis of the case and advising Client about legal rights and responsibilities;
- d. _____ Guidance and procedural information for filing or serving documents;
- e. _____ Review pleadings and other documents prepared by Client;

- f. _____ Suggest documents to be prepared;
- g. _____ Draft pleadings, motions and other documents;
- h. _____ Factual investigation: contacting witnesses, public record searches, in-depth interview of Client;
- i. _____ Legal research and analysis;
- j. _____ Evaluate settlement options;
- k. _____ Discovery: interrogatories, depositions, requests for document production;
- l. _____ Planning for negotiations, including simulated role-playing with Client;
- m. _____ Planning for court appearances, including simulated role-playing with Client;
- n. _____ Standby telephone assistance during negotiations or settlement conferences;
- o. _____ Backup and troubleshooting during the hearing or trial;
- p. _____ Referring Client to expert witnesses, special masters or other counsel;
- q. _____ Counseling Client about an appeal;
- r. _____ Procedural assistance with an appeal and assisting with substantive legal argument in an appeal;
- s. _____ Provide preventive planning and/or schedule legal check-ups;
- t. _____ Other: _____

4. Attorney's Responsibilities: Attorney will exercise due professional care and observe strict confidentiality in providing the services identified by the word "YES" in Paragraph 4 above. In providing those services, Attorney WILL NOT:

- a. Represent, speak for, appear for, or sign papers on the Client's behalf;
- b. Become attorney of record on any court papers or litigate on Client's behalf;
- c. Provide services which are not identified by the word "YES" in Paragraph 4;
- d. Make decisions for Client about any aspect of the case;
- e. Protect Client's property or position by means of restraining orders while discovery and/or negotiations are in progress.

- f. The Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services will be specifically listed in an amendment to this Agreement, and initialed and dated by both parties. The date that both the Attorney and the Client initial any such list of additional services to be provided will be the date on which the Attorney becomes responsible for providing those additional services. If the Client decides to retain the Attorney as the Client's Attorney of record for handling the entire case on the Client's behalf, the Client and the Attorney will enter into a new written Agreement setting forth that fact, and the Attorney's additional responsibilities in the Client's case.
- g. **Right to Seek Advice of Other Counsel:** Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in paragraph 3, which are identified with the word "*no*" at any time during or following this Ongoing Consulting Agreement.

5. Method of Payment for Services:

a. Hourly Fee:

The current hourly fee charged by Attorney for services under this agreement is \$_____. Unless a different fee arrangement is established in clause b) of this Paragraph, the hourly fee shall be payable at the time of the service. Attorney will charge in increments of one tenth of an hour, rounded off for each particular activity to the nearest one tenth of an hour.

If, while this agreement is in effect, Attorney increases the hourly rate(s) being charged to clients generally for Attorney's fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided thirty days or more after written notice of the increase is mailed to Client. If Client chooses not to consent to the increased rate(s), Client may terminate Attorney's services under this agreement by written notice effective when received by Attorney.

b. Payment from Deposit:

For a continuing consulting role, Client will pay to Attorney a deposit of \$_____, to be received by Attorney on or before _____, and to be applied against Attorney's fees and costs incurred by Client. This amount will be deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney's fees and costs as they are incurred by Client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

Costs: Client will pay Attorney's out of pocket costs incurred in connection with this agreement, including long distance telephone and fax costs, photocopy expense and postage. All costs payable to third parties in connection with Client's case including filing fees, investigation fees, deposition fees and the like will be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney's fees to be incurred by Client under this agreement.

- c. Should it be necessary to institute any legal action for the enforcement of this agreement, the prevailing party shall be entitled to receive all court costs and reasonable attorney fees incurred in such action from the other party.

6. Discharge of Attorney: Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. Notwithstanding the discharge, Client will remain obligated to pay Attorney at the agreed rate for all services provided and to reimburse Attorney for all costs incurred prior to such discharge.

7. Withdrawal of Attorney: Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: a) The client consents, b) the client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively, and c) the client fails to pay Attorney's fees or costs as required by his or her agreement with the Attorney.

Notwithstanding Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided, and to reimburse Attorney for all costs incurred before the withdrawal.

At the termination of services under this agreement, Attorney will promptly release all of Client's papers and property to Client on request.

8. Resolving Disputes between Client and Attorney

- a. **Notice and Negotiation.** If any dispute between Client and Attorney arises under this agreement regarding the payment of fees, Attorney's professional services rendered to or for Client, and any other disagreement, regardless of the nature of the facts or legal theories involved, both Attorney and Client agree to meet and confer within ten (10) days of written notice by either Client or Attorney that the dispute exists. The purpose of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.

b. Mediation. If the dispute is not resolved through negotiation, Client and Attorney will attempt, within fifteen (15) days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within fifteen (15) days. If the Attorney and Client cannot agree on a neutral mediator, they will request that the local bar association or community based non-profit mediation program select a mediator. The mediation shall occur within fifteen (15) days after the mediator is selected. The Attorney and Client shall share the costs of the mediation, provided that the payment of costs and any attorney's fees may be mediated. Nothing in this provision shall constitute a waiver of Client's rights to State Bar fee arbitration or a trial *de novo* after a State Bar fee arbitration.

9. Amendments and Additional Services. This written Agreement governs the entire relationship between Client and Attorney. All amendments shall be in writing and attached to this agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraph 4, a photocopy of Paragraph 4 that clearly denotes which extra services are to be provided, signed and dated by both Attorney and Client and attached to this Agreement, shall qualify as an amendment.

10. Severability in Event of Partial Invalidity. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

11. Statement of Client's Understanding. I have carefully read this Agreement and believe that I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

- a. _____ I have accurately described the nature of my case in Paragraph 1.
- b. _____ I will be responsible for the conduct of my case and will be in control of my case at all times as described in Paragraph 2.
- c. _____ The services Attorney has agreed to perform in my case are identified by the word "YES" in Paragraph 3. I take responsibility for all other aspects of my case.
- d. _____ I understand and agree to the limitations on the scope of Attorney's responsibilities identified in Paragraph 4 and understand Attorney will not be responsible for my conduct in handling my case.
- e. _____ I will pay Attorney for services as described in Paragraph 5.

- f. _____ I will resolve any disputes I may have with Attorney under this Agreement in the manner described in Paragraph 8.
- g. _____ I understand that any amendments to this Agreement shall be in writing, as described in Paragraph 9.
- h. _____ I acknowledge that I have been advised by Attorney that I have the right to consult with another independent attorney to review this Agreement and to advise me on my rights as a client *before* I sign this Agreement.

(Client)

(Attorney)

(Date)

(Date)

Source: General Interest/Fee Agreement Forms Manual/9 Limited Scope Representation--Sample Fee Agreements and Checklists/§9.14 D. Form: Sample Fee Agreement--Limited Representation Including Court Appearance

§9.14 D. Form: Sample Fee Agreement—Limited Representation Including Court Appearance



FEE AGREEMENT #4*
LIMITED REPRESENTATION AGREEMENT INCLUDING COURT APPEARANCE

Identification of Parties: This agreement, executed in duplicate with each party receiving an executed original, is made between _____, hereafter referred to as "Attorney," and _____, hereafter referred to as "Client."

- 1. Nature of Case:** The Client is requesting ongoing consulting services from Attorney in the following matter:
- _____
- _____

These services are likely to require Attorney to appear of record for a limited issue.

- 2. Client Responsibilities and Control.** Client intends to retain control over all aspects of the case except those specifically assigned to Attorney, and understands that he/she will remain in control of the case and be responsible for all decisions made in the course of the case. Client agrees to:

- a. Cooperate with Attorney or office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;
- b. Keep attorney or office advised of Client's concerns and any information that is pertinent to Client's case;
- c. Provide Attorney with copies of all pleadings and correspondence to and from Client regarding the case;
- d. Immediately provide Attorney with any new pleadings or motions received from the other party;
- e. Keep all documents related to the case in a file for review by Attorney.

3. Services to be performed by Attorney

- a. Client seeks the services from Attorney as set forth in the Tasks and Issues to be Apportioned checklist attached as Exhibit A. Client and Attorney shall designate the services to be rendered by Attorney by writing the word "Yes" in the column labeled "Attorney Shall Do" next to the services they agree Attorney will do, and shall designate the services Client shall undertake him/herself by writing the word "Yes" under the column labeled "Client to Do" next to those services. If a service is to be rendered by another attorney or some other third person, the word "Other Attorney" or other similar designation shall be written in the blank opposite the service. Attorney and Client shall each retain an original of this agreement and the designation of services in Exhibit A attached.

*Use in conjunction with the Tasks/Issues checklists at pages 22-25.

- b. The Client may request that Attorney provide additional services. If Attorney agrees to provide additional services, those additional services will be specifically listed in an amendment to this Agreement, and initialed and dated by both parties. The date that both the Attorney and the Client initial any such list of additional services to be provided will be the date on which the Attorney becomes responsible for providing those additional services. If the Client decides to retain the Attorney as the Client's Attorney of record for handling the entire case on the Client's behalf, the Client and the Attorney will enter into a new written Agreement setting forth that fact, and the Attorney's additional responsibilities in the Client's case.
 - c. **Right to Seek Advice of Other Counsel:** Client is advised of the right to seek the advice and professional services of other counsel with respect to those services in paragraph 2 and Exhibit A and successor exhibits detailing the scope of representation which are identified with the words "*no*" or "*client to do*" at any time during or following this Limited Representation Agreement.
4. **Attorney of Record.** It is the intention of Attorney and Client that Attorney shall only perform those services specifically requested of Attorney. Some of those services may require Attorney to become attorney of record or make a court appearance in Client's case in order to perform the service requested. Attorney and Client specifically agree that Attorney's becoming attorney of record for such purposes shall not authorize or require Attorney to expand the scope of representation beyond the specific services designated. In the event that any court requires Attorney, as attorney of record for one or more authorized issues or tasks, to assume the responsibility for other tasks or issues reserved to client or a third party professional, Attorney may, at his/her option, elect to withdraw from representation, and Client agrees to execute any Substitution of Attorney forms reasonably requested by Attorney.

5. Method of Payment for Services:

a. Hourly Fee

The current hourly fee charged by Attorney for services under this agreement is as follows:

1)	Attorney	_____
2)	Associate	_____
3)	Paralegal	_____
4)	Law Clerk	_____

Unless a different fee arrangement is established in clause b) of this paragraph, the hourly fee shall be payable at the time of the service. Attorney will charge in increments of one tenth of an hour, rounded off for each particular activity to the nearest one tenth of an hour.

If, while this agreement is in effect, Attorney increases the hourly rate(s) being charged to clients generally for Attorney's fees, that increase may be applied to fees incurred under this agreement, but only with respect to services provided thirty days or more after written notice of the increase is mailed to Client. If Client chooses not to consent to the increased rate(s), Client may terminate Attorney's services under this agreement by written notice effective when received by Attorney.

- b. Payment from Deposit.** For a continuing consulting role, Client will pay to Attorney a deposit of \$_____, to be received by Attorney on or before _____, and to be applied against Attorney's fees and costs incurred by Client. This amount will be deposited by Attorney in Attorney's trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay Attorney's fees and costs as they are incurred by Client.

Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for Attorney's fees and costs is less than the amount of the deposit, the difference will be refunded to Client.

Costs: Client will pay Attorney's out of pocket costs incurred in connection with this agreement, including long distance telephone and fax costs, photocopy expense and postage. All costs payable to third parties in connection with Client's case including filing fees, investigation fees, deposition fees and the like will be paid directly by Client. Attorney will not advance costs to third parties on Client's behalf.

Client acknowledges that Attorney has made no promises about the total amount of Attorney's fees to be incurred by Client under this agreement.

6. Resolving Disputes between Client and Attorney

- a. Notice and Negotiation.** If any dispute between Client and Attorney arises under this agreement, both Attorney and Client agree to meet and confer within ten (10) days of written notice by either Client or Attorney that the dispute exists. The purpose of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.
- b. Mediation.** If the dispute is not resolved through negotiation, Client and Attorney shall attempt, within fifteen (15) days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within fifteen (15) days. If the Attorney and Client cannot agree on a neutral mediator, they shall request that the local bar association or community based non-profit mediation center select a mediator. The mediation shall occur within fifteen (15) days after the mediator is selected. The Attorney and Client shall share the costs of the mediation, provided that the payment of costs and any attorney's fees may be mediated. Nothing in this provision shall constitute a waiver of Client's rights to State Bar fee arbitration or a trial *de novo* after a State Bar fee arbitration.

7. **Amendments and Additional Services.** This written Agreement governs the entire relationship between Client and Attorney. All amendments shall be in writing and attached to this agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraph 3b, a photocopy of Paragraph 3b which clearly denotes which extra services are to be provided, signed and dated by both Attorney and Client and attached to this Agreement, shall qualify as an amendment.
8. **Severability in Event of Partial Invalidity:** If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.
9. I have carefully read this Agreement and believe that I understand all of its provisions. I signify my agreement with the following statements by initialing each one:
- a. _____ I have accurately described the nature of my case in Paragraph 1.
 - b. _____ I will be responsible for the conduct of my case and will be in control of my case at all times as described in Paragraph 2.
 - c. _____ The services that I want Attorney to perform in my case are identified by the word "YES" in Paragraph 3. I take responsibility for all other aspects of my case.
 - d. _____ I understand and accept the limitations on the scope of Attorney's responsibilities identified in Paragraph 4 and understand that Attorney will not be responsible for my conduct in handling my own case.
 - e. _____ I will pay Attorney for services as described in Paragraph 5.
 - f. _____ I will resolve any disputes I may have with Attorney under this Agreement in the manner described in Paragraph 6.
 - g. _____ I understand that any amendments to this Agreement will be in writing, as described in Paragraph 7.
 - h. _____ I acknowledge that I have been advised by Attorney that I have the right to consult with another independent attorney to review this Agreement and to advise me on my rights as a client *before* I sign this Agreement.

(Client)

(Attorney)

(Date)

(Date)

Source: General Interest/Fee Agreement Forms Manual/9 Limited Scope Representation--Sample Fee Agreements and Checklists/§9.15 E. Form: Sample Change in Scope Letter

§9.15 E. Form: Sample Change in Scope Letter



Sample Change in Scope Letter

Re: Limited Scope Representation

Dear _____:

Per our [telephone] conversation of _____, 200_, you have asked me to perform additional tasks for you that are not included in our original Agreement for Limited Scope Representation dated _____ [and modified _____] (copies enclosed).

You have requested and I have agreed to do the following:

[Enumerate the specific tasks/issues that you have agreed to undertake for the client.]

(e.g. to prepare _____ in response to the motion recently filed.)

I understand that you wish to continue handling all other matters yourself as set forth in our original Agreement.

It is essential that we both have the same understanding of our respective responsibilities in connection with your case. **I am unable to begin to work on the new task[s] until one copy of the signed revised checklist has been returned to me.** [If applicable] Some of the tasks you want me to undertake have significant time constraints which could seriously impact your legal rights. It is therefore **extremely important** that you complete and initial a new Tasks/Issues checklist to memorialize the new scope of my involvement in your case. I've prepared and enclosed two copies of a new checklist, which I believe covers the changes to the prior Agreement for Limited Scope Representation. If time is of the essence in taking the necessary steps to protect your rights in this new area, you should consider either coming to my office to sign the checklist, or fax me a signed copy so I can start.

Please review it carefully and, if you agree, initial BOTH copies, and return one to me in the envelope provided. The other copy is for your records and should be attached to your copy of our Agreement for Limited Scope Representation.

I encourage you to seek the advice of other counsel in connection with tasks that I have not undertaken. Also, please feel free to consult with another attorney of your choice regarding this revised Agreement before signing and returning it to me.

I look forward to working with you on this new matter.

Very truly yours,

Enclosures:

Two copies of Revised Task/Issues Checklist
Return envelope for your convenience

Source: General Interest/Fee Agreement Forms Manual/9 Limited Scope Representation--Sample Fee Agreements and Checklists/§9.16 F. Checklist: Tasks to Be Apportioned (Use as Attachment to Limited Scope Fee Agreement)

§9.16 F. Checklist: Tasks to Be Apportioned (Use as Attachment to Limited Scope Fee Agreement)



FOLLOW-UP CHECKLIST

Client:

Attorney and Client consulted on

By

(fill in date) Client will:

Obtain the following documents:

Contact the following witnesses:

Complete the following forms:

Prepare the following information for coach:

By

(fill in date) Attorney will:

Draft the following documents:

Prepare the following forms:

Contact the following witnesses:

Research the law/procedure on:

Review the following documents:

Other:

Other assignments:

Attorney initials:

Client initials:

Source: General Interest/Fee Agreement Forms Manual/9 Limited Scope Representation--Sample Fee Agreements and Checklists/§9.17 G. Checklist: Tickler (Keep on Top of File)

§9.17 G. Checklist: Tickler (Keep on Top of File)



TICKLER CHECKLIST
(***Keep on top of file***)

Client:				Case opened:			
Initial Intake Checklist completed and copy given to client on							
Revised dated:							
Materials given to Client						Date	
Limited Scope ("Unbundling") Description							
Brochure							
Referral information							
Directions to court							
Self-Help Court Services							
Other							
Worksheet re scope of services and services NOT performed _____							
Modified and signed by attorney and client (new form for each change in scope)							
Dated:							
Documents in hand signed by Client				Date		Modified on	
Intake Checklist							
Issues to be Apportioned							
Tasks to be Apportioned							
Retainer Agreement No.							
Other:							
Other:							
Other:							
Case Conclusion							
Closing letter sent:							
Substitution of attorney sent to client _____ (date), signed by client _____ (date) filed							
Application to be Relieved as Counsel served and filed _____. Order granting application filed _____							
Case Closed:							
Other Comments:							

10

Marital Dissolution—Sample Fee Agreements

I. SCOPE OF CHAPTER §10.1

II. FORM: SAMPLE ATTORNEY FEE AGREEMENT—LETTER STYLE §10.2

III. FORM: SAMPLE FEE AGREEMENT FOR SERVICES WITH CLIENT ENGAGED IN MEDIATION OF DISSOLUTION ISSUES §10.3

§10.1 I. SCOPE OF CHAPTER

This chapter presents sample fee agreements designed to illustrate two types of agreements for legal services in a marital dissolution:

- A sample, letter-style attorney fee agreement (see §10.2); and
- A sample fee agreement for representation of a client engaged in mediation of dissolution issues (see §10.3).

The sample agreements in this chapter are illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. On practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§10.2 II. FORM: SAMPLE ATTORNEY FEE AGREEMENT—LETTER STYLE

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10.2-1 Sample attorney fee agreement—letter style

__ *[Date]* __

__ *[Client name and address]* __

Re: Agreement for legal services

Dear __ *[name of client]* __:

Thank you for consulting with me about __ *[specify, e.g., your marital dissolution matter]* __ **. This letter will confirm our agreement regarding the services you have requested that I provide to you regarding this matter. At this point, we expect that my work will consist of advising and representing you in all issues involving this matter including, but not limited to, filing a** __ *[specify, e.g., petition for marital dissolution and related pleadings and papers]* __ **, the possible drafting of a marital settlement agreement, and** __ *[specify any other anticipated actions, e.g., handling all other aspects of your marital dissolution through a trial and judgment]* __ **. It is understood that I will not be handling** __ *[specify any excluded services, e.g., appeals after the judgment or postjudgment enforcement measures]* __ **unless we agree otherwise in writing.**

We have agreed that I will provide you with legal services at the rate of __ *[dollar amount]* __ **per hour** __ *[, with an initial retainer or deposit of* __ *[dollar amount]* __ *, which I will deposit in a trust account and apply to your statement as fees are owed to me]* __ **. I will bill you for my actual legal time, and I will not undertake any work without your authorization. Interest on any retainer or deposit is automatically conveyed to a state trust fund that provides legal services to indigents, and therefore you will not earn any interest on the retainer or deposit. Any unused portion of the retainer or deposit will be promptly returned on the completion of my work.**

I will not bill you generally for __ *[specify, e.g., local travel time or for ordinary office and clerical expenses]* __ **, but I will bill you for** __ *[specify, e.g., long-distance telephone calls and delivery charges]* __ **. I will inform you in advance if there will be a significant amount of travel time for which I must bill you. Amounts due to me must be paid within** __ *[specify, e.g., 30 days]* __ **of the date of the bill.**

In addition to prompt payment of my statements within __ *[specify, e.g., 30 days]* __ **of receipt, it is your obligation to keep me fully and truthfully informed of the facts of this situation and to cooperate with me in all matters regarding this representation. You should also be certain to keep me informed at all times of your current address and telephone number.**

Because it is uncertain at this time how the matter will be resolved or how complicated the process will be, I have not given you any firm estimate of total fees and costs. Moreover, should I give you any estimates, those estimates should *not* **be viewed as a firm guaranty of what the fees will be in total, because the nature of any matter depends on the concerns and actions of the parties and the services you request of me. If at any time it appears that the total fees and costs will be significantly higher than anticipated, I will contact you and obtain your approval before proceeding with additional work.**

You understand that I reserve the right to withdraw from representing you at any time if your bill has not been paid or if a conflict arises that results in substantial disagreement between us. Should this occur, I will provide you with ample notice of my withdrawal, so that you can retain alternate counsel.

[If applicable, include]

You understand that I may seek a court order requiring your estranged spouse to pay all or part of your

attorney fees and costs. If the court grants such an order, any amounts that I receive from your spouse will be credited against your balance due for attorney fees and costs. However, you will be liable for fees and costs if the amount awarded by the court is less than your balance due under this agreement for fees and costs. If the total amount of your payments and payments received from your spouse exceeds the balance due for fees and costs, the excess payments will be refunded to you.

[Continue]

Please acknowledge your agreement to these terms by signing this letter below and returning it to me at your earliest convenience.

Thank you for coming to me for assistance in these difficult matters. Please keep me informed regarding your situation.

Very truly yours,

Date: _ _ _ _ _

_____[Signature]_____
 _____[Typed name]_____

I hereby agree to retain [attorney's name] under the terms and conditions set forth above.

Date: _ _ _ _ _

 [Signature of client]

 [Typed name]

Source: Dissolution Strategies: From Intake to Judgment §1.34 (Cal CEB 2005).

Comment: On hourly fee agreements, see §1.23. On defining the scope of services, see §§1.20-1.21. On fees paid by a third party under court order or agreement, see §1.36. On "unbundling" or limited scope representation, see chap 9. On deposits and trust accounts, see §1.30.

Source: General Interest/Fee Agreement Forms Manual/10 Marital Dissolution--Sample Fee Agreements/§10.3 III.
FORM: SAMPLE FEE AGREEMENT FOR SERVICES WITH CLIENT ENGAGED IN MEDIATION OF DISSOLUTION ISSUES

§10.3 III. FORM: SAMPLE FEE AGREEMENT FOR SERVICES WITH CLIENT ENGAGED IN MEDIATION OF DISSOLUTION ISSUES

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10.3-1 Sample fee agreement for services with client engaged in mediation of dissolution issues

This is an agreement by which _ *[name of client]* _ (Client) hires _ *[name of attorney]* _ (Consulting Attorney) to provide legal services.

Client has chosen to mediate the issues in the dissolution of _ *[his/her]* _ marriage. Consulting Attorney will provide legal advice and assistance to Client in that regard. Consulting Attorney will not represent Client, nor will Consulting Attorney participate directly in the mediation process. The specific services to be provided by Consulting Attorney will be determined by Client and Consulting Attorney as Client proceeds with that process.

Consulting Attorney will charge for _ *[his/her]* _ services at the rate of _ *[dollar amount]* _ per hour for all time expended by _ *[him/her]* _ in the service of Client including, but not limited to, meetings with Client, correspondence, telephone conversations, legal research, review of documents, review and drafting of agreements reached, and coordination of mediation with court process. Consulting Attorney will also charge for all costs incurred in the service of Client including, but not limited to, court filing fees, long-distance telephone calls, and photocopying.

Client will pay Consulting Attorney a retainer of _ *[dollar amount]* _ to be applied toward fees and costs incurred. Consulting Attorney will deposit that retainer in _ *[his/her]* _ trust account. Consulting Attorney will send to Client monthly itemized statements of all fees and costs incurred. Client hereby authorizes Consulting Attorney to transfer funds from _ *[his/her]* _ trust account to apply to Client's monthly balance as each statement is provided to Client. If any balance on the retainer remains when Consulting Attorney's services to Client are completed, it will be returned to Client. Once that retainer has been applied in full to fees and costs incurred, Client will pay the balance due on each monthly statement within 30 days.

The foregoing is agreed to by:

Date: _ _ _ _ _
_____ Client

Date: _ _ _ _ _
_____ Consulting Attorney

Source: California Marital Settlement and Other Family Law Agreements §2.29 (3d ed Cal CEB 2005).

Comment: On retainer agreements, see §1.32. On defining the scope of services, see §§1.20-1.21; see also Marital Settlement Agreements §2.27. On "unbundling" or limited scope representation, see chap 9.

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11

Medical Malpractice—Sample Fee Agreement

I. SCOPE OF CHAPTER §11.1

II. FORM: SAMPLE CONTINGENT FEE AGREEMENT FOR MEDICAL MALPRACTICE ACTION §11.2

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Source: General Interest/Fee Agreement Forms Manual/11 Medical Malpractice--Sample Fee Agreement/§11.1 I. SCOPE OF CHAPTER

§11.1 I. SCOPE OF CHAPTER

This chapter presents a sample contingent fee agreement in numbered paragraph form for legal representation in a medical malpractice matter (see §11.2).

The sample agreement in this chapter is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. On practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

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§11.2 II. FORM: SAMPLE CONTINGENT FEE AGREEMENT FOR MEDICAL MALPRACTICE ACTION

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11.2-1 Sample contingent fee agreement for medical malpractice action

LEGAL SERVICES AGREEMENT

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between __[*name*]__, hereafter referred to as "Attorney," and __[*name*]__, hereafter referred to as "Client."

This agreement is required by California Business and Professions Code §6147 and is intended to fulfill the requirements of that section.

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: representation of Client with respect to __[*his/her*]__ claim for damages for injuries or damages arising out of the injury on __[*date*]__.

3. DELEGATION OF ATTORNEY SERVICES. Attorney may delegate to other attorneys some of the attorney services to be provided to Client. Any such delegation will not affect Client's obligation to pay attorney fees as provided for in this agreement.

4. LEGAL SERVICES SPECIFICALLY EXCLUDED. Legal services that are excluded under this agreement specifically include, but are not limited to, the following: representation with respect to any appeal in which Client is an appellant from a court judgment on Client's professional negligence claim (*i.e.*, Attorney's obligation to represent Client under this agreement extends to an appeal only if Client is a respondent); and __[*add other legal services specifically excluded*]__.

If Client wishes that Attorney provide any legal services excluded under this agreement, a separate written agreement between Attorney and Client will be required.

5. TAX ADVICE SPECIFICALLY EXCLUDED. Attorney has advised Client that any settlement or judgment obtained as a result of the representation may be partly or wholly taxable. Attorney has informed Client that tax advice is specifically excluded from the scope of the services Attorney will provide under this agreement. Attorney has informed Client that __[*he/she*]__ is not an expert in tax law and has recommended that Client obtain advice from a tax practitioner concerning the tax consequences of any recovery.

6. RESPONSIBILITIES OF ATTORNEY AND CLIENT. Attorney will perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries and communications. Client will be truthful and cooperative with Attorney and keep Attorney reasonably informed of developments and of Client's address, telephone number, and whereabouts.

7. ATTORNEY FEES. The amount Attorney will receive for attorney fees for the legal services to be provided under this agreement will be the following:

(a) __[*Specify number*]__ percent of the net recovery if the recovery is obtained before the filing of a lawsuit;

(b) __[*Specify number*]__ percent of the net recovery if the recovery is obtained after the filing of a lawsuit but before the arbitration hearing, settlement conference, or trial, whichever occurs first;

(c) __[*Specify number*]__ percent of the net recovery if the recovery is obtained at or after the arbitration hearing, settlement conference, or trial, whichever occurs first, but before the filing of Client's brief

in an appeal from a court judgment; and

(d) *[Specify number]* percent of the net recovery if the recovery is obtained after the filing of Client's brief in an appeal from a court judgment.

"Net recovery" means the amount remaining after the total amount received (whether by settlement, arbitration award, or court judgment) has been reduced by the sum of all "costs," as defined in Paragraph 9 of this agreement.

If payment of all or any part of the amount to be received will be deferred (such as in the case of an annuity, a structured settlement, or periodic payments), the "total amount received," for purposes of calculating the attorney fees, will be the initial lump-sum payment plus the present value, as of the time of the settlement, final arbitration award, or final judgment, of the payments to be received thereafter. The attorney fees will be paid out of the initial lump-sum payment. If the payment is insufficient to pay the attorney fees in full, the balance will be paid from subsequent payments of the recovery before any distribution to Client.

[Add one of the following alternatives]

[Alternative 1: When charging the maximum allowable fee]

Client is informed that this attorney fee provides for the maximum limits allowed by law, as set forth in California Business and Professions Code §6146, for a contingent fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based on the health care provider's alleged professional negligence. *[A copy of that section is attached as Exhibit]*

Client is further informed that only the maximum limits are set by law and that the Attorney and the Client may negotiate a lower rate.

[Alternative 2: When charging less than the maximum allowable fee]

Client is informed that the maximum limits allowed by law for a contingent fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based on the health care provider's alleged professional negligence are set forth in California Business and Professions Code §6146. *[A copy of that section is attached as Exhibit]*

Client is further informed that only the maximum limits are set by law and that the Attorney and the Client may negotiate a lower rate.

[Continue]

If there is no net recovery, Attorney will receive no attorney fees.

8. DIVISION OF ATTORNEY FEES. Attorney will divide the attorney fees received for the legal services provided under this agreement with *[name]* . The terms of the division are as follows: Attorney will pay to *[name]* one-third of all attorney fees received. Client is informed that, under Rule 2-200 of the Rules of Professional Conduct of the State Bar of California, such a division may be made only with the Client's written consent after a full disclosure to the Client in writing that a division of fees will be made and of the terms of such division. Client hereby expressly consents to the division.

9. COSTS. Attorney will advance all "costs" in connection with Attorney's representation of Client under this agreement. Attorney will be reimbursed out of any recovery before any distribution of fees to Attorney or any distribution to Client. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss. Costs include, but are not limited to, court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees. Items that are not to be considered costs, and that must be paid by Client without being either advanced or contributed to by Attorney, include, but are not limited to, Client's medical expenses and other parties' costs, if any, that Client is ultimately required to pay.

10. SETTLEMENT. Attorney will not settle Client's claim without the approval of Client, who will have the absolute right to accept or reject any settlement. Attorney will notify Client promptly of the terms of any settlement offer received by Attorney.

11. ATTORNEY'S LIEN. Attorney will have a lien for attorney fees and costs advanced on all claims and causes of action that are the subject of _ _[his/her]_ _ representation of Client under this agreement and on all proceeds of any recovery obtained (whether by settlement, arbitration award, or court judgment).

Client is aware, and acknowledges, that this lien may significantly impair Client's interest because Attorney may be able to delay payment of any recovery or settlement funds to Client until any disputes with Attorney about unpaid attorney fees and costs advanced have been resolved. Client acknowledges that Client has been advised to seek independent legal advice about granting Attorney this lien and has had a reasonable opportunity to do so. By signing this fee agreement and returning it to Attorney, Client represents that Client has either obtained legal advice about this lien or has decided that it was unnecessary to do so.

12. DISCHARGE OF ATTORNEY. Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Attorney is Client's attorney of record in any proceeding, Client will execute and return a substitution-of-attorney form immediately on its receipt from Attorney. Notwithstanding the discharge, Client will be obligated to pay Attorney out of any recovery reasonable attorney fees for all services provided and to reimburse Attorney out of any recovery for all costs advanced. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss.

13. WITHDRAWAL OF ATTORNEY. Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: (a) Client consents, or (b) Client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively. Notwithstanding Attorney's withdrawal, Client will be obligated to pay Attorney out of any recovery reasonable attorney fees for all services provided, and to reimburse Attorney out of any recovery for all costs advanced, before the withdrawal. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss.

14. RELEASE, RETENTION, AND DISPOSITION OF CLIENT'S PAPERS AND PROPERTY. It is Attorney's policy to retain and ultimately destroy all files, documents, records, and writings relating to each engagement for which Attorney has been retained without notifying clients or former clients of the destruction of these items. Therefore, to be certain that Attorney has not retained any material that Client may need or desire, Attorney will return to Client all original documents Client has made available to Attorney, together with copies of any other files, documents, records, and writings relating to this engagement, which copies will be provided at Client's expense, if Client instructs Attorney in writing within 90 days after Attorney mails to Client a letter informing Client that Attorney has completed the services set forth under the terms of this agreement.

15. DISCLAIMER OF GUARANTY. Although Attorney may offer an opinion about possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guaranty.

16. ENTIRE AGREEMENT. This agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

17. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

18. MODIFICATION BY SUBSEQUENT AGREEMENT. This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out.

19. ARBITRATION OF FEE DISPUTE. If a dispute arises between Attorney and Client regarding attorney fees or costs under this agreement and Attorney files suit in any court, or begins an arbitration proceeding other than through the State Bar or a local bar association under California Business and Professions Code §§6200-6206, then Client will have the right to stay that suit or arbitration proceeding by timely electing to arbitrate the dispute through the State Bar or a local bar association under Business and Professions Code §§6200-6206, in which event Attorney must submit the matter to that arbitration.

20. ARBITRATION OF MALPRACTICE CLAIM. If a dispute arises between Attorney and Client regarding a claim of attorney malpractice under this agreement (*i.e.*, regarding whether any legal services rendered under this agreement were improperly, negligently, or incompetently rendered), then the dispute will be submitted for arbitration by, and in accordance with the rules of, the __[specify name, e.g., American Arbitration Association]__ in __[county, state]__, and Attorney and Client will be bound by the result. Client understands and acknowledges that, by agreeing to binding arbitration, Client waives the right to submit the dispute for determination by a court and thereby also waives the right to a jury or court trial.

21. ATTORNEY FEES AND COSTS IN ACTION ON AGREEMENT. The prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded reasonable attorney fees and costs incurred in that action or proceeding or in efforts to negotiate the matter.

22. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date on which Attorney is in receipt of one copy of the agreement executed by Client, provided the copy is received on or before __[date]__, or Attorney accepts late receipt. The attorney-client relationship will commence on the effective date of this agreement. Attorney will not become Client's attorney nor will Attorney perform any legal services on behalf of Client before the effective date of this agreement.

The foregoing is agreed to by:

Date: _____
Client

Date: _____
Attorney

Comment: On limits on fees in medical malpractice cases, see §1.26. On fee splitting, see §1.27. On payment of costs under a contingent fee agreement, see §1.29. On attorney's liens, see §1.38. On arbitration of fee disputes, see §§1.46-1.47. On arbitration of malpractice claims, see §1.48.

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12

Personal Injury—Sample Fee Agreement and Health Care Provider Lien Agreement

I. SCOPE OF CHAPTER §12.1

II. FORM: SAMPLE CONTINGENT FEE AGREEMENT §12.2

III. FORM: SAMPLE HEALTH CARE PROVIDER-PATIENT-ATTORNEY LIEN AGREEMENT §12.3

§12.1 I. SCOPE OF CHAPTER

This chapter presents two types of sample forms:

- A sample contingent fee agreement in numbered paragraph form for legal representation in a personal injury matter (see §12.2); and
- A sample health care provider-patient-attorney lien agreement (see §12.3).

The sample agreements in this chapter are illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. On practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§12.2 II. FORM: SAMPLE CONTINGENT FEE AGREEMENT

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12.2-1 Sample contingent fee agreement

LEGAL SERVICES AGREEMENT

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between _ *[name]* _, hereafter referred to as "Attorney," and _ *[name]* _, hereafter referred to as "Client."

This agreement is required by California Business and Professions Code §6147 and is intended to fulfill the requirements of that section.

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: representation of Client with respect to _ *[his/her]* _ claim for damages for personal injuries arising out of the automobile accident on _ *[date]* _.

3. DELEGATION OF ATTORNEY SERVICES. Attorney may delegate to other attorneys some of the attorney services to be provided to Client. Any such delegation will not affect Client's obligation to pay attorney fees as provided for in this agreement.

4. LEGAL SERVICES SPECIFICALLY EXCLUDED. Legal services that are excluded under this agreement specifically include, but are not limited to, the following: representation with respect to (a) any claim for property damage arising out of the accident; (b) any dispute with a medical care provider about amounts owed by Client for services received; or (c) any appeal in which Client is an appellant from a court judgment on Client's personal injury claim (*i.e.*, Attorney's obligation to represent Client under this agreement extends to an appeal only if Client is a respondent).

If Client wishes that Attorney provide any legal services excluded under this agreement, a separate written agreement between Attorney and Client will be required.

5. TAX ADVICE SPECIFICALLY EXCLUDED. Attorney has advised Client that any settlement or judgment obtained as a result of the representation may be partly or wholly taxable. Attorney has informed Client that tax advice is specifically excluded from the scope of the services Attorney will provide under this agreement. Attorney has informed Client that _ *[he/she]* _ is not an expert in tax law and has recommended that Client obtain advice from a tax practitioner concerning the tax consequences of any recovery.

6. RESPONSIBILITIES OF ATTORNEY AND CLIENT. Attorney will perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries and communications. Client will be truthful and cooperative with Attorney and keep Attorney reasonably informed of developments and of Client's address, telephone number, and whereabouts.

7. ATTORNEY FEES. The amount Attorney will receive for attorney fees for the legal services to be provided under this agreement will be

(a) _ *[Specify number]* _ percent of the net recovery if the recovery is obtained before the filing of a lawsuit;

(b) _ *[Specify number]* _ percent of the net recovery if the recovery is obtained after the filing of a lawsuit but before the arbitration hearing, settlement conference, or trial, whichever occurs first;

(c) _ *[Specify number]* _ percent of the net recovery if the recovery is obtained at or after the arbitration hearing, settlement conference, or trial, whichever occurs first, but before the filing of Client's brief in an appeal from a court judgment; and

(d) _ *[Specify number]* _ percent of the net recovery if the recovery is obtained after the filing of Client's brief in an appeal from a court judgment.

"Net recovery" means the amount remaining after the total amount received (whether by settlement, arbitration award, or court judgment) has been reduced by the sum of all "costs," as defined in Paragraph 9 of this agreement.

If payment of all or any part of the amount to be received will be deferred (such as in the case of an annuity, a structured settlement, or periodic payments), the "total amount received," for purposes of calculating the attorney fees, will be the initial lump-sum payment plus the present value, as of the time of the settlement, final arbitration award, or final judgment, of the payments to be received thereafter. The attorney fees will be paid out of the initial lump-sum payment. If the payment is insufficient to pay the attorney fees in full, the balance will be paid from subsequent payments of the recovery before any distribution to Client.

Client is informed that these attorney fees are not set by law but rather are negotiable between the Attorney and the Client.

If there is no net recovery, Attorney will receive no attorney fees.

8. DIVISION OF ATTORNEY FEES. Attorney will divide the attorney fees received for the legal services provided under this agreement with [name] . The terms of the division are as follows: Attorney will pay to [name] one-third of all attorney fees received. Client is informed that, under Rule 2-200 of the Rules of Professional Conduct of the State Bar of California, such a division may be made only with the Client's written consent after a full disclosure to the Client in writing that a division of fees will be made and of the terms of such division. Client hereby expressly consents to the division.

9. REPRESENTATION OF ADVERSE INTERESTS. Client is informed that the Rules of Professional Conduct of the State Bar of California require the Client's informed written consent before an Attorney may begin or continue to represent the Client when the attorney has or had a relationship with another party interested in the subject matter of the Attorney's proposed representation of the client. Attorney is not aware of any relationship with any other party interested in the subject matter of Attorney's services for Client under this agreement. As long as Attorney's services for Client continue under this agreement, Attorney will not agree to provide legal services for any such party without Client's prior written consent.

10. COSTS. Attorney will advance all "costs" in connection with Attorney's representation of Client under this agreement. Attorney will be reimbursed out of any recovery before any distribution of fees to Attorney or any distribution to Client. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss. Costs include, but are not limited to, court filing fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees. Items that are not to be considered costs, and that must be paid by Client without being either advanced or contributed to by Attorney, include, but are not limited to, Client's medical expenses and other parties' costs, if any, that Client is ultimately required to pay.

11. SETTLEMENT. Attorney will not settle Client's claim without the approval of Client, who will have the absolute right to accept or reject any settlement. Attorney will notify Client promptly of the terms of any settlement offer received by Attorney.

12. ATTORNEY'S LIEN. Attorney will have a lien for attorney fees and costs advanced on all claims and causes of action that are the subject of [his/her] representation of Client under this agreement and on all proceeds of any recovery obtained (whether by settlement, arbitration award, or court judgment).

Client is aware, and acknowledges, that this lien may significantly impair Client's interest because Attorney may be able to delay payment of any recovery or settlement funds to Client until any disputes with Attorney about unpaid attorney fees and costs advanced have been resolved. Client acknowledges that Client has been advised to seek independent legal advice about granting Attorney this lien and has had a reasonable opportunity to do so. By signing this fee agreement and returning it to Attorney, Client represents that Client has either obtained legal advice about this lien or has decided that it was unnecessary to do so.

13. DISCHARGE OF ATTORNEY. Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Attorney is Client's attorney of record in any proceeding, Client will execute and return a substitution-of-attorney form immediately on its receipt from Attorney. Notwithstanding the discharge, Client will be obligated to pay Attorney out of any recovery reasonable attorney fees for all services provided and to reimburse Attorney out of any recovery for all costs advanced. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss.

14. WITHDRAWAL OF ATTORNEY. Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such

withdrawal include, but are not limited to, the following: (a) Client consents, or (b) Client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively. Notwithstanding Attorney's withdrawal, Client will be obligated to pay Attorney out of any recovery reasonable attorney fees for all services provided, and to reimburse Attorney out of any recovery for all costs advanced, before the withdrawal. If there is no recovery, or the recovery is insufficient to reimburse Attorney in full for costs advanced, Attorney will bear the loss.

15. RELEASE, RETENTION, AND DISPOSITION OF CLIENT'S PAPERS AND PROPERTY. It is Attorney's policy to retain and ultimately destroy all files, documents, records, and writings relating to each engagement for which Attorney has been retained without notifying clients or former clients of the destruction of these items. Therefore, to be certain that Attorney has not retained any material that Client may need or desire, Attorney will return to Client all original documents Client has made available to Attorney, together with copies of any other files, documents, records, and writings relating to this engagement, which copies will be provided at Client's expense, if Client instructs Attorney in writing within 90 days after Attorney mails to Client a letter informing Client that Attorney has completed the services set forth under the terms of this agreement.

16. DISCLAIMER OF GUARANTY. Although Attorney may offer an opinion about possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guaranty.

17. ENTIRE AGREEMENT. This agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

18. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

19. MODIFICATION BY SUBSEQUENT AGREEMENT. This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out.

20. ARBITRATION OF FEE DISPUTE. If a dispute arises between Attorney and Client regarding attorney fees or costs under this agreement and Attorney files suit in any court, or begins an arbitration proceeding other than through the State Bar or a local bar association under California Business and Professions Code §§6200-6206, then Client will have the right to stay that suit or arbitration proceeding by timely electing to arbitrate the dispute through the State Bar or a local bar association under Business and Professions Code §§6200-6206, in which event Attorney must submit the matter to that arbitration.

21. ARBITRATION OF MALPRACTICE CLAIM. If a dispute arises between Attorney and Client regarding a claim of attorney malpractice under this agreement (*i.e.*, regarding whether any legal services rendered under this agreement were improperly, negligently, or incompetently rendered), then the dispute will be submitted for arbitration by, and in accordance with the rules of, the _ *[specify name, e.g., American Arbitration Association]* _ in _ *[county, state]* _, and Attorney and Client will be bound by the result. Client understands and acknowledges that, by agreeing to binding arbitration, _ *[he/she]* _ waives the right to submit the dispute for determination by a court and thereby also waives the right to a jury or court trial.

22. ATTORNEY FEES AND COSTS IN ACTION ON AGREEMENT. The prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded reasonable attorney fees and costs incurred in that action or proceeding or in efforts to negotiate the matter.

23. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date on which Attorney is in receipt of one copy of the agreement executed by Client, provided the copy is received on or before _ *[date]* _, or Attorney accepts late receipt. The attorney-client relationship will commence on the effective date of this agreement. Attorney will not become Client's attorney nor will Attorney perform any legal services on behalf of Client before the effective date of this agreement.

The foregoing is agreed to by:

Date: _ _ _ _ _
Client

Date: _ _ _ _ _
Attorney

Comment: On contingent fee agreements, see §1.26; Civ Proc Before Trial §§3.22-3.25. On fee splitting, see §1.27. On payment of costs under a contingent fee agreement, see §1.29. On attorney's liens, see §1.38. On arbitration of fee disputes, see §§1.46-1.47. On arbitration of malpractice claims, see §1.48.

§12.3 III. FORM: SAMPLE HEALTH CARE PROVIDER-PATIENT-ATTORNEY LIEN AGREEMENT

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12.3-1 Sample health care provider-patient-attorney lien agreement

LIEN AGREEMENT

1. IDENTIFICATION OF PARTIES. This agreement, executed in triplicate with each party receiving an executed original, is made between _ [name] __, hereafter referred to as "Health Care Provider," _ [name] __, hereafter referred to as "Patient," and _ [name] __, hereafter referred to as "Attorney."

2. CREATION OF LIEN. Health Care Provider will have a lien on all claims and causes of action of Patient arising out of the _ [e.g., automobile accident] __ on _ [date] __, and on all proceeds of any recovery, whether by settlement, arbitration award, or court judgment. The lien will secure payment of all amounts owed by Patient to Health Care Provider for health care services rendered to Patient. Patient hereby authorizes Health Care Provider to take any reasonable actions to implement this agreement.

3. DEFERRAL OF PAYMENT. Payment of amounts owed to Health Care Provider may be deferred until resolution of Patient's claim, except to the extent that any amounts are paid to Patient, or on Patient's behalf, by any insurer, benefit program, or other third party for amounts owed to Health Care Provider.

4. PATIENT'S RESPONSIBILITY FOR PAYMENT. Notwithstanding any other provisions of this agreement, Patient will remain responsible for payment of all amounts owed to Health Care Provider. To the extent that amounts owed are not paid out of the proceeds of any recovery, or if there is no recovery, they must be paid by Patient _ [himself/herself] __.

5. DIRECTION TO ATTORNEY. Patient hereby directs Attorney to honor the lien and to pay the funds secured directly to Health Care Provider as soon as possible after the proceeds of any recovery are received by Attorney.

6. ATTORNEY'S RESPONSIBILITY. Attorney acknowledges notice of the lien granted herein by Patient to Health Care Provider and will honor the lien by paying the funds secured directly to Health Care Provider as soon as possible after the proceeds of any recovery are received by Attorney. Attorney will have no financial responsibility to Health Care Provider beyond the honoring of the lien, however, and does not by virtue of this agreement become a guarantor with respect to any amounts owed by Patient to Health Care Provider.

7. CHANGE OF ATTORNEY. Patient is represented by Attorney with respect to any claims and causes of action arising out of the aforementioned _ [e.g., automobile accident] __. If Patient replaces Attorney with another attorney, Patient will notify Health Care Provider immediately of the name, address, and telephone number of the new attorney and Patient will provide _ [his/her] __ new attorney immediately with a copy of this agreement.

8. ARBITRATION OF DISPUTE. If a dispute arises between any of the parties regarding any aspect of this agreement or its implementation, they will submit the matter for arbitration under the auspices of _ [specify, e.g., name of local interprofessional legal-medical committee] __. The arbitration will be nonbinding unless the arbitrating parties agree in writing that it will be binding. Pending resolution of the dispute, Attorney will hold the disputed amount in a trust account.

9. ATTORNEY FEES AND COSTS IN ACTION ON AGREEMENT. The prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded reasonable attorney fees and costs incurred in that action or proceeding or in efforts to negotiate the matter.

10. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date of its execution by the third of the parties to do so.

The foregoing is agreed to by:

Date: _ _ _ _ _ _____

Health Care Provider

Date: _ _ _ _ _

Patient

Date: _ _ _ _ _

Attorney

Comment: Purpose of lien. This sample lien agreement addresses a common source of conflict between personal injury clients and health care providers. The clients often lack the insurance and personal resources with which to pay for necessary health care treatment. The health care providers often are unfamiliar and uncomfortable with the periods required to resolve personal injury claims and may be unwilling to wait until resolution for payment of their fees.

A well-drafted lien agreement offers the health care provider a lien on the client's recovery in exchange for allowing the client to defer payment until the claim is resolved. The agreement assures the health care provider that full payment will be made on successful termination of the process and thereby may encourage the provider's cooperation with items such as reports, depositions, or trial. The agreement allows the client, and by extension the attorney, to proceed without conflict with the health care provider over payment of fees.

Drafting considerations. There are a number of important considerations for the attorney with respect to the lien agreement. In executing the agreement, the client remains personally liable for the full amount of the health care fees. If there is no recovery, or if the recovery is insufficient to pay the fees in full, the potential for conflict between the client and the health care provider will be present. The attorney might attempt to assist the client and health care provider in working out an agreement for payment. If the health care provider resists making such an agreement, the local interprofessional legal-medical committee might provide a nonbinding opinion regarding a reasonable arrangement. Health care providers are likely to accept an arrangement recommended by such a committee.

Attorney's duty to honor lien. An attorney with notice of the lien agreement is bound to honor it by making direct payment of the health care provider's fees out of the recovery and would be personally liable to the health care provider for failure to do so. See *Weiss v Marcus* (1975) 51 CA3d 590, 124 CR 297. If a conflict develops between the client and the health care provider over the amount owed, the attorney should place in a trust account a sum sufficient to pay the amount to which the health care provider is ultimately determined to be entitled. If, however, the client and the health care provider have not agreed to this procedure, and the attorney cannot obtain their agreement, the attorney should commence an action in interpleader. See California State Bar Formal Opinion No. 1988-101. See also Goldhammer, *Handling Medical Liens*, 13 CEB Civ Litigation Rep 138 (June 1991). On interpleader generally, see California Civil Procedure Before Trial, chap 28 (4th ed Cal CEB 2004).

Obtaining attorney's lien first. The attorney should secure his or her attorney fees and costs by a lien on the client's recovery before any liens are given to health care providers. Liens are ordinarily honored in the order of their creation. CC §2897; *Cetenko v United Cal. Bank* (1982) 30 C3d 528, 179 CR 902. In *County of San Bernardino v Calderon* (2007) 148 CA4th 1103, 1112, 56 CR3d 333, the court held that a hospital's lien under the Hospital Lien Act (HLA) (CC §§3045.1-3045.6) was created only when notice of the lien was given to the responsible third party, not when the hospital services were actually rendered. In addition, the court held that regardless of the time of creation of the lien, HLA liens do not have first priority over competing liens. 148 CA4th at 1113. See also *Wujcik v Wujcik* (1994) 21 CA4th 1790, 1793, 27 CR2d 102 (contractual liens held by medical providers and attorney against personal injury award took precedence over ex-spouse's subsequent judgment lien against same award for delinquent child support).

Thus, the attorney whose client has given liens to health care providers but not to the attorney may discover that the liens have not left sufficient proceeds to pay the attorney fees and costs. The best approach is to include the attorney's lien in a fee agreement executed before the client enters into any lien agreements with health care providers. For a sample attorney's lien provision and commentary, see §1.38.

13

Probate—Sample Fee Agreements

I. SCOPE OF CHAPTER §13.1

II. FORM: SAMPLE PROBATE FEE AGREEMENT §13.2

III. FORM: SAMPLE VARIABLE CONTINGENT FEE AGREEMENT—WILL AND TRUST CONTEST §13.3

§13.1 I. SCOPE OF CHAPTER

This chapter presents two types of sample forms:

- A sample probate fee agreement (see §13.2); and
- A sample variable contingent fee agreement for use in a will and trust contest (see §13.3).

The sample agreements in this chapter are illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. On practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

§13.2 II. FORM: SAMPLE PROBATE FEE AGREEMENT

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13.2-1 Sample probate fee agreement

LEGAL SERVICES AGREEMENT

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between [name] , hereafter referred to as "Law Firm," and [name] , hereafter referred to as "Client," as executor of the estate of [name] .

This agreement is required by California Business and Professions Code §6148 and is intended to fulfill the requirements of that section.

2. RETENTION OF FIRM RATHER THAN PARTICULAR ATTORNEY. Client is retaining a Law Firm, not any particular attorney, and the attorney services to be provided to Client will not necessarily be performed by any particular attorney.

3. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Law Firm to Client are as follows: representation of Client in [his/her] capacity as executor of the estate of [name] including, but not limited to, securing Client's appointment as executor, marshaling the estate's assets and paying its debts, arranging for any sales of estate property, preparing and filing any required estate tax returns, distributing the net assets, preparing and filing all required documents with the court, and obtaining all required court orders.

4. LEGAL SERVICES SPECIFICALLY EXCLUDED. Legal services that are excluded under this agreement specifically include, but are not limited to, the following: arrangements for preparation and filing of any required federal and state fiduciary income tax returns; representation of Client as an individual, rather than as executor, with respect to any litigation pertaining to the estate; and provision for transfer of any nonprobate assets such as property held in joint tenancy or payable-on-death form.

If Client wishes that Law Firm provide any legal services excluded under this agreement, a separate written agreement between Law Firm and Client will be required. Because of the conflict it would create, however, Law Firm could not represent Client both as executor and as an individual with respect to any litigation pertaining to the estate.

5. RESPONSIBILITIES OF LAW FIRM AND CLIENT. Law Firm will perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries and communications. Client will be truthful and cooperative with Law Firm; keep Law Firm reasonably informed of developments and of Client's address, telephone number, and whereabouts; and timely make any payments required by this agreement.

6. ATTORNEY FEES. Law Firm's fees will be set by the Court at or near the end of administration of the estate under the rules for attorney compensation set out in California Probate Code §10810 (copy attached). Law Firm's fee for ordinary services will be based on the amount of estate accounted for. "The amount of estate accounted for" means the total amount of the inventory plus gains over appraisal value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on property in the estate, if any. In addition, the Court may authorize payment of additional fees for "extraordinary services" if they are rendered to the estate. "Extraordinary services" include, but are not limited to, sales of real property, preparation of estate tax returns, and estate litigation. Any fees for extraordinary services require a petition by Law Firm and approval by the Court. All attorney fees are payable out of the estate and not by Client individually.

7. COSTS. Costs will be advanced by Law Firm and then billed to Client. Costs include, but are not limited to, court filing fees, publication charges, and probate referee fees. All costs are payable out of the estate, not by Client individually, and are subject to court approval.

8. STATEMENTS AND PAYMENTS. Law Firm will send Client monthly statements indicating costs incurred and their basis and any current balance owed. If no costs are incurred for a particular month, or if they are minimal, the statement may be held and combined with that for the following month unless a statement is requested by Client. Any balance will be paid in full within 30 days after the statement is mailed.

9. DISCHARGE OF LAW FIRM. Client may discharge Law Firm at any time by written notice effective when received by Law Firm. Unless specifically agreed by Law Firm and Client, Law Firm will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Law Firm is Client's attorney of record in any proceeding, Client will execute and return a substitution-of-attorney form immediately on its receipt from Law Firm. Notwithstanding the discharge, Client will be obligated to pay Law Firm, out of the estate and subject to court approval, reasonable attorney fees for all services provided and to reimburse Law Firm, also out of the estate and subject to court approval, for all costs advanced.

10. WITHDRAWAL OF LAW FIRM. Law Firm may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: (a) Client consents, or (b) Client's conduct renders it unreasonably difficult for the attorney to carry out the employment effectively. Notwithstanding Law Firm's withdrawal, Client will be obligated to pay Law Firm (out of the estate and subject to court approval) reasonable attorney fees for all services provided, and to reimburse Law Firm (also out of the estate and subject to court approval) for all costs advanced, before the withdrawal.

11. RELEASE, RETENTION, AND DISPOSITION OF CLIENT'S PAPERS AND PROPERTY. At the termination of services under this agreement, Law Firm will release promptly to Client on request all of Client's papers and property. After 5 years have passed since the termination of services under this agreement, Law Firm may dispose of Client's papers and property. If Client desires to have Law Firm retain Client's papers and property beyond 5 years after the termination of services, Client must make separate written arrangements with Law Firm. "Client's papers and property" include correspondence, deposition transcripts, exhibits, experts' reports, legal documents, physical evidence, and other items reasonably necessary to Client's representation, whether Client has paid for them or not.

12. DISCLAIMER OF GUARANTY. Although Law Firm may offer an opinion about possible results regarding the subject matter of this agreement, Law Firm cannot guarantee any particular result. Client acknowledges that Law Firm has made no promises about the outcome and that any opinion offered by Law Firm in the future will not constitute a guaranty.

13. ENTIRE AGREEMENT. This agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

14. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

15. MODIFICATION BY SUBSEQUENT AGREEMENT. This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out.

16. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date when it is executed by the second of the parties to do so. The attorney-client relationship will commence on the effective date of this agreement. Law Firm will not become Client's attorney or perform any legal services on behalf of Client before the effective date of this agreement.

The foregoing is agreed to by:

Date: _ _ _ _ _

__ [Signature] __
__ [Typed name] __
Client

Date: _ _ _ _ _

_ _ *[Name of firm]* _ _

By: _ *[Signature]* _

_ *[Typed name]* _

Law Firm

Comment: On Treasury Department standards (IRS Circular 230) for legal opinions that can be relied on by a taxpayer for the purpose of avoiding tax penalties, see §1.21. On defining the scope of the engagement, see §§1.20-1.21.

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§13.3 III. FORM: SAMPLE VARIABLE CONTINGENT FEE AGREEMENT—WILL AND TRUST CONTEST

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13.3-1 Sample variable contingent fee agreement—will and trust contest

Re: __ *[Describe matter]* __

Dear __ *[name of client]* __:

This letter is to confirm our agreement under which this firm has undertaken to represent your interests in connection with contesting the will and trust of __ *[name of decedent]* __, deceased. Our representation will be limited under this agreement to these matters. If other matters arise that require separate representation, we will contact you to determine whether you wish to engage us in such matters and the terms under which such representation will be conducted.

We suggest that you discuss this agreement and these matters with your personal counsel. The terms of this agreement, including the fee, are not set by law and are subject to negotiation. We will be happy to discuss such terms with you.

We have discussed the risk that the initiation of legal contact or litigation may eliminate any possibility of receiving a benefit from the decedent, either as a result of an in terrorem (no-contest) clause in the will or trust or because of action taken in retaliation by others interested in decedent's will or trust. We have also discussed the risks inherent in bringing this litigation and the possibility that no recovery may be obtained. You should be aware that, if litigation is brought and lost, you may be personally liable for an award of costs by the court.

However, based on the facts and documents you have provided us, we are willing to undertake this representation on a contingent fee basis, with our firm to advance your litigation costs for prosecuting the suit, to be recovered out of any settlement or judgment obtained, as provided below.

The contingent fee is as follows: First, if the matter is settled or a judgment obtained after less than __ *[number, e.g., 50]* __ hours of attorney time, our fee will be twice our hourly rate plus any costs advanced. Such costs include filing fees, copying expenses, court or jury fees, deposition transcripts, travel expenses, expert witness fees, process server costs, and other out-of-pocket expenses.

The hourly rate for partners on this matter for purposes of this enhanced fee will be __ *[dollar amount]* __, with lesser rates for associates and legal assistants ranging from __ *[dollar amount]* __ to __ *[dollar amount]* __.

If more than __ *[number, e.g., 50]* __ hours of attorney time are expended before obtaining a settlement or judgment, our fees will be on a sliding scale. If more than __ *[number, e.g., 50]* __ hours of attorney time are required, the contingent fee will be __ *[number, e.g., 25]* __ percent of the amount of the settlement, judgment, or other recovery, after first deducting and paying to us our costs.

If litigation is not resolved until one month before the trial date, the contingent fee percentage would be __ *[number, e.g., 33 1/3]* __ percent of any settlement, judgment, or other recovery received after such time. In the event of an appeal, the contingent fee percentage will be __ *[number, e.g., 40]* __ percent of any settlement, award, judgment, or other recovery.

If you sign and return this fee agreement to us, you grant us a lien for all unpaid attorney fees and costs advanced on all claims and causes of action that are the subject of our representation of you under this agreement and on all proceeds of any recovery obtained, whether by settlement, award, order, or judgment. Please be aware that this lien may significantly impair your interest because, among other factors, we may be

able to delay payment of any recovery or settlement funds to you until any disputes with us about unpaid attorney fees and costs advanced have been resolved. We advise you to obtain independent legal advice about granting us this lien. By signing this fee agreement and returning it to us, you are representing that you have had a reasonable opportunity to seek independent legal advice about this lien and have either obtained it or decided that it was unnecessary to do so.

Of course, we cannot guarantee that there will be any recovery. You have the right to agree or disagree with any settlement proposed. You have the right to terminate our firm's representation at your discretion. If you do so, however, our firm would retain a quantum meruit claim for a proportion of any subsequent settlement or recovery under common law rules.

Our firm has the right to resign from this representation, subject to any necessary court approval and subject to any quantum meruit claim that we might have under applicable law.

We are pleased to be representing you in this matter and look forward to working with you. Please acknowledge your agreement to the foregoing by signing and returning the enclosed copy of this letter at your earliest convenience.

Very truly yours,

Date: _ _ _ _ _

__ [Signature] __
__ [Typed name] __
Attorney

ACCEPTED AND AGREED TO:

Date: _ _ _ _ _

__ [Signature of client] __
__ [Typed name] __
Client

Source: California Trust and Probate Litigation §3.42 (Cal CEB 1999).

Comment: On hourly fee agreements, see §1.23. On contingent fee agreements, see §1.26.

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14

Unlawful Detainer—Sample Fee Agreement

I. SCOPE OF CHAPTER §14.1

II. FORM: SAMPLE UNLAWFUL DETAINER FEE AGREEMENT—PRIVATE PRACTITIONER §14.2

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Source: General Interest/Fee Agreement Forms Manual/14 Unlawful Detainer--Sample Fee Agreement/§14.1 I.
SCOPE OF CHAPTER

§14.1 I. SCOPE OF CHAPTER

This chapter presents a sample fee agreement designed to illustrate an agreement to provide legal services in an unlawful detainer matter (see §14.2).

The sample agreement in this chapter is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. On practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

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§14.2 II. FORM: SAMPLE UNLAWFUL DETAINER FEE AGREEMENT—PRIVATE PRACTITIONER

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14.2-1 Sample unlawful detainer fee agreement—private practitioner

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between [name] , hereafter referred to as "Attorney," and [name] , hereafter referred to as "Client."

2. DELEGATION OF ATTORNEY SERVICES. Attorney may delegate to other attorneys some of the attorney services to be provided to Client. Any such delegation will not affect attorney fees to be paid by Client under this agreement.

3. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: representation in an action filed in [specify county] court to evict Client from the rental property located at [specify address] , California [and to] [state any further scope of representation] . Client and Attorney agree that Attorney represents Client [alone and no other tenant, occupant, or person residing at those premises/as well as the following other tenants, occupants, or residents of the rental premises:] [specify name(s)] .

4. LEGAL SERVICES SPECIFICALLY EXCLUDED. Legal services that are not to be provided by Attorney under this agreement specifically include, but are not limited to, the following: representation (1) of any person other than Client with regard to the eviction except for persons specifically named in Paragraph 3; (2) as to any appeal from a court judgment in the eviction action against Client; and (3) as to any affirmative action not directly related to the eviction action brought against Client by the landlord.

If Client wishes Attorney to provide any legal services excluded under this agreement, a separate written agreement between Attorney and Client will be required.

5. RESPONSIBILITIES OF ATTORNEY AND CLIENT. Attorney will perform the legal services called for under this agreement; keep Client informed of progress and developments; and respond promptly to Client's inquiries and communications. Client will be truthful and cooperative with Attorney; keep Attorney reasonably informed of developments and of Client's address, telephone number, and whereabouts; and timely make any payments required by this agreement.

6. ATTORNEY FEES. Client will pay to Attorney the sum of [dollar amount] per hour for attorney fees for the legal services provided under this agreement. Attorney will charge in increments of [specify fraction, e.g., one-tenth] of an hour, rounded off for each particular activity to the nearest [specify fraction, e.g., one-tenth] of an hour. The minimum time charged for any particular activity will be [specify fraction, e.g., one-tenth] of an hour.

Attorney will charge for all activities undertaken in providing legal services to Client under this agreement, including, but not limited to, the following: conferences, court sessions, and depositions (preparation and participation); correspondence and legal documents (review and preparation); legal research; and telephone conversations.

Client acknowledges that Attorney has made no promises about the total amount of attorney fees to be incurred by Client under this agreement.

7. COSTS. Client will pay all costs in connection with Attorney's representation of Client under this agreement. Costs will be advanced by Attorney and then billed to Client unless the costs can be met from deposits Client has made to defray costs. Costs include, but are not limited to, court filing and writ issuance fees, deposition costs, expert fees and expenses, investigation costs, long-distance telephone charges,

messenger service fees, photocopying expenses, and process server fees.

8. DEPOSIT FOR FEES. Client will pay to Attorney a deposit of *[dollar amount]* to be received by Attorney on or before *[date]* , to be applied against attorney fees incurred by Client each month. Attorney will bill Client each month and withdraw that sum from the deposit. Client agrees to pay each month the sum that will bring the remaining deposit to its original amount.

9. DEPOSIT FOR COSTS. Client will pay to Attorney a deposit of *[dollar amount]* to be received by Attorney on or before *[date]* , and to be applied against costs incurred by Client. This amount will be deposited by Attorney in an interest-bearing trust account. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. Client authorizes Attorney to withdraw the principal from the trust account to pay costs as they are incurred by Client. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by Client for costs is less than the amount of the deposit, the difference will be refunded to Client.

10. DEPOSIT OF RENT. Client will pay to Attorney a deposit of back rent at *[dollar amount]* per month covering the period of *[specify beginning date to ending date]* . This deposit must be paid by *[date]* . Client will pay to Attorney a deposit of future rent of *[dollar amount]* per month starting on *[date]* , and covering each month after that until instructed otherwise. This future rent must be paid by the *[specify number, e.g., 5th]* business day of each month. Attorney will hold these funds in a trust account. These deposits are separate from any other deposit for fees or costs under this agreement. Attorney will not pay out the money deposited under this paragraph to anyone without Client's permission. Client may demand return of this deposit at any time, allowing *[number, e.g., 10]* days for Attorney to prepare the payout. If Client fails to make the payments required under this paragraph, or withdraws money deposited under this section against the recommendation of Attorney, then Attorney may withdraw as counsel of record in Client's case and substitute Client as counsel in propria persona.

11. STATEMENTS AND PAYMENTS. Attorney will send Client monthly statements indicating attorney fees and costs incurred and their basis, any amounts applied from deposits, and any current balance owed. If no attorney fees or costs are incurred for a particular month, or if they are minimal, the statement may be held and combined with that for the following month unless a statement is requested by Client. Any balance will be paid in full within 30 days after the statement is mailed.

12. REPRESENTATION OF ADVERSE INTERESTS. Client is informed that the Rule 2-200 of the Rules of Professional Conduct of the State Bar of California requires the Client's informed written consent before an Attorney may begin or continue to represent the Client when the Attorney has or had a relationship with another party interested in the subject matter of the Attorney's proposed representation of the Client, and that the Attorney inform the Client in writing of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the Client. Client is further informed that the Rules require that, before an Attorney may represent a party who has, in a separate matter, an interest adverse to that of the Attorney's Client in the separate matter, the Attorney obtain the informed written consent of both parties. Attorney is not aware of any relationship with any other party interested in the subject matter of Attorney's services for Client under this agreement or of any separate matter in which Client has an interest adverse to that of any Client of Attorney.

13. ORDER OR AGREEMENT FOR PAYMENT OF ATTORNEY FEES OR COSTS BY ANOTHER PARTY. The Court may order, or the parties to the dispute may agree, that another party will pay some or all of Client's attorney fees, costs, or both. Any such award will not affect Client's obligation to pay attorney fees and costs under this agreement, nor will Attorney be obligated under this agreement to enforce such an order or agreement. Any such amounts actually received by Attorney, however, will be credited against attorney fees and costs incurred by Client.

14. SETTLEMENT. Attorney will not settle Client's case without the approval of Client, who will have the absolute right to accept or reject any settlement. Attorney will notify Client promptly of the terms of any settlement offer received by Attorney.

15. DISCHARGE OF ATTORNEY. Client may discharge Attorney at any time by written notice effective when received by Attorney. Unless specifically agreed by Attorney and Client, Attorney will provide no further services and advance no further costs on Client's behalf after receipt of the notice. If Attorney is Client's attorney of record in any proceeding, Client will execute and return a substitution-of-attorney form immediately

on its receipt from Attorney. Despite the discharge, Client will remain obligated to pay Attorney at the agreed rate for all services provided and to reimburse Attorney for all costs advanced, and, in addition, Attorney will be entitled to the nonrefundable deposit for attorney fees to the extent, if any, that it exceeds Client's total obligation for attorney fees incurred.

16. WITHDRAWAL OF ATTORNEY. Attorney may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. The circumstances under which these Rules permit such withdrawal include, but are not limited to, the following: (a) Client consents, (b) Client's conduct renders it unreasonably difficult for the Attorney to carry out the employment effectively, and (c) Client fails to pay attorney fees or costs as required by his or her agreement with the attorney. Despite Attorney's withdrawal, Client will remain obligated to pay Attorney at the agreed rate for all services provided, and to reimburse Attorney for all costs advanced, before the withdrawal.

17. RELEASE OF CLIENT'S PAPERS AND PROPERTY. At the termination of services under this agreement, Attorney will release promptly to Client on request all of Client's papers and property. Client's papers and property include correspondence, legal documents, and other items reasonably necessary to Client's representation, whether Client has paid for them or not.

18. DISCLAIMER OF GUARANTY. Although Attorney may offer an opinion about possible results regarding the subject matter of this agreement, Attorney cannot guarantee any particular result. Client acknowledges that Attorney has made no promises about the outcome and that any opinion offered by Attorney in the future will not constitute a guaranty.

19. ENTIRE AGREEMENT. This agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

20. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

21. MODIFICATION BY SUBSEQUENT AGREEMENT. This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out.

22. ARBITRATION OF FEE OR COSTS DISPUTE. If a dispute arises between Attorney and Client regarding attorney fees or costs under this agreement and Attorney files suit in any court other than small claims court, Client will have the right to stay that suit by timely electing to arbitrate the dispute under Business and Professions Code §§6200-6206, in which event Attorney must submit the matter to such arbitration.

23. ATTORNEY FEES AND COSTS IN ACTION ON AGREEMENT. The prevailing party in any action or proceeding to enforce any provision of this agreement will be awarded reasonable attorney fees and costs incurred in that action or proceeding or in efforts to negotiate the matter.

24. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date it is executed by the second of the parties to do so.

Once effective, this agreement will apply to services provided by Attorney on this matter before its effective date.

The foregoing is agreed to by:

Date: _ _ _ _ _ _ [Signature] _
 _ [Typed name] _
 Client

Date: _ _ _ _ _ _ [Signature] _
 _ [Typed name] _
 Attorney

Comment: This sample agreement may be used by a private practitioner or adapted for use by a legal services organization.

On other matters counsel might include in the fee agreement, see Eviction Defense Man §4.27. Paragraph 10 on tenant deposit of back and future rent is optional, but it may be particularly valuable both as an indication of the tenant's good faith and, in warranty of habitability defenses, in guarding the funds needed to comply with a court order favoring the tenant. See Eviction Defense Man §§4.30-4.31. See also Eviction Defense Man §4.29 for another sample form of agreement if the attorneys belong to a legal services organization that does not charge a fee.

On hourly fee arrangements, see §1.23. On deposits and client trust accounts, see §1.30. On mandatory fee arbitration, see §§1.46-1.47. On court orders regarding payment of fees or costs by third party, see §1.36.

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15

Wrongful Termination—Sample Fee Agreement

I. SCOPE OF CHAPTER §15.1

II. FORM: SAMPLE ATTORNEY FEE AGREEMENT §15.2

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Source: General Interest/Fee Agreement Forms Manual/15 Wrongful Termination--Sample Fee Agreement/§15.1 I. SCOPE OF CHAPTER

§15.1 I. SCOPE OF CHAPTER

This chapter presents a sample form for use as a fee agreement in wrongful termination litigation (see §15.2).

The sample agreement in this chapter is illustrative only; when drafting an agreement, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation. On practical, legal, and ethical considerations relating to specific fee agreement provisions, see chap 1.

CAUTION: California Rules of Professional Conduct 3-410 (operative January 1, 2010) requires attorneys who do not carry malpractice insurance to inform their clients of that fact in writing. See §1.51A.

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§15.2 II. FORM: SAMPLE ATTORNEY FEE AGREEMENT

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15.2-1 Sample attorney fee agreement

Dear _ *[name of client]* _:

This letter sets out and confirms the legal services agreement we discussed on _ *[date]* _. Business and Professions Code §6147 requires a written fee agreement in cases such as yours and this letter is intended to meet the requirements of that section. Any modifications to this agreement must be in writing. We are sending you an original and one copy of this letter. If you agree to its terms, please sign both, keep the original, and return the copy to us.

If you need legal services other than those we have agreed to provide, we will need to discuss separate fee arrangements for those services.

1. LEGAL SERVICES TO BE PROVIDED. You have authorized us, _ *[name of law firm]* _, to represent you in pursuit of your claims of employment discrimination and wrongful termination arising from your employment with _ *[name of company]* _.

2. RETENTION OF FIRM RATHER THAN PARTICULAR ATTORNEY. You are retaining the _ *[name of law firm]* _, not any particular attorney, and the attorney services to be provided will not necessarily be performed by any particular attorney.

3. DELEGATION OF ATTORNEY AND PARALEGAL SERVICES. You agree that we may delegate to other attorneys and legal professionals, such as contract attorneys and contract paralegals, some of the attorney services to be provided to you. Such services will be billed to you at the same hourly rates that we bill our services.

4. ATTORNEY FEE—PARTIAL CONTINGENT FEE AGREEMENT. We have agreed to represent you in your employment discrimination and wrongful termination claims against _ *[name of company]* _. In exchange, you have agreed to pay us either:

- a. _ *[Specify fraction, e.g., One-third]* _ of the net recovery obtained up to 60 days before trial;
- b. _ *[Specify number, e.g., 40]* _ percent of the net recovery obtained at any time after 60 days before trial, either by settlement or by judgment; or
- c. If you choose to drop your suit before settlement or judgment or if you choose to discharge us and obtain other counsel before settlement or judgment, compensation at our hourly rates for each hour expended on your case.

"Net recovery" means the amount remaining after the total amount received (whether by settlement, arbitration award, or court judgment) has been reduced by the sum of all "costs" as defined in Paragraph 10 of this agreement.

Our hourly rates are as follows: _ *[dollar amount]* _ per hour for partners; _ *[dollar amount]* _ per hour for associates; and _ *[dollar amount]* _ per hour for paralegals. We bill for all legal service activities under this agreement including, but not limited to, conferences, court sessions, depositions (preparation and participation), correspondence, preparation and review of legal documents, legal research, and telephone calls.

We reserve the right to raise our rates in the future. If we should do so while this agreement is in effect, we will bill you at the increased rates, but only for services provided 30 days or more after we mail written notice

of the increase to you. If you choose not to consent to the increased rates, you may terminate our services under this agreement by written notice effective when received by us, provided that you execute and return a substitution-of-attorney form immediately on its receipt from us if we are your counsel of record in any proceeding.

You acknowledge that we have made no promises about the total amount of attorney fees that you may incur under this agreement.

Our practice is to send each client a monthly statement of the costs we have incurred describing the services we have rendered at specific hourly rates. As discussed in Paragraph 10 of this agreement, payment of costs is due within 30 days after the statement date. We would be pleased and grateful if payment is received sooner.

If you have any disagreement with the monthly statement, please call or write to us immediately. If you do not contact us within 30 days of the date of the monthly statement, we will assume that the statement is satisfactory to you.

The contingent amounts are not set by law, but are negotiable between us.

5. LIEN FOR FEES AND COSTS. You have agreed to grant our firm, __ *[name of firm]* __, a lien on all claims or causes of action arising from the subject of our representation of you. The lien is for any sums, including costs, due and owing to us at the conclusion of our services and attaches to any recovery you may obtain, whether by arbitration award, settlement, court action, or otherwise, whether we obtained the recovery or not.

You are aware, and acknowledge, that this lien may significantly impair your interest because our firm may be able to delay payment of any recovery or settlement funds to you until any disputes with us about unpaid attorney fees and costs have been resolved. You acknowledge that we have advised you to seek independent legal advice about granting us this lien and you have had a reasonable opportunity to do so. By signing this fee agreement and returning it to us (Attorney Law Firm), you state that you have either obtained legal advice about this lien or have decided that it was unnecessary to do so.

6. LIMITATION OF REPRESENTATION. This agreement applies only to legal services regarding your employment discrimination and wrongful termination claims. You may have rights or incur other obligations related to those claims, which this agreement does not cover. For example, this firm does not represent clients in the workers' compensation area, and, under California's Workers' Compensation Act, you may be entitled to compensation for some of your injuries. Similarly, because we do not handle bankruptcy matters, if your employer were to declare bankruptcy, you would need to employ other counsel to pursue your claims in bankruptcy court. Nor are we licensed to practice law in any jurisdiction outside California, so we, therefore, cannot represent you in any out-of-state proceedings.

This agreement provides only for representation through trial. It does not cover other circumstances, for example:

- a. Defending you against claims that your employer or another party may have against you;
- b. Representing you in an appeal; or
- c. Representing you in any proceedings that may be necessary to collect a judgment.

If it is necessary for you to incur additional fees in such a circumstance, we will need to negotiate a separate fee arrangement at the time such event occurs.

7. POSSIBLE AWARD OF ATTORNEY FEES. As you may know, certain California and federal statutes provide for the award of attorney fees to the prevailing party in a suit alleging unlawful employment practices. Following trial, the court may order the losing party to pay the fees and costs that the winner has incurred. If the court awards you such statutory fees following trial, the __ *[name of law firm]* __ is entitled to either the full amount of the statutory fee award or the percentage of the net recovery agreed to in this agreement, whichever is greater.

If you reject a good faith settlement offer and then lose at trial, you may be liable for the defendant's

litigation costs and fees.

8. DUTIES OF ATTORNEYS. We will perform the legal services called for under this agreement, keep you informed of the progress and developments in the case, and respond promptly to your inquiries and communications. We do not guarantee the outcome of your matter; there can be no assurance that you will recover any sum or sums. We will represent you vigorously and with the utmost diligence, however, and will give you our best legal judgment.

9. DUTIES OF CLIENT. You agree to be truthful and cooperative with us; to keep us reasonably informed of developments in the case, and of your address, telephone number, and whereabouts; and to timely make any payments required by this agreement. It is quite possible that a settlement offer will be made before trial. Although you retain the ultimate authority to accept or reject a settlement offer, we expect you to listen to our advice, be responsive and responsible in your approach to settlement negotiations, obtain and supply us with information that is reasonably available to you, and consult with us in person or by telephone when necessary. It is important that you consider each settlement offer carefully.

10. COSTS. You agree to pay any and all costs in connection with our representation of you under this agreement.

We will pay up front for certain costs on your behalf and then bill you for them. These costs may include, but are not limited to, paralegal fees, filing fees, photocopying and facsimile charges, long-distance and cellular telephone calls, messenger fees, computer time, deposition costs, and travel costs (including coach airfare and hotel accommodations).

If it is necessary to employ an economist, physician, or other expert or consultant, we will instruct the expert or consultant to bill you directly. However, we will not employ any such consultant or expert without your consent.

Our practice is to send monthly statements detailing the services performed and the costs incurred in your case. Payment for costs is due within 30 days after the statement date. We would be pleased and grateful if payment is received sooner. Any amount outstanding at the time of settlement or judgment will be deducted before funds are disbursed. If you have any disagreement with the monthly statement, please call or write to us immediately. If you do not notify us within 30 days of the date of the monthly statement of any problem, we will assume that the statement is correct and satisfactory to you.

11. RIGHT TO WITHDRAW. The attorney-client relationship is one of mutual trust and confidence. You retain the right to discharge us at any time on written notice. If we are your attorney of record in any proceeding at the time you discharge us, you agree to execute and return a substitution-of-attorney form immediately on its receipt from us.

We retain the right to withdraw from your case at any time on reasonable notice if continued representation could involve us in ethical violations, if a lack of cooperation by you prevents us from properly pursuing your case, or for other good cause such as nonpayment of attorney fees and costs. If the need to withdraw arises, or if you choose to retain other counsel and discharge us or to drop the case before settlement or judgment, then we are entitled to payment for all our fees and costs to date regardless of the ultimate outcome of the case.

12. ATTORNEY-CLIENT PRIVILEGE. All communications between an attorney and the client are protected by the attorney-client privilege and we will treat them as confidential. The purpose of this privilege is to encourage you to speak openly and freely about your situation so that we can give you accurate legal advice. Information conveyed to an attorney's agent (e.g., a paralegal or a secretary) for transmission to the attorney is also protected.

13. BINDING ARBITRATION TO RESOLVE DISPUTES ARISING FROM OUR RELATIONSHIP. While we look forward to a mutually satisfactory relationship with you, one of the responsibilities of an attorney is to provide for the unanticipated. Accordingly, you and we mutually agree to submit any dispute that may arise between us including, but not limited to, fee disputes and claims of legal malpractice arising out of this matter, first to mediation, and then, if mediation fails, to binding arbitration through the American Arbitration Association in accord with the rules of the American Arbitration Association prevailing at the time of the arbitration. By putting your initials under this paragraph and by signing this agreement, you hereby acknowledge that you are

aware that, by agreeing to arbitrate, you waive any right you may have to submit the dispute for determination by a court and that you also waive the right to a trial before a judge or a jury.

Initials

14. ENFORCEMENT OF THIS AGREEMENT. In the event of any action or proceeding taken to enforce any provision of this agreement, the prevailing party will be entitled to recover attorney fees and costs incurred in the action or proceeding or in efforts to negotiate the matter.

15. SIGNATURE. If you understand and agree to the terms and conditions of this agreement, please sign the enclosed copy of this letter, signifying your understanding and acceptance, and return it to our office in the envelope provided. Please keep the original of this letter for your records. We look forward to working with you on this matter and hope we can achieve a prompt and successful resolution.

16. EFFECTIVE DATE. This agreement takes effect when we receive your signed copy of it.

Very truly yours,

Date: _ _ _ _ _

__ [Name of firm] __
By: __ [Signature] __
__ [Typed name] __
Attorney

THE FOREGOING IS UNDERSTOOD AND AGREED. I have carefully read and reviewed this fee agreement letter and have had an opportunity to ask questions about it and to consult other counsel if I wish. I understand that this agreement is not subject to the attorney-client privilege and may be disclosed to a court or otherwise as appropriate.

Date: _ _ _ _ _

__ [Signature] __
__ [Typed name] __
Client

Source: Wrongful Employment Termination Practice §9.105 (2d ed Cal CEB 1997).

Comment: This sample partial contingent fee agreement may be adapted for use in many employment cases.

When drafting the agreement, counsel should keep in mind that its terms may become part of the record, especially in any subsequent attorney fee litigation. For discussion of attorney fees in wrongful employment termination litigation, see Wrongful Emp Term, chap 16.

On attorney's liens, see §1.38. On mandatory fee arbitration, see §§1.46-1.47. On arbitration of malpractice and other disputes, see §§1.48-1.49. On retainers, see §1.32. On nonrefundable deposits, see §1.30. On costs under a contingent fee arrangement, see §1.29. On payment of attorney fees under a fee shifting statute, see §1.36. On defining the scope of the engagement, see §§1.20-1.21.

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16

Completion of Representation Letter and Nonengagement Letter

I. SCOPE OF CHAPTER §16.1

II. FORM: SAMPLE COMPLETION OF REPRESENTATION LETTER §16.2

III. FORM: SAMPLE NONENGAGEMENT LETTER §16.3

§16.1 I. SCOPE OF CHAPTER

This chapter contains two sample letters, one to be sent on the completion of representation (see §16.2) and the other to be sent if, after consultation with a potential client, the attorney decides to decline the engagement (see §16.3).

This type of letter will help ensure that the client fully understands counsel's intentions. Specifically, it is useful to send a completion of representation letter so that the client knows the representation has ended and there is nothing left to be done in the matter. Additionally, if there is an agreement as to disposition of files, the completion letter can specify what will happen to the files (e.g., put in storage, return to the client, or other).

In the case of a would-be client, the nonengagement letter makes clear that no representation has been commenced, eliminating ambiguity and allowing the client to obtain other counsel to protect his or her interests.

The samples in this chapter are illustrative only. As with any document, when drafting these letters, attorneys should use their own independent legal and professional judgment in light of the particular client and factual situation.

§16.2 II. FORM: SAMPLE COMPLETION OF REPRESENTATION LETTER

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16.2-1 Sample completion of representation letter

[Law firm letterhead]

__ [Date] __

__ [Name and address of client] __

Re: __ [Identify client matter] __

Dear __ [name of client] __:

As you know, we entered into an engagement agreement on __ [specify effective date of agreement] __, which provided for the following legal services: __ [list services described in fee agreement including any modifications] __. __ [Law Firm/Attorney] __ has completed all of the services required under the terms of the agreement. If your understanding is different, please advise immediately on receipt of this letter.

As indicated in the engagement agreement, it is __ [Law Firm's/Attorney's] __ policy to retain and ultimately destroy all files, documents, records, and writings relating to each engagement for which __ [Law Firm/Attorney] __ has been retained without notifying clients or former clients of the destruction of these items. Therefore, to be certain that __ [Law Firm/Attorney] __ has not retained any material that you may need or desire, __ [Law Firm/Attorney] __ will return to you all original documents we have not already returned to you __ [together with copies of any other files, documents, records, and writings relating to this engagement (which copies will be provided at your expense)] __ if you instruct __ [Law Firm/Attorney] __ in writing identifying the files, documents, records, and writings within __ [number, e.g., 90] __ days of the date of this letter.

__ [Enclosed is a closing statement that reflects balances due for services rendered and disbursements made for your account.] __ **If you should have any questions about any of the above, please let us hear from you on receipt of this letter. We appreciate having you as a client and hope that should you be in need of legal services in the future you would consider retaining us as your attorneys.**

Sincerely,

Date: _ _ _ _ _

__ [Name of firm] __

By: __ [Signature] __

__ [Typed name] __

Attorney

Comment: At the end of an engagement, it is important to send a letter notifying the client that the matter is completed. The CCP §340.6 statute of limitations for a legal malpractice action is tolled while the client still reasonably believes he or she is represented by an attorney. *Gonzalez v Kalu* (2006) 140 CA4th 21, 30, 43 CR3d 866 (in event of attorney's unilateral withdrawal, representation ends when client "actually has or reasonably should have no expectation that the attorney will provide further legal services").

If the engagement agreement contains a provision permitting the attorney to destroy client files without prior notice to the client (see §1.41), the completion letter should notify the client of the need to make arrangements for the return of any documents the client wants to retain.

§16.3 III. FORM: SAMPLE NONENGAGEMENT LETTER

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16.3-1 Sample nonengagement letter

__ *[Law firm letterhead]* __

__ *[Date]* __

__ *[Name and address of nonclient]* __

Dear __ *[name of nonclient]* __:

This letter is to confirm that on __ *[date]* __, **you** __ *[specify, e.g., contacted me by phone/met with me in my office/sent me a letter]* __ **to discuss** __ *[describe subject matter or problem]* __ **and whether this firm would be willing to represent you as your attorney. I have reviewed the matter** __ *[together with all the, e.g., documents and papers you provided me]* __.

[Use applicable alternative]

[Alternative 1: If reason for declining representation is other than nonwaivable conflict with existing client]

Although we appreciate the confidence you have expressed in our firm, unfortunately, we have concluded that we cannot represent you in this matter. In concluding that it is not feasible to represent you, neither I nor the firm is expressing an opinion on the merits of your matter or case. Do not refrain from seeking legal assistance from another firm because of our decision not to represent you. Because any comments made during our initial consultation were only preliminary and were not based on a thorough analysis of your matter or case, you should not rely on these comments. Instead, you should seek the advice of another attorney. I am returning to you the following materials that you gave me for my review: __ *[list the materials enclosed]* __ **. You will find these materials enclosed.**

Every legal matter has deadlines. Failure to meet these deadlines can cause you to lose your case or important legal rights. Because critical deadlines may affect your case, you should take steps immediately to contact another attorney to preserve any rights you may have. Neither I nor this firm is taking any action to protect your rights. You may wish to contact __ *[specify, e.g., legal services provider/name of attorney/name of local bar association lawyer referral service]* __, **who may be able to assist you in this matter.**

[Alternative 2: If reason for declining representation is nonwaivable conflict with existing client]

Although we appreciate the confidence you have expressed in our firm, unfortunately, we have concluded that we cannot represent you in this matter because to do so would conflict with our representation of an existing client. I am returning to you the following materials that you gave me for my review: __ *[list the materials enclosed]* __ **. You will find these materials enclosed.**

[Continue]

Because this office has not given you any legal advice or agreed to represent you, there is no charge to you for any time spent or expenses incurred by the firm in having reviewed your matter or case. Thank you for having given us the opportunity to review your matter or case. If you have need in the future for legal assistance, I hope you will again consider our firm.

Sincerely yours,

__ *[Name of law firm]* __

By: __ *[Signature]* __

Comment: Whenever an attorney or law firm decides not to represent a potential client after an interview or discussion with the potential client that might conceivably be interpreted to have created an attorney-client relationship, it is wise to send a nonengagement letter. This is true whether the discussion took place in the attorney's office, in the would-be client's home, or on the telephone. Be aware that a significant factor in determining the existence of an attorney-client relationship is whether any legal advice was given. See *Fox v Pollack* (1986) 181 CA3d 954, 226 CR 532; *Miller v Metzinger* (1979) 91 CA3d 31, 154 CR 22.

In general, it is good practice to advise a potential client to seek alternative representation and be alert to statutory deadlines. If, however, the reason for declining representation is that the attorney or law firm has discovered that the target of the potential client's litigation is an *existing* client, the nonengagement letter should not advise the potential client to seek other legal advice or to avoid the statute of limitations because giving such advice could violate the duty of loyalty to the existing client. *Flatt v Superior Court* (1994) 9 C4th 275, 36 CR2d 537 (even assuming that meeting with new client had resulted in attorney-client relationship, when declining further representation in action against existing client, attorney's duty of undivided loyalty to existing client negated duty to inform new client of statute of limitations or advisability of seeking other counsel). If considerable time had elapsed and substantial resources had been expended before the conflict was discovered, causing the new client substantial prejudice, a duty to advise the new client might exist. 9 C4th at 290 n6. The *Flatt* court did not decide this issue.

Source: General Interest/Fee Agreement Forms Manual/Appendix A State Bar of California Sample Written Fee Agreement Forms

Appendix A

State Bar of California Sample Written Fee Agreement Forms

THE STATE BAR OF CALIFORNIA

Sample Written Fee Agreement Forms

(Prepared by the State Bar Committee on Mandatory Fee Arbitration.
Approved by the Board of Governors June 20, 1987; amended effective
November 22, 1996, May 15, 2001, and June 23, 2005.)

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INSTRUCTIONS AND COMMENTS

I.

INTRODUCTION

Attached are three sample attorney-client fee agreements prepared by the Committee on Mandatory Fee Arbitration of the State Bar of California and approved by the Board of Governors. They are advisory only. They are not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility, or any member of the State Bar.

The first two agreement forms are designed for use in non-contingent fee arrangements. They cover (1) litigation on an hourly basis, and (2) non-litigation on an hourly basis. The third form is for a contingency fee matter. Finally, there are "Other Clauses of Interest in Fee Agreements" which list optional clauses for specific circumstances.

II.

OVERVIEW

A. INTENDED PURPOSE AND LIMITATIONS

The accompanying forms are samples. These "Instructions and Comments" and the forms are intended for use only by attorneys admitted to practice in California, who are expected to utilize their own independent legal and business judgment when evaluating the forms and these comments.

The agreements are in the format of a relatively formal agreement while attempting to eliminate unnecessary "legalese." For those attorneys who prefer a more colloquial style, such as a letter-agreement, the language can be adapted to that format. Attorneys are encouraged to mold the samples to fit their needs.

B. SUMMARY OF THE STATUTES

I. Non-Contingent Fee Agreements

In non-contingent matters, Section 6148 of the Business and Professions Code requires California attorneys to have written fee agreements with their clients whenever the client's total expense, including fees, will foreseeably exceed \$1000 and to provide a duplicate copy of the fully executed agreement to the client.

The fee agreement must state:

- (a) Any basis for compensation including, but not limited to, hourly rates, statutory or flat fees, and other standard rates, fees and charges;
- (b) The general nature of the legal services to be provided to the client;
- (c) The responsibilities of attorney and client under the agreement.

If an attorney fails to comply with the statute, the fee agreement becomes voidable at the client's option, whereupon the attorney is entitled to a "reasonable" fee.

A written fee agreement is not required when services are rendered in an emergency to avoid prejudice to the client or where a writing is otherwise impractical; when the client is a corporation; when the client, after full disclosure, makes a written waiver of the benefits of [section 6148](#); or when the fee agreement is implied in fact by prior services of the same general kind having been rendered to and paid for by the client. The attorney is urged to use caution in relying upon these "exceptions." There can be very few circumstances where a written fee agreement is not advisable.

[Section 6148\(b\)](#) requires attorneys to provide their clients with written billing statements. A client may request such statements at minimum intervals of 30 days. The attorney must provide a statement within 10 days after demand. All statements, whether requested by the client or not, must state "...the amount, rate and basis for calculation or other method of determination of the attorneys fees and costs." (subd.(b)).

2. *Contingency Fee Agreements.*

In contingency fee agreements, [Section 6147 of the Business and Professions Code](#) contains the same requirements as non-contingency fee agreements (discussed above) for a written fee agreement and a duplicate copy of the executed agreement being provided to the client.

There are additional requirements for contingency fee agreements. The agreement must include:

- (a) A statement of the contingency fee percentage amount.
- (b) A statement as to how disbursements and costs will affect the contingency fee and the client's recovery.
- (c) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee agreement. This may include any amounts collected for the client by the attorney.
- (d) Unless the claim is subject to the provisions of [Business and Professions Code Section 6146](#) (Claim Against Health Care Provider), a statement that the fee is not set by law but is negotiable between attorney and client.
- (e) If the claim is subject to [Section 6146](#), a statement that the rates set forth in that section are the maximum limits for the contingency fee and that the attorney and client may negotiate a lower rate. [If the matter involves a claim for injury or damage against a health care provider based upon negligence, the attorney should carefully review [Business and Professions Code Section 6146](#).]

If any contingency fee agreement does not comply with the statutory provisions, the agreement is voidable at the option of the client, and the attorney is then entitled to a "reasonable" fee.

III.

GUIDELINES FOR COMPLIANCE

Compliance with the statute requires the judgment of the individual attorney. Forms alone cannot tell an attorney how to comply. Rather, compliance will result from the attorney's understanding of the statutory provisions and the issues those provisions raise.

A. STANDARD FOR DISCLOSURE

Due to the consumer orientation of the statutes and the fiduciary nature of the attorney-client relationship, the statutes must be examined in the light most favorable to the client. Disclosures required by statute should be accompanied by all additional information necessary to make the disclosure complete, accurate, and not misleading. The statutory requirements should be considered minimum standards.

B. AGREEMENT IN WRITING

To meet the statutory requirement of an agreement in writing, the fee agreement must be signed by both the attorney and the client. An attorney must be firm in requesting that the client sign the agreement before work commences.

C. DISCLOSURE OF STANDARD RATES, FEES AND CHARGES

An attorney should err on the side of inclusion when enumerating standard rates, fees and charges. In an hourly case, fixed or

minimum charges for specific functions should be clearly set forth in the agreement to avoid misleading the client. For example, most firms have a minimum billing unit; some charge a minimum time for a telephone call, letter, or court appearance; others charge flat fees for the use of standardized documents developed over the years, or for specific tasks.

Costs and expenses that are passed through should be enumerated in enough detail to avoid misunderstanding. Charges passed through other than "at cost" should be detailed to avoid omitting a "standard rate, fee or charge." Caution should be exercised in "marking up" or "surcharging" costs, as some authorities consider such practices unethical. Caution should also be exercised in charging for items that would be considered general office overhead.

D. NATURE OF SERVICES/DUTIES OF PARTIES

When the statute requires disclosure of the nature of the services to be rendered and the respective duties of the attorney and the client, it simply enumerates two of the indispensable terms of an agreement. When the fee is on an hourly basis, these items can be covered in simple, short generalities. In flat or "premium" fee agreements, however, the scope of the attorney's responsibilities should be defined carefully. In contingency fee agreements, the scope of the services and costs covered and excluded under the percentage fee is especially important.

E. BILLS: AMOUNT, RATE AND BASIS

All bills must state the amount, rate and basis for calculation (or other method of determination) of the attorney's fees and costs. A bill that simply states "for services rendered" is not sufficient. In an hourly case, the bill should describe the services, identify the attorneys who performed services, the time each expended, their hourly rates and the resulting fee for each attorney's time. In other types of cases, such as flat or premium fees, the bill should refer to the "basis of calculation" which should be set forth in the fee agreement. Bills for costs and expenses must clearly identify the costs and expenses and provide the amount of the costs and expenses incurred. It is recommended that costs be individually itemized.

F. EXEMPTIONS

Except for the provision exempting corporate clients from the required disclosures, the exemptions in the statute are narrow. Attorneys should rely on these exemptions with caution.

G. BREVITY AND CLARITY v COMPLETE DISCLOSURE

The statute embraces two potentially inconsistent goals: detailed disclosure on one hand, and information in an understandable format on the other. Each attorney should strive to strike a balance between these goals when drafting fee agreements. In addition to a proper agreement, it is suggested that the attorney take the time and effort to explain the terms of the agreement and to determine that the client fully understands its terms.

IV.

INSTRUCTIONS

A. FORM NO. 1: HOURLY LITIGATION

1. *Conditions (Par. 1) and Effective Date (Par. 14)*

At the threshold, the attorney must determine at what point the agreement comes to life. Until it does, there is no written agreement that complies with the statute. Once it does, the attorney is obligated to render services, even if the client has not paid. If services are performed before the written agreement takes effect, the attorney will be limited to a "reasonable" fee. This form and the other samples embody one solution to these intertwined issues. It is not the only solution, nor will it always be the best solution.

Par. 1 (Conditions) interacts closely with Par. 14 (Effective Date). Working together, the two clauses are designed to delay the attorney's obligation to perform services until the client signs the agreement and pays the deposit; however, the clauses also are drafted to bring within the agreement any services performed before signing and payment. The delay in the attorney's obligation to perform services is based on a cautious reading of the statute's written agreement requirement. We assume that no written agreement exists until both parties sign and perform the conditions precedent. At the same time, however, we recognize that attorneys frequently will (or must) perform services before signing and payment; they will often do so under circumstances that will not fall within the statute's exemptions for emergencies or impracticality. For that reason, "premature" services are brought under the agreement's protection; upon signing and payment the agreement will take effect, but retroactively to the date the attorney first performed services. Without the retroactivity provision compensation for "premature" services would be limited to a reasonable fee, because the services were performed without a written agreement.

Of course, if the agreement never takes effect, then the statutory penalty limits the attorney to the reasonable value of any services performed.

If the attorney expects to perform services before the agreement is signed and the deposit paid, then the attorney should document the facts in a writing, preferably one signed by the client.

Likewise, document reliance on any statutory exemptions, such as emergency or impracticality.

2. Scope and Duties (Par. 2 and Par. 3)

Fill in a brief description of the subject of the representation (Par. 2). This is a statutory requirement. Enumeration of the client's and attorney's duties likewise is required by the statute (Par. 3).

The scope of services provided excludes appeal from the judgment and execution proceedings. The attorney may exclude more, less or nothing. Any exclusion from the scope of services should be carefully drawn, and consistent with the duty of care owed by the attorney regarding the specific matter that is the subject of the representation.

3. Deposit (Par. 4)

This is an optional clause. Fill in the amount of any deposit and the date by which it must be paid. An attorney cannot withdraw funds from the trust account without the client's express authorization. We have provided for that authorization. If a more cautious approach to the authorization question is preferred, the attorney might provide that sums will be withdrawn from the trust account only after they are invoiced to client and "x" days pass without client's protest of any of the charges.

The attorney need not require a deposit of any kind. This paragraph sets forth one way to handle the deposit if the attorney opts for one. This clause places a ceiling on further deposits. Without a ceiling, the right to require further deposits is so open-ended that it might be unenforceable for uncertainty. In addition, provision is made for advance payment of all fees and costs to be incurred in preparing for and conducting trial or arbitration. Because it is calculated based on objective facts, no ceiling has been placed on the pre-trial deposit.

The "Replenishing Deposit" clause provided in the "Additional Provisions" forms may be used as an alternative.

4. Legal Fees (Par. 5)

The attorney must inform the client in the fee agreement whether and under what conditions rates are subject to change.

Also, the attorney should add any standard or minimum time or dollar charges for specific functions—for example, "0.x" hours for a telephone call or letter. Failure to disclose such practices probably misleads the client when the agreement states that fees are charged by the actual time by the hour and some fraction of an hour.

Some firms either do not charge for travel time or charge at reduced rates. The attorney should discuss this with the client.

5. Costs and Expenses (Par. 6)

This is not an inclusive list. The attorney may include more or less. The attorney should disclose the rate or charge for any items not passed through strictly at cost; if not done, the attorney may violate the statute's requirement that standard rates, fees and charges be disclosed.

A Rate Schedule should be included for charges that are not usually passed through strictly at cost. All such charges should be enumerated to comply with the statute's requirement that attorneys disclose their standard rates, fees and charges.

The attorney should specifically address how air travel other than economy, hotel accommodations and meals will be charged.

The sample paragraph allows the attorney to incur costs and retain consultants, etc., without client consent. Optional clauses, to be initialed by the client, would require client approval before costs in excess of a specific dollar amount or of a certain nature, (*e.g.*, experts) were incurred.

Language is included notifying the client that in certain cases, it may be the client's responsibility to pay other parties' costs.

6. Billing Statements (Par. 7)

Attorneys' statements shall describe the services rendered, and must state the "basis" of the charges, including the amount, rate, and basis for calculation or other method of determination of fees and costs.

7. *Lien (Par. 8)*

This is an optional clause, but is recommended for the attorney's protection. The California Supreme Court has determined that a lien in an hourly fee case gives the attorney an interest adverse to the client, and therefore the attorney must comply with Rule 3-300 of the Rules of Professional Conduct by fully disclosing the acquisition and terms of the lien and transmitting that information to the client in writing in a manner which should reasonably be understood by the client, advising the client in writing that the client may seek the advice of an independent lawyer of the client's choice, and giving the client a reasonable opportunity to seek that advice before the client gives written consent to the lien. The Supreme Court left open whether the same requirements must be met for a valid lien in a contingent fee case, but caution dictates that the same procedure be followed.

8. *Discharge and Withdrawal (Par. 9)*

This clause is declaratory of applicable law and the Rules of Professional Conduct.

9. *Disclaimer of Guarantee (Par. 10)*

This is an optional clause.

10. *Construction Clauses (Par. 11-15)*

These are optional clauses found in many formal agreements.

B. FORM NO. 2: HOURLY-NON-LITIGATION

With the exceptions and additions recited below, the comments on the Hourly-Litigation Form apply equally to the Hourly Non-Litigation Form.

1. *Scope and Duties (Par. 2)*

An exclusion for litigation has been added.

2. *Client's Duties (Par. 3)*

References to appearances at legal proceedings are deleted.

3. *Deposit (Par. 4)*

References to trial and arbitration dates and related fees are deleted.

4. *Costs and Expenses (Par. 6)*

Reference to litigation-related costs is deleted.

5. *Lien*

The attorney's lien has been deleted because it may be inappropriate in a non-litigation context.

C. FORM NO. 3: CONTINGENCY FEE

With the exceptions and additions recited below, the comments on the Hourly Litigation Form 1 apply equally to the Contingency Form 3.

1. *Conditions (Par. 1) and Effective Date (Par. 19)*

The instructions for these paragraphs are the same as those for the Hourly Litigation Form, Paragraphs 1 and 14.

2. *Scope of Services (Par. 2), Responsibility of the Parties (Par. 3), and Limitation of Representation (Par. 10)*

Fill in the defendant's name, the nature of the event giving rise to the claim and the date (Par. 2). This paragraph and Paragraph 10 (Limitation of Representation), describe the scope and limitations of the representation. A description of the subject of the representation is a statutory requirement. Enumeration of the client's and attorney's responsibilities likewise is required by the statute (Par. 3).

The point at which the covered services ends should be carefully defined to avoid any question of the obligation to provide

additional services without additional fees. The scope of services in the sample excludes appeal from the judgment and execution proceedings. The attorney may exclude more, less or nothing. Any exclusion from the scope of services should be carefully drawn, and should be consistent with the duty of care owed by the attorney regarding the specific matter that is the subject of the representation.

The scope of representation is also limited to the specific matter defined in Paragraph 2. Business and Professions Code Section 6147 requires a statement as to what extent, if any, the client could be required to pay any compensation to the attorney that arises out of their relationship but is not covered by the contingency fee agreement. The sample (Par. 10) provides that representation as to related matters will require a separate agreement. As to the related matter of defending the client on cross-complaints, the option of a separate agreement or engaging separate counsel is given. Here again, the attorney may broaden the scope of the services to include those related matters which are excluded in the sample.

3. *Legal Fees (Par. 4)*

As required by statute, this paragraph explains the contingency on which fees become due, the method of calculation of fees at various points in the litigation, and deduction of costs. An optional clause includes non-monetary proceeds as part of the net recovery on which the fees are based. If this clause is used, consideration should be given to whether or not to enumerate the potential non-monetary items, *e.g.*, the value of continued insurance coverage.

Neither the particular stages in litigation at which the percentage of the fee changes, nor the specific basis for computation of a reasonable fee in the event of discharge, should be viewed as being endorsed by the State Bar. It should be noted that no specific contingency fee amounts are recommended in these forms. These provisions are illustrative only. Other provisions may be more appropriate in particular cases.

Business and Professions Code Section 6147 provides that a reasonable fee is owed in the event of failure to comply with the statute, and existing case law provides for payment of a reasonable fee in the event of discharge of the attorney by the client prior to occurrence of the contingency on which fees become due. Accordingly, this paragraph states that the reasonable fee in such a case is payable on the occurrence of the contingency and provides assistance in the determination of the amount of a fee which may be considered reasonable.

4. *Negotiability of Fees (Par. 5)*

This statement is required by statute.

5. *Billing Statements (Par. 8)*

This optional paragraph is intended for use in the event the client is to pay costs as the litigation progresses, rather than deducting all costs from the recovery.

6. *Approval Necessary for Settlement (Par. 9)*

This provision is optional.

7. *Discharge and Withdrawal (Par. 11)*

This is declaratory of applicable law and rules. Together with Paragraphs 4 (Legal Fees), 12 (Conclusion of Services) and 13 (Lien), this paragraph notifies the client of payment obligations if the attorney is discharged or withdraws.

8. *Conclusion of Services (Par. 12)*

Returning the file and other property is required under existing law and the Rules of Professional Conduct.

9. *Receipt of Proceeds (Par. 14)*

This is an optional clause.

10. *Disclaimer of Guarantee (Par. 15)*

This is an optional clause.

11. *Construction Clauses (Paras. 16-18)*

These are optional clauses found in many formal agreements.

ADDITIONAL PROVISIONS

There are innumerable additional provisions that an attorney may include in a fee agreement. The following are several which the attorney may wish to consider. All of these clauses are optional.

1. *Arbitration Clause*

An attorney should consult the firm's malpractice insurance carrier regarding its position on arbitration and particular arbitration provisions, including any award of attorney's fees.

The suggested clause is appropriate for binding arbitration of all claims other than fee disputes which are subject to non-binding arbitration under Business and Professions Code Sections 6200, et seq. Such clauses may only be enforceable with full disclosure to the client of the ramifications of those choices and the comparative advantages and disadvantages of other alternatives. This clause advises the client of the right to have an independent attorney review it, and requires initialing to approve it.

2. *Mediation Clause*

This is an optional clause. Under Business and Professions Code Section 6200, a mediation option may be offered to the parties after the attorney or client files a request for fee arbitration with some local bar association or the State Bar fee arbitration programs.

The attorney may want to consider this in determining whether to include a pre-filing mediation clause such as the suggested clause.

3. *Interest Clause*

It is legally and ethically proper to charge interest on fees. If the attorney elects to do so, this clause provides appropriate language. Please keep in mind that interest, if charged, must be reasonable so as not to violate either the prohibition against unconscionable fees... or the usury provisions of the California Constitution. It must be simple interest, made a part of the agreement, and separately stated as an increment on the monthly or other periodic billing. Generally, interest should begin running only after a certain specified period, *i.e.*, thirty, sixty or ninety days after the billing invoice is rendered, if not paid within that time.

If the Agreement uses the terms "finance charges," "late fees," "penalty payment" or anything other than simple interest, this may create problems with the Federal Truth In Lending Law and the California Unruh Act.

4. *Replenishing Deposit*

This is an alternative to Par. 4 in Forms 1 and 2, and provides for an automatically replenishing deposit.

5. *Attorneys' Fees Clause*

An attorneys' fees clause is permitted, except that attorneys' fees are not recoverable in fee arbitrations under Business and Professions Code Sections 6200, et seq. Further, an attorney may not usually recover fees for representing him or herself. If this clause and an arbitration clause are both used, the attorneys' fee provisions should be the same. Inclusion of this clause should be cleared with the attorney's malpractice insurance carrier.

6. *Other Payor Clauses*

These clauses may be appropriate where someone other than the client is responsible for paying the attorney's fees, and may be used only in compliance with Rule 3-310(F) of the Rules of Professional Conduct.

7. *Fixed Fee Clause*

This clause is a suggested alternative to Paragraph 5 (Legal Fees and Billing Practices) where the work is being performed on a fixed fee basis.

8. *Other Attorney Clauses*

See California Rules of Professional Conduct Rule 2-200(A). These clauses may be appropriate where the attorney contemplates working with another attorney who is not a partner, associate or shareholder of the attorney. Charging associate counsel fees as a

cost in an hourly fee case is appropriate, but is a suspect practice in contingency fee litigation. Separate sample clauses are therefore offered for hourly and contingency fee cases.

VII.

CONCLUSION

These forms are disseminated in the hope that they will be useful to attorneys in their practices. Attorneys are urged to make alterations to these forms so that they conform to the attorney's practice and the needs and requirements of the attorney and clients, subject always to satisfying the statutory requirements for fee agreements and the Rules of Professional Conduct.

Form No. 1
Sample Written Fee Agreement
Hourly Litigation*

CRANE, GARCIA & MOORE
441 Bauchet Street
Los Angeles, CA 90012
(213) 680-9600
_____(Date)_____

ATTORNEY-CLIENT FEE AGREEMENT

CRANE, GARCIA & MOORE ("Attorney") and STELLA KING ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below.

1. CONDITIONS. This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit called for under Paragraph 4.

2. SCOPE OF SERVICES. Client hires Attorney to provide legal services in the following matter: __ *[describe matter]* __. Attorney will provide those legal services reasonably required to represent Client. Attorney will take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. If a court action is filed, Attorney will represent Client through trial and post-trial motions. This Agreement does not cover representation on appeal or in execution proceedings after judgment. Separate arrangements must be agreed to for those services. Services in any matter not described above will require a separate written agreement.

3. CLIENT'S DUTIES. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information or developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills on time, and to keep Attorney advised of Client's address, telephone number and whereabouts. Client will assist Attorney in providing necessary information and documents and will appear when necessary at legal proceedings.

4. DEPOSIT. Client agrees to pay Attorney an initial deposit of \$____ by _____. The hourly charges will be charged against the deposit. The initial deposit, as well as any future deposit, will be held in a trust account. Client authorizes Attorney to use that fund to pay the fees and other charges as they are incurred. Payments from the fund will be made upon remittance to client of a billing statement. Client acknowledges that the deposit is not an estimate of total fees and costs, but merely an advance for security.

Whenever the deposit is exhausted, Attorney reserves the right to demand further deposits, each up to a maximum of \$__ *[dollar amount]* __ before a trial or arbitration date is set. Once a trial or arbitration date is set, Client shall pay all sums then owing and deposit the attorneys' fees estimated to be incurred in preparing for and completing the trial or arbitration, as well as the jury fees or arbitration fees, expert witness fees and other costs likely to be assessed. Those sums may exceed the maximum deposit.

Client agrees to pay all deposits after the initial deposit within __ days of Attorney's demand. Unless otherwise agreed in writing, any unused deposit at the conclusion of Attorney's services will be refunded.

5. LEGAL FEES AND BILLING PRACTICES. Client agrees to pay by the hour at Attorney's prevailing rates for all time spent on Client's matter by Attorney's legal personnel. Current hourly rates for legal personnel are as follows:

Senior partners __ __ __ /hour

Partners __ __ __ /hour

Associates __ __ __ /hour

Paralegals _ _ _ _/hour

Law clerks _ _ _ _/hour

The rates on this schedule are subject to change on 30 days' written notice to Client. If Client declines to pay increased rates, Attorney will have the right to withdraw as attorney for Client.

The time charged will include the time Attorney spends on telephone calls relating to Client's matter, including calls with Client, witnesses, opposing counsel or court personnel. The legal personnel assigned to Client's matter may confer among themselves about the matter, as required and appropriate. When they do confer, each person will charge for the time expended, as long as the work done is reasonably necessary and not duplicative. Likewise, if more than one of the legal personnel attends a meeting, court hearing or other proceeding, each will charge for the time spent. Attorney will charge for waiting time in court and elsewhere and for travel time, both local and out of town.

Time is charged in minimum units of one-tenth (0.1) of an hour. The following have higher minimum charges:

Telephone calls:

Letters:

Other:

6. COSTS AND OTHER CHARGES.

(a) Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses in addition to the hourly fees. The costs and expenses commonly include, service of process charges, filing fees, court and deposition reporters' fees, jury fees, notary fees, deposition costs, long distance telephone charges, messenger and other delivery fees, postage, photocopying and other reproduction costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses, consultants' fees, expert witness, professional, mediator, arbitrator and/or special master fees and other similar items. Except for the items listed below, all costs and expenses will be charged at Attorney's cost.

In-office photocopying _ _ _ _ _/page

Facsimile charges _ _ _ _ _/page

Mileage _ _ _ _ _/mile

Other: _ _ _ _ _

(b) Out of town travel. Client agrees to pay transportation, meals, lodging and all other costs of any necessary out-of-town travel by Attorney's personnel. Client will also be charged the hourly rates for the time legal personnel spend traveling.

(c) Experts, Consultants and Investigators. To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants or investigators. Client agrees to pay such fees and charges. Attorney will select any expert witnesses, consultants or investigators to be hired, and Client will be informed of persons chosen and their charges.

Additionally, Client understands that if the matter proceeds to court action or arbitration, Client may be required to pay fees and/or costs to other parties in the action. Any such payment will be entirely the responsibility of Client.

7. BILLING STATEMENTS. Attorney will send Client periodic statements for fees and costs incurred. Each statement will be payable within _ _ days of its mailing date. Client may request a statement at intervals of no less than 30 days. If Client so requests, Attorney will provide one within 10 days. The statements shall include the amount, rate, basis of calculation or other method of determination of the fees and costs, which costs will be clearly identified by item and amount.

8. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of the representation under this Agreement. The lien will be for any sums owing to Attorney at the conclusion of services performed. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Attorney will have a lien as specified above.

_____(Client Initial Here) _____(Attorney Initial Here)

9. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Agreement, refusal to cooperate or to follow Attorney's advice on a material matter or any fact or circumstance that would render Attorney's continuing representation unlawful or unethical. When Attorney's services conclude, all unpaid charges will immediately become due and payable. After services conclude, Attorney will, upon Client's request, deliver Client's file, and property in Attorney's possession unless subject to the lien provided in Paragraph 8 above, whether or not Client has paid for all services.

10. DISCLAIMER OF GUARANTEE AND ESTIMATES. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Attorney makes no such promises or guarantees. Attorney's comments about the outcome of the matter are expressions of opinion only. Any estimate of fees given by Attorney shall not be a guarantee. Actual fees may vary from estimates given.

11. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

12. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

13. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them, or an oral agreement only to the extent that the parties carry it out.

14. EFFECTIVE DATE. This Agreement will govern all legal services performed by Attorney on behalf of Client commencing with the date Attorney first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM AS OF THE DATE ATTORNEY FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____ [Signature] _____

Stella King

Address: _____

Telephone: _____

DATED: _____ CRANE, GARCIA & MOORE

By: [Signature] _____

Linda H. Garcia, Partner

Form No. 2

Sample Written Fee Agreement

Hourly Non-Litigation*

CRANE, GARCIA & MOORE

441 Bauchet Street

Los Angeles, CA 90012

(213) 680-9600

_____(Date)_____

CRANE, GARCIA & MOORE ("Attorney") and STELLA KING ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below.

1. CONDITIONS. This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit called for under Paragraph 4.

2. SCOPE OF SERVICES. Client hires Attorney to provide legal services in the following matter: _ [describe matter] _ . Attorney will provide those legal services reasonably required to represent Client. Attorney will take reasonable steps to keep

Client informed of progress and to respond to Client's inquiries. This Agreement does not cover litigation services of any kind, whether in court, arbitration, administrative hearings, or government agency hearings. Separate arrangements must be agreed to for those services. Services in any matter not described above will require a separate written agreement.

3. CLIENT'S DUTIES. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information or developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills on time and to keep Attorney advised of Client's address, telephone number and whereabouts. Client will assist Attorney in providing information and documents necessary for the representation in the described matter.

4. DEPOSIT. Client agrees to pay Attorney an initial deposit of \$ _ _ [dollar amount] _ _ by _____.

The hourly charges will be charged against the deposit. The initial deposit, as well as any future deposit, will be held in a trust account. Client authorizes Attorney to use that fund to pay the fees and other charges as they are incurred. Payments from the fund will be made upon remittance to Client of a billing statement. Client acknowledges that the deposit is not an estimate of total fees and costs, but merely an advance for security.

Whenever the deposit is exhausted, Attorney reserves the right to demand further deposits, each up to a maximum of \$ _ _ [dollar amount] _ _

Client agrees to pay all deposits after the initial deposit within _ _ days of Attorney's demand. Unless otherwise agreed in writing, any unused deposit at the conclusion of Attorney's services will be refunded.

5. LEGAL FEES AND BILLING PRACTICES. Client agrees to pay by the hour at Attorney's prevailing rates for all time spent on Client's matter by Attorney's legal personnel. Current hourly rates for legal personnel are as follows:

Senior partners _ _ _ _ /hour

Partners _ _ _ _ /hour

Associates _ _ _ _ /hour

Paralegals _ _ _ _ /hour

Law clerks _ _ _ _ /hour

The rates on this schedule are subject to change on 30 days' written notice to client. If Client declines to pay any increased rates, Attorney will have the right to withdraw as Attorney for Client.

The time charged will include the time Attorney spends on telephone calls relating to Client's matter, including calls with Client and other parties and attorneys. The legal personnel assigned to Client's matter may confer among themselves about the matter, as required and appropriate. When they do confer, each person will charge for the time expended, as long as the work done is reasonably necessary and not duplicative. Likewise, if more than one of the legal personnel attends a meeting or other proceeding, each will charge for the time spent. Attorney will charge for waiting time and for travel time, both local and out of town.

Time is charged in minimum units of one-tenth (0.1) of an hour. The following have higher minimum charges:

Telephone calls:

Letters:

Other:

6. COSTS AND OTHER CHARGES.

(a) In general, Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses in addition to the hourly fees. The costs and expenses commonly include fees fixed by law or assessed by public agencies, long distance telephone charges; messenger and other delivery fees, postage, photocopying and other reproduction costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses and consultants' fees and other similar items. Except for the items listed below, all costs and expenses will be charged at Attorney's cost.

In-office photocopying _ _ _ _ _ /page

Facsimile charges _____/page

Mileage _____/mile

Other: _____

(b) Out of town travel. Client agrees to pay transportation, meals, lodging and all other costs of any necessary out-of-town travel by Attorney's personnel. Client will also be charged the hourly rates for the time legal personnel spend traveling.

(c) Consultants and Investigators. To aid in the representation in Client's matter, it may become necessary to hire consultants or investigators. Client agrees to pay such fees and charges. Attorney will select any consultants or investigators to be hired, and Client will be informed of persons chosen and their charges.

7. BILLING STATEMENTS. Attorney will send Client periodic statements for fees and costs incurred. Each statement will be payable within __ days of its mailing date. Client may request a statement at intervals of no less than 30 days. If Client... requests, Attorney will provide one within 10 days. The statements shall include the amount, rate, basis of calculation or other method of determination of the fees and costs, which costs will be clearly identified by item and amount.

8. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Agreement, refusal to cooperate or to follow Attorney's advice on a material matter or any fact or circumstance that would render Attorney's continuing representation unlawful or unethical. When Attorney's services conclude, all unpaid charges will immediately become due and payable. After services conclude, Attorney will, upon Client's request, deliver Client's file and property in Attorney's possession, whether or not Client has paid for all services.

9. DISCLAIMER OF GUARANTEE AND ESTIMATES. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Attorney makes no such promises or guarantees. Attorney's comments about the outcome of the matter are expressions of opinion only. Any estimate of fees given by Attorney shall not be a guarantee. Actual fees may vary from estimates given.

10. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

11. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

12. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement only to the extent that the parties carry it out.

13. EFFECTIVE DATE. This Agreement will govern all legal services performed by Attorney on behalf of Client commencing with the date Attorney first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM AS OF THE DATE ATTORNEY FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. THE CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____ __[Signature]__

Stella King

Address: _____

Telephone: _____

DATED: _____

CRANE, GARCIA & MOORE

By: __[Signature]__

Linda H. Garcia, Partner

CRANE, GARCIA & MOORE
441 Bauchet Street
Los Angeles, CA 90012
(213) 680-9600
_____(Date)_____

ATTORNEY-CLIENT CONTINGENCY FEE AGREEMENT

CRANE, GARCIA & MOORE ("Attorney"), and STELLA KING ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below.

1. CONDITIONS. This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit, if any, called for under Paragraph 7.

2. SCOPE OF SERVICES. Client is hiring Attorney to represent Client in the matter of Client's claims against _____, *— [and possibly others as future investigation may indicate] —*, arising out of _____ which occurred on or about _____.

If a court action is filed, Attorney will represent Client until a settlement or judgment, by way of arbitration or trial, is reached. Attorney will oppose any motion for a new trial or any other post-trial motions filed by an opposing party, or will make any appropriate post-trial motions on Client's behalf. After judgment, Attorney will not represent Client on any appeal, or in any proceeding to execute on the judgment, unless Client and Attorney agree that Attorney will provide such services and also agree upon additional fees, if any, to be paid to Attorney for such services. Services in any matter not described above will require a separate written agreement.

3. RESPONSIBILITIES OF THE PARTIES. Attorney will provide those legal services reasonably required to represent Client in prosecuting the claims described in Paragraph 2 and will take reasonable steps to keep Client informed of progress and developments, and to respond promptly to inquiries and communications. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information and developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills for costs on time, and to keep Attorney advised of Client's address, telephone number and whereabouts. Client agrees to appear at all legal proceedings when Attorney deems it necessary, and generally to cooperate fully with Attorney in all matters related to the preparation and presentation of Client's claims.

4. LEGAL FEES. Attorney will only be compensated for legal services rendered if a recovery is obtained for Client. If no recovery is obtained, Client will be obligated to pay only for costs, disbursements and expenses, as described in Paragraph 6.

The fee to be paid to Attorney will be a percentage of the "net recovery," depending on the stage at which the settlement or judgment is reached. The term "net recovery" means: (1) the total of all amounts received by settlement, arbitration award or judgment, including any award of attorneys fees, (2) minus all costs and disbursements set forth in Paragraph 6. *— [Net recovery shall also include the reasonable value of any non-monetary proceeds.] —*

Attorney's fee shall be calculated as follows:

- (i) If the matter is resolved before filing a lawsuit or formal initiation of proceedings, then Attorney's fee will be ___ ___ percent (___%) of the net recovery;
- (ii) If the matter is resolved prior to ___ ___ days before the date initially set for the trial or arbitration of the matter then Attorney's fee will be percent (___%) of the net recovery; and
- (iii) If the matter is resolved after the times set forth in (i) and (ii), above, then Attorney's fee will be ___ ___ percent (___%) of the net recovery.

In the event of Attorney's discharge or withdrawal as provided in Paragraph 11, Client agrees that, upon payment of the settlement, arbitration award or judgment in Client's favor in this matter, Attorney shall be entitled to be paid by Client a reasonable fee for the legal services provided. Such fee shall be determined by considering the following factors:

- (1) The actual number of hours expended by Attorney in performing legal services for Client;
- (2) Attorney's hourly rates;
- (3) The extent to which Attorney's services have contributed to the result obtained;
- (4) The amount of the fee in proportion to the value of the services performed;

- (5) the amount of recovery obtained;
- (6) Time limitations imposed on Attorney by Client or by the circumstances; and
- (7) The experience, reputation and ability of personnel performing the services.

5. NEGOTIABILITY OF FEES. The rates set forth above are not set by law, but are negotiable between an attorney and client.

6. COSTS AND LITIGATION EXPENSES. Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses paid or owed by Client in connection with this matter, or which have been advanced by Attorney on Client's behalf and which have not been previously paid or reimbursed to Attorney. Costs, disbursements and litigation expenses commonly include court fees, jury fees, service of process charges, court and deposition reporters' fees, photocopying and reproduction costs, notary fees, long distance telephone charges, messenger and other delivery fees, postage, deposition costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses, consultant, expert witness, professional mediator, arbitrator and/or special master fees and other similar items. Except for the items listed below, costs and expenses will be charged at Attorney's cost.

In-office photocopying _____/page

Facsimile charges _____/page

Mileage _____/mile

Other: _____

Client understands that, as set forth in Paragraph 7 below, a deposit for costs may be required before the expenditure is made by Attorney.

To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants or investigators. Attorney will select any expert witnesses, consultants or investigators to be hired, and Client will be informed of persons chosen and their charges.

Client authorizes Attorney to incur all reasonable costs and to hire any investigators, consultants or expert witnesses reasonably necessary in Attorney's judgment unless one or both of the clauses below are initialed by Attorney.

Attorney shall obtain Client's consent before incurring any costs in excess of \$_____.

Attorney shall obtain Client's consent before retaining outside investigators, consultants, or expert witnesses.

If an award of fees and/or costs is sought on Client's behalf in this action, Client understands that the amount which the court may order as fees and/or costs is the amount the court believes the party is entitled to recover, and does not determine what fees and/or costs Attorney is entitled to charge Client or that only the fees and/or costs which were allowed were reasonable. Client agrees that, whether or not attorneys' fees or costs are awarded by the court in Client's case, Client will remain responsible for the payment, in full, of all attorneys' fees and costs in accordance with this Agreement.

Additionally, Client understands that if Client's case proceeds to court action or arbitration, Client may be required to pay fees and/or costs to other parties in the action. Any such award will be entirely the responsibility of Client.

7. DEPOSIT. Client agrees to pay Attorney an initial deposit for costs of \$____, to be returned with this signed Agreement. Attorney will hold this initial deposit in a trust account. Client hereby authorizes Attorney to use that deposit to pay the costs, disbursements and other expenses incurred under this Agreement.

When Client's deposit is exhausted, Attorney reserves the right to demand further deposits, each up to a maximum of \$_____.

Once a trial or arbitration date is set, Attorney will require Client to pay all sums then owing, and to deposit the costs Attorney estimates will be incurred in preparing for and completing the trial or arbitration, as well as the jury fees or arbitration fees likely to be assessed. Those sums may exceed the maximum deposit.

Client agrees to pay all deposits required under this Agreement within 10 days of Attorney's demand. Any deposit that is unused at the conclusion of Attorney's services will be refunded.

8. MONTHLY BILLING STATEMENTS. Attorney will send Client monthly billing statements for costs, disbursements and expenses incurred in connection with this matter. Each statement is to be paid in full within 15 days after the date of such

statement.

9. APPROVAL NECESSARY FOR SETTLEMENT. Attorney will not make any settlement or compromise of any nature of any of Client's claims without Client's prior approval. Client retains the absolute right to accept or reject any settlement. Client agrees to consider seriously any settlement offer Attorney recommends before making a decision to accept or reject such offer. Client agrees not to make any settlement or compromise of any nature of any of Client's claims without prior notice to Attorney.

10. LIMITATION OF REPRESENTATION. Attorney is representing Client only on the matter described in Paragraph 2. Attorney's representation does not include independent or related matters that may arise, including, among other things, claims for property damage, workers' compensation, disputes with a health care provider about the amount owed for their services, or claims for reimbursement (subrogation) by any insurance company for benefits paid under an insurance policy.

This Agreement also does not include defending Client against, or representing Client in any claims that may be asserted against Client as a cross-claim or counter-claim in Client's case. This Agreement does not apply to any other legal matters. If any such matters arise later, Attorney and Client will either negotiate a separate agreement if Client and Attorney agree that Attorney will perform such additional legal work or Client will engage separate counsel with respect to the cross-claim or counter-claim or additional legal work.

11. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time, upon written notice to Attorney. Attorney may withdraw from representation of Client (a) with Client's consent, (b) upon court approval, or (c) if no court action has been filed, for good cause and upon reasonable notice to Client. Good cause includes Client's breach of this contract, Client's refusal to cooperate with Attorney or to follow Attorney's advice on a material matter, or any other fact or circumstance that would render Attorney's continuing representation unlawful or unethical.

Notwithstanding Attorney's withdrawal or Client's notice of discharge, and without regard to the reasons for the withdrawal or discharge, Client will remain obligated to pay Attorney for all costs incurred prior to the termination and, in the event that there is any net recovery obtained by Client after conclusion of Attorney's services, Client remains obligated to pay Attorney for the reasonable value of all services rendered from the effective date of this Agreement to the date of discharge.

12. CONCLUSION OF SERVICES. When Attorney's services conclude, all unpaid charges will immediately become due and payable. Attorney is authorized to use any funds held in Attorney's trust account as a deposit against costs to apply to such unpaid charges. After Attorney's services conclude, upon request, Client's file and property will be delivered to Client, or Client's other attorney, whether or not Client has paid any fees and/or costs owed to Attorney.

13. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums owing to Attorney for any unpaid costs, or attorneys' fees, at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's own choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Attorney will have a lien as specified above.

_____(Client initials here) _____(Attorney initials here)

14. RECEIPT OF PROCEEDS. All proceeds of Client's case shall be deposited into Attorney's trust account for disbursement in accordance with the provisions of this Agreement.

15. DISCLAIMER OF GUARANTEE. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of this matter. Attorney makes no such promises or guarantees. There can be no assurance that Client will recover any sum or sums in this matter. Attorney's comments about the outcome of this matter are expressions of opinion only. Client acknowledges that Attorney has made no promise or guarantees about the outcome.

16. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties. No other agreement, statement or promise made on or before the effective date of this Agreement will be binding on the parties.

17. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

18. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may be modified by subsequent agreement of the

parties only by an instrument in writing signed by both of them or an oral agreement only to the extent that the parties carry it out.

19. EFFECTIVE DATE. This Agreement will govern all legal services performed by Attorney on behalf of Client commencing with the date Attorney first performed services. The date at the beginning of the Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM, AS OF THE DATE ATTORNEY FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE JOINTLY AND SEVERALLY FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. THE CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____ [Signature] _____

Stella King

Address: _____

Telephone: _____

DATED: _____ CRANE, GARCIA & MOORE

By: [Signature] _____

Linda H. Garcia, Partner

Other Clauses of Interest in Fee Agreements

1. ARBITRATION

A. ARBITRATION OF ALL DISPUTES INCLUDING CLAIMS OF MALPRACTICE

Any controversy between the parties regarding the construction, application or performance of any services under this Agreement, and any claim arising out of or relating to this Agreement or its breach, shall be submitted to binding arbitration upon the written request of one party after the service of that request on the other party. The parties shall appoint one person _____ [Option: or agree upon a 5-person panel] _____ to hear and determine the dispute. _____ [Option: name the arbitration provider such as AAA, JAMS, ADR, etc., and provide that the arbitration shall be conducted pursuant to the provider's rules] _____. If the parties cannot agree, then the Superior Court of _____ [fill in the name of county] _____ County shall choose an impartial arbitrator whose decision shall be final and conclusive on all parties. Attorney and Client shall each have the right of discovery in connection with any arbitration proceeding in accordance with Code of Civil Procedure Section 1283.05. _____ [Optional provision: The cost of the arbitration, excluding legal fees and costs, shall be borne by the losing party or in such proportion as the arbitrator shall decide.] _____ The parties shall bear their own legal fees and costs for _____ [all claims, or contract claims, or tort claims] _____. The arbitration shall take place in _____ [fill in name of county] _____ County, California.

B. STATE BAR FEE ARBITRATION

Notwithstanding subparagraph A above, in any dispute subject to the jurisdiction of the State of California over attorney's fees, charges, costs or expenses, Client has the right to elect arbitration pursuant to the fee arbitration procedures of the State Bar of California, as set forth in California Business and Professions Code Section 6200, et seq. Those procedures permit a trial after arbitration, unless the parties agree in writing, after the dispute has arisen, to be bound by the arbitration award. If, after receiving a notice of client's right to arbitrate, Client does not elect to proceed under the State Bar fee arbitration procedures, and file a request for fee arbitration within 30 days, any dispute over fees, charges, costs or expenses, will be resolved by binding arbitration as provided in the previous subparagraph A.

Because each party is giving up a right, Client is encouraged to have an independent lawyer of Client's choice review these arbitration provisions before agreeing to them.

By initialing below, Client and Attorney confirm that they have read and understand subparagraphs A and B above, and voluntarily agree to binding arbitration. In doing so, Client and Attorney voluntarily give up important constitutional rights to trial by judge or jury, as well as rights to appeal. Client is advised that Client has the right to have an independent lawyer of Client's choice review these arbitration provisions, and this entire agreement, prior to initialing this provision or signing this Agreement.

_____ (Client initial here) _____ (Attorney initial here)

2. MEDIATION CLAUSE

If a dispute arises out of or relating to any aspect of this Agreement between Client and Attorney, or the breach thereof, and if the dispute cannot be settled through negotiation, Attorney and Client agree to discuss in good faith the use of mediation before resorting to arbitration, litigation, or any other dispute resolution procedure.

3. INTEREST CHARGES

If a billing statement is not paid when due, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of 0.833% per month (TEN PERCENT _ [10%] _ ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest until paid.

[Interest may not be compounded without compliance with the California Civil Code, Appendix I, dealing with usury.]

4. REPLENISHING DEPOSIT

To commence the representation, Client has provided _ [must provide] _ Attorney with a \$ _ [dollar amount] _ deposit. Attorney will hold the deposit in Attorney's trust account and apply it to each statement when rendered by Attorney. Client will pay any additional balance due upon receipt of Attorney's statements each month and also will replenish the deposit each month in the amount of all payments made to Attorney from the deposit. At the conclusion of the matter, the deposit will be applied to the final statement, in which event Client will be responsible for any amount due over and above the deposit or be entitled to a refund of any amount remaining after the final statement is satisfied in full.

5. SECURITY DEPOSIT

Attorney's obligation to render services to Client will be subject to Attorney's receipt of a refundable security deposit of \$ _ [dollar amount] _.

Attorney will apply \$ _ [dollar amount] _ of that deposit to the first fees and costs billed to Client pursuant to this Agreement, and will retain the remainder of the deposit in Attorney's trust account as security for Client's obligations to make timely payment of fees and costs pursuant to this Agreement. Attorney will thereafter apply the remaining deposit against what appears to be the last billing for the services rendered to Client pursuant to this Agreement. Client agrees to provide an additional security deposit of \$ _ [dollar amount] _ at least 120 days prior to the first scheduled trial date of the matter.

6. ATTORNEYS' FEES CLAUSE

The prevailing party in any action or proceeding arising out of or to enforce any provision of this Agreement, with the exception of a fee arbitration or mediation under Business and Professions Code Sections 6200-6206, will be awarded reasonable attorneys' fees and costs incurred in that action or proceeding, or in the enforcement of any judgment or award rendered.

7. OTHER PAYOR CLAUSE—INSURANCE

Client has informed Attorney that Client may have insurance coverage which may pay for some or all of Attorney's fees which may become due under this Agreement. Attorney will make a claim with the insurer for compensation. It is understood, however, that if the insurance provider refuses or fails to pay Attorney for any reason, Client shall remain responsible for paying all Attorney's statements as they are rendered upon the billing and payment terms set forth in this Agreement. Should the insurance provider pay only a portion of the fees and costs, Client shall be responsible for the balance.

8. OTHER PAYOR CLAUSE—PERSONAL

Client has informed Attorney that Client has arranged for _ [employer/relative-name and relationship] _ to be responsible for some or all of Attorney's fees which may become due under this Agreement. It is understood that should _ [name] _ fail for any reason to pay Attorney's statements as they become due, Client shall remain responsible for paying all Attorney's statements as they are rendered upon the billing and payment terms set forth in this Agreement.

It is understood that the attorney/client relationship will only exist between Attorney and Client, and that _ [employer/relative name] _ will have no right to information regarding the representation of Client by Attorney, and have no right to control or direct the Attorney in providing the services under this Agreement, unless specifically approved by Client.

[Note: Provide signature line for employer/relative in Agreement.]

9. FIXED FEE CLAUSE

Client agrees to pay a fixed fee of __[*dollar amount*]__ for Attorney's services under this Agreement. The fixed fee is due by _____. Attorney shall have no obligation to provide services to Client until the fixed fee is paid in full. Unless Attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under this Agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed.

10. "OTHER ATTORNEY" CLAUSE—CONTINGENCY

It is agreed that Attorney will associate with another attorney, __[*name*]__, who will assist Attorney regarding the representation. __[*Name*]__ will be compensated out of the fees which Attorney otherwise will earn under this Agreement based upon the effort and time he/she puts into the case. Attorney will divide the total fees received from the representation with __[*name*]__, and the terms of the division will be __[*specify the terms of fee division*]__. This division of fees will not increase the fee due from Client should Attorney obtain a recovery on behalf of Client.

11. "OTHER ATTORNEY" CLAUSE—HOURLY

It is agreed that Attorney will associate with another attorney, [*name*], who will assist Attorney regarding the representation. [*Name*] will be compensated by Attorney on an hourly basis at a rate of \$ __[*dollar amount*]__ per hour. These charges will be billed by Attorney to Client as a cost as defined in this Agreement. __[*Option: or "billed directly to Client by the other attorney."*]__.

[Note: not suitable for use in contingency fee cases.]

* This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code section 6148 but may not address varying contractual obligations which may be present in a particular case. The State Bar makes no representation of any kind, express or implied, concerning the use of these forms.

* This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code section 6148 but may not address varying contractual obligations which may be present in a particular case. The State Bar makes no representation of any kind, express or implied, concerning the use of these forms.

* This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code Section 6147 but may not address varying contractual obligations which may be present in a particular case. The State Bar makes no representation of any kind, express or implied, concerning the use of these forms.

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Source: General Interest/Fee Agreement Forms Manual/Appendix B Selected Business & Professions Code Sections and Rules of Professional Conduct

Appendix B

Selected Business & Professions Code Sections and Rules of Professional Conduct

I. SCOPE OF APPENDIX

II. FEE AGREEMENTS STATUTES (BUS & P C §§6146-6149.5)

- A. Bus & P C §6146
- B. Bus & P C §6147
- C. Bus & P C §6147.5
- D. Bus & P C §6148
- E. Bus & P C §6149
- F. Bus & P C §6149.5

III. FEE ARBITRATION STATUTES (Bus & P C §§6200-6206)

- A. Bus & P C §6200
- B. Bus & P C §6201
- C. Bus & P C §6202
- D. Bus & P C §6203
- E. Bus & P C §6204
- F. Bus & P C §6204.5
- G. Bus & P C §6206

IV. SELECTED CALIFORNIA RULES OF PROFESSIONAL CONDUCT

- A. Rule 1-320. Financial Arrangements With Non-Lawyers
- B. Rule 2-200. Financial Arrangements Among Lawyers
- C. Rule 3-300. Avoiding Interests Adverse to a Client
- D. Rule 3-310. Avoiding the Representation of Adverse Interests
- E. Rule 3-400. Limiting Liability to Client
- F. Rule 3-410 (operative January 1, 2010). Disclosure of Professional Liability Insurance
- G. Rule 3-500. Communication
- H. Rule 3-510. Communication of Settlement Offer
 - I. Rule 3-700. Termination of Employment
- J. Rule 4-100. Preserving Identity of Funds and Property of a Client
- K. Rule 4-200. Fees for Legal Services
- L. Rule 4-210. Payment of Personal or Business Expenses Incurred by or for a Client

I. SCOPE OF APPENDIX

This appendix contains the text of selected sections of the Business and Professions Code (§§B.2-B.14) and the text of selected Rules of Professional Conduct (§§B.15-B.25). These are discussed in chap 1.

NOTE: The outline headings (*e.g.*, A., B., C.) have been added by the editors for ease of use and are not part of the text of the statute or rule.

II. FEE AGREEMENTS STATUTES (BUS & P C §§6146-6149.5)

A. Bus & P C §6146

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

- (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered.
- (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered.
- (3) Twenty-five percent of the next five hundred thousand dollars (\$500,000) recovered.
- (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars (\$600,000).

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500), or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(3) Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

B. Bus & P C §6147

(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:

- (1) A statement of the contingency fee rate that the client and attorney have agreed upon.
- (2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.
- (3) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the

plaintiff by the attorney.

- (4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between attorney and client.
- (5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.
- (b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.
- (c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.
- (d) This section shall become operative on January 1, 2000.

C. Bus & P C §6147.5

- (a) Sections 6147 and 6148 shall not apply to contingency fee contracts for the recovery of claims between merchants as defined in Section 2104 of the Commercial Code, arising from the sale or lease of goods or services rendered, or money loaned for use, in the conduct of a business or profession if the merchant contracting for legal services employs 10 or more individuals.
- (b) (1) In the instances in which no written contract for legal services exists as permitted by subdivision (a), an attorney shall not contract for or collect a contingency fee in excess of the following limits:
 - (A) Twenty percent of the first three hundred dollars (\$300) collected.
 - (B) Eighteen percent of the next one thousand seven hundred dollars (\$1700) collected.
 - (C) Thirteen percent of sums collected in excess of two thousand dollars (\$2000).
- (2) However, the following minimum charges may be charged and collected:
 - (A) Twenty-five dollars (\$25) in collections of seventy-five dollars (\$75) to one hundred twenty-five dollars (\$125).
 - (B) Thirty-three and one-third percent of collections less than seventy-five dollars (\$75).

D. Bus & P C §6148

- (a) In any case not coming within Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars (\$1000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative. The written contract shall contain all of the following:
 - (1) Any 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.
 - (2) The general nature of the legal services to be provided to the client.
 - (3) The respective responsibilities of the attorney and the client as to the performance of the contract.
- (b) All 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. Bills for the cost and expense portion of the bill shall clearly identify the costs and expenses incurred and the amount of the costs and expenses. Upon request by the client, the attorney shall provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days prior to the request, in which case the attorney may provide a bill to the client no later than 31 days following the date the most recent bill was provided. The client is entitled to make similar requests at intervals of no less than 30 days following the initial request. In providing responses to client requests for billing information, the attorney may use billing data that is currently effective on the date of the request, or, if any fees or costs to that date cannot be accurately determined, they shall be described and estimated.
- (c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.

(d) This section shall not apply to any of the following:

(1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.

(2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

(3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.

(4) If the client is a corporation.

(e) This section applies prospectively only to fee agreements following its operative date.

(f) This section shall become operative on January 1, 2000.

E. Bus & P C §6149

A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and of Section 952 of the Evidence Code.

F. Bus & P C §6149.5

(a) Upon the payment of one hundred dollars (\$100) or more in settlement of any third-party liability claim the insurer shall provide written notice to the claimant if both of the following apply:

(1) The claimant is a natural person.

(2) The payment is delivered to the claimant's lawyer or other representative by draft, check, or otherwise.

(b) For purposes of this section, "written notice" includes providing to the claimant a copy of the cover letter sent to the claimant's attorney or other representative that accompanied the settlement payment.

(c) This section shall not create any cause of action for any person against the insurer based upon the insurer's failure to provide the notice to a claimant required by this section. This section shall not create a defense for any party to any cause of action based upon the insurer's failure to provide this notice.

III. FEE ARBITRATION STATUTES (BUS & P C §§6200-6206)

A. Bus & P C §6200 (for text of section operative on January 1, 2010, see section following)

(a) The board of governors shall, by rule, establish, maintain, and administer a system and procedure for the arbitration, and may establish, maintain, and administer a system and procedure for mediation of disputes concerning fees, costs, or both, charged for professional services by members of the State Bar or by members of the bar of other jurisdictions. The rules may include provision for a filing fee in such amount as the board may, from time to time, determine.

(b) This article shall not apply to any of the following:

(1) Disputes where a member of the State Bar of California is also admitted to practice in another jurisdiction or where an attorney is only admitted to practice in another jurisdiction, and he or she maintains no office in the State of California, and no material portion of the services were rendered in the State of California.

(2) Claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct, except as provided in subdivision (a) of Section 6203.

(3) Disputes where the fee or cost to be paid by the client or on his or her behalf has been determined pursuant to statute or court order.

(c) Unless the client has agreed in writing to arbitration under this article of all disputes concerning fees, costs, or both, arbitration under this article shall be voluntary for a client and shall be mandatory for an attorney if commenced by a client. Mediation under this article shall be voluntary for an attorney and a client.

(d) The board of governors shall adopt rules to allow arbitration and mediation of attorney fee and cost disputes under this article to proceed under arbitration and mediation systems sponsored by local bar associations in this state. Rules of procedure

promulgated by local bar associations are subject to review by the board to insure that they provide for a fair, impartial, and speedy hearing and award.

(e) In adopting or reviewing rules of arbitration under this section the board shall provide that the panel shall include one attorney member whose area of practice is either, at the option of the client, civil law, if the attorney's representation involved civil law, or criminal law, if the attorney's representation involved criminal law, as follows:

(1) If the panel is composed of three members the panel shall include one attorney member whose area of practice is either, at the option of the client, civil or criminal law, and shall include one lay member.

(2) If the panel is composed of one member, that member shall be an attorney whose area of practice is either, at the option of the client, civil or criminal law.

(f) In any arbitration or mediation conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of governors, an arbitrator or mediator, as well as the arbitrating association and its directors, officers, and employees, shall have the same immunity which attaches in judicial proceedings.

(g) In the conduct of arbitrations under this article the arbitrator or arbitrators may do all of the following:

(1) Take and hear evidence pertaining to the proceeding.

(2) Administer oaths and affirmations.

(3) Compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding.

(h) Participation in mediation is a voluntary consensual process, based on direct negotiations between the attorney and his or her client, and is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration or other proceedings.

Bus & P C §6200 (operative January 1, 2010)

(a) The board of governors shall, by rule, establish, maintain, and administer a system and procedure for the arbitration, and may establish, maintain, and administer a system and procedure for mediation of disputes concerning fees, costs, or both, charged for professional services by members of the State Bar or by members of the bar of other jurisdictions. The rules may include provision for a filing fee in the amount as the board may, from time to time, determine.

(b) This article shall not apply to any of the following:

(1) Disputes where a member of the State Bar of California is also admitted to practice in another jurisdiction or where an attorney is only admitted to practice in another jurisdiction, and he or she maintains no office in the State of California, and no material portion of the services were rendered in the State of California.

(2) Claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct, except as provided in subdivision (a) of Section 6203.

(3) Disputes where the fee or cost to be paid by the client or on his or her behalf has been determined pursuant to statute or court order.

(c) Unless the client has agreed in writing to arbitration under this article of all disputes concerning fees, costs, or both, arbitration under this article shall be voluntary for a client and shall be mandatory for an attorney if commenced by a client. Mediation under this article shall be voluntary for an attorney and a client.

(d) The board of governors shall adopt rules to allow arbitration and mediation of attorney fee and cost disputes under this article to proceed under arbitration and mediation systems sponsored by local bar associations in this state. Rules of procedure promulgated by local bar associations are subject to review by the board or a committee designated by the board to ensure that they provide for a fair, impartial, and speedy hearing and award.

(e) In adopting or reviewing rules of arbitration under this section, the board shall provide that the panel shall include one attorney member whose area of practice is either, at the option of the client, civil law, if the attorney's representation involved civil law, or criminal law, if the attorney's representation involved criminal law, as follows:

(1) If the panel is composed of three members the panel shall include one attorney member whose area of practice is either, at the

option of the client, civil or criminal law, and shall include one lay member.

(2) If the panel is composed of one member, that member shall be an attorney whose area of practice is either, at the option of the client, civil or criminal law.

(f) In any arbitration or mediation conducted pursuant to this article by the State Bar or by a local bar association, pursuant to rules of procedure approved by the board of governors, an arbitrator or mediator, as well as the arbitrating association and its directors, officers, and employees, shall have the same immunity which attaches in judicial proceedings.

(g) In the conduct of arbitrations under this article the arbitrator or arbitrators may do all of the following:

(1) Take and hear evidence pertaining to the proceeding.

(2) Administer oaths and affirmations.

(3) Issue subpoenas for the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding.

(h) Participation in mediation is a voluntary consensual process, based on direct negotiations between the attorney and his or her client, and is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration or other proceedings.

B. Bus & P C §6201

(a) The rules adopted by the board of governors shall provide that an attorney shall forward a written notice to the client prior to or at the time of service of summons or claim in an action against the client, or prior to or at the commencement of any other proceeding against the client under a contract between attorney and client which provides for an alternative to arbitration under this article, for recovery of fees, costs, or both. The written notice shall be in the form that the board of governors prescribes, and shall include a statement of the client's right to arbitration under this article. Failure to give this notice shall be a ground for the dismissal of the action or other proceeding. The notice shall not be required, however, prior to initiating mediation of the dispute.

The rules adopted by the board of governors shall provide that the client's failure to request arbitration within 30 days after receipt of notice from the attorney shall be deemed a waiver of the client's right to arbitration under the provisions of this article.

(b) If an attorney, or the attorney's assignee, commences an action in any court or any other proceeding and the client is entitled to maintain arbitration under this article, and the dispute is not one to which subdivision (b) of Section 6200 applies, the client may stay the action or other proceeding by serving and filing a request for arbitration in accordance with the rules established by the board of governors pursuant to subdivision (a) of Section 6200. The request for arbitration shall be served and filed prior to the filing of an answer in the action or equivalent response in the other proceeding; failure to so request arbitration prior to the filing of an answer or equivalent response shall be deemed a waiver of the client's right to arbitration under the provisions of this article if notice of the client's right to arbitration was given pursuant to subdivision (a).

(c) Upon filing and service of the request for arbitration, the action or other proceeding shall be automatically stayed until the award of the arbitrators is issued or the arbitration is otherwise terminated. The stay may be vacated in whole or in part, after a hearing duly noticed by any party or the court, if and to the extent the court finds that the matter is not appropriate for arbitration under the provisions of this article. The action or other proceeding may thereafter proceed subject to the provisions of Section 6204.

(d) A client's right to request or maintain arbitration under the provisions of this article is waived by the client commencing an action or filing any pleading seeking either of the following:

(1) Judicial resolution of a fee dispute to which this article applies.

(2) Affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.

(e) If the client waives the right to arbitration under this article, the parties may stipulate to set aside the waiver and to proceed with arbitration.

C. Bus & P C §6202

The provisions of Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code shall not prohibit the disclosure of any relevant communication, nor shall the provisions of Chapter 4 (commencing with Section 2018.010) of Title 4 of Part 4 of the Code of Civil Procedure be construed to prohibit the disclosure of any relevant work product of the attorney in

connection with: (a) an arbitration hearing or mediation pursuant to this article; (b) a trial after arbitration; or (c) judicial confirmation, correction, or vacation of an arbitration award. In no event shall such disclosure be deemed a waiver of the confidential character of such matters for any other purpose.

D. Bus & P C §6203 (for text of section operative on January 1, 2010, see section following)

(a) The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy. The award shall not include any award to either party for costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding, notwithstanding any contract between the parties providing for such an award or costs or attorney's fees. However, the filing fee paid may be allocated between the parties by the arbitrators. This section shall not preclude an award of costs or attorney's fees to either party by a court pursuant to subdivision (c) of this section or of subdivision (d) of Section 6204. The State Bar, or the local bar association delegated by the State Bar to conduct the arbitration, shall deliver to each of the parties with the award, an original declaration of service of the award.

Evidence relating to claims of malpractice and professional misconduct, shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled. The arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying any such claim. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney.

(b) Even if the parties to the arbitration have not agreed in writing to be bound, the arbitration award shall become binding upon the passage of 30 days after mailing of notice of the award, unless a party has, within the 30 days, sought a trial after arbitration pursuant to Section 6204. If an action has previously been filed in any court, any petition to confirm, correct, or vacate the award shall be to the court in which the action is pending, and may be served by mail on any party who has appeared, as provided in Chapter 4 (commencing with Section 1003) of Title 14 of Part 2 of the Code of Civil Procedure; otherwise it shall be in the same manner as provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure. If no action is pending in any court, the award may be confirmed, corrected, or vacated by petition to the court having jurisdiction over the amount of the arbitration award, but otherwise in the same manner as provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure.

(c) Neither party to the arbitration may recover costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding with the exception of the filing fee paid pursuant to subdivision (a) of this section. However, a court confirming, correcting, or vacating an award under this section may award to the prevailing party reasonable fees and costs incurred in obtaining confirmation, correction, or vacation of the award including, if applicable, fees and costs on appeal. The party obtaining judgment confirming, correcting, or vacating the award shall be the prevailing party except that, without regard to consideration of who the prevailing party may be, if a party did not appear at the arbitration hearing in the manner provided by the rules adopted by the board of governors, that party shall not be entitled to attorney's fees or costs upon confirmation, correction, or vacation of the award.

(d) (1) In any matter arbitrated under this article in which the award is binding or has become binding by operation of law or has become a judgment either after confirmation under subdivision (c) or after a trial after arbitration under Section 6204, or in any matter mediated under this article, if: (A) the award, judgment, or agreement reached after mediation includes a refund of fees or costs, or both, to the client and (B) the attorney has not complied with that award, judgment, or agreement the State Bar shall enforce the award, judgment, or agreement by placing the attorney on involuntary inactive status until the refund has been paid.

(2) The State Bar shall provide for an administrative procedure to determine whether an award, judgment, or agreement should be enforced pursuant to this subdivision. An award, judgment, or agreement shall be so enforced if:

(A) The State Bar shows that the attorney has failed to comply with a binding fee arbitration award, judgment, or agreement rendered pursuant to this article.

(B) The attorney has not proposed a payment plan acceptable to the client or the State Bar.

However, the award, judgment, or agreement shall not be so enforced if the attorney has demonstrated that he or she (i) is not personally responsible for making or ensuring payment of the refund, or (ii) is unable to pay the refund.

(3) An attorney who has failed to comply with a binding award, judgment, or agreement shall pay administrative penalties or reasonable costs, or both, as directed by the State Bar. Penalties imposed shall not exceed 20 percent of the amount to be refunded to the client or one thousand dollars (\$1000), whichever is greater. Any penalties or costs, or both, that are not paid shall be added to the membership fee of the attorney for the next calendar year.

(4) The board shall terminate the inactive enrollment upon proof that the attorney has complied with the award, judgment, or

agreement and upon payment of any costs or penalties, or both, assessed as a result of the attorney's failure to comply.

(5) A request for enforcement under this subdivision shall be made within four years from the date (A) the arbitration award was mailed, (B) the judgment was entered, or (C) the date the agreement was signed. In an arbitrated matter, however, in no event shall a request be made prior to 100 days from the date of the service of a signed copy of the award. In cases where the award is appealed, a request shall not be made prior to 100 days from the date the award has become final as set forth in this section.

Bus & P C §6203 (operative January 1, 2010)

(a) The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy. The award shall not include any award to either party for costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding, notwithstanding any contract between the parties providing for such an award or costs or attorney's fees. However, the filing fee paid may be allocated between the parties by the arbitrators. This section shall not preclude an award of costs or attorney's fees to either party by a court pursuant to subdivision (c) of this section or of subdivision (d) of Section 6204. The State Bar, or the local bar association delegated by the State Bar to conduct the arbitration, shall deliver to each of the parties with the award, an original declaration of service of the award.

Evidence relating to claims of malpractice and professional misconduct, shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled. The arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying the claim. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney.

(b) Even if the parties to the arbitration have not agreed in writing to be bound, the arbitration award shall become binding upon the passage of 30 days after service of notice of the award, unless a party has, within the 30 days, sought a trial after arbitration pursuant to Section 6204. If an action has previously been filed in any court, any petition to confirm, correct, or vacate the award shall be to the court in which the action is pending, and may be served by mail on any party who has appeared, as provided in Chapter 4 (commencing with Section 1003) of Title 14 of Part 2 of the Code of Civil Procedure; otherwise it shall be in the same manner as provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure. If no action is pending in any court, the award may be confirmed, corrected, or vacated by petition to the court having jurisdiction over the amount of the arbitration award, but otherwise in the same manner as provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure.

(c) Neither party to the arbitration may recover costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding with the exception of the filing fee paid pursuant to subdivision (a) of this section. However, a court confirming, correcting, or vacating an award under this section may award to the prevailing party reasonable fees and costs incurred in obtaining confirmation, correction, or vacation of the award including, if applicable, fees and costs on appeal. The party obtaining judgment confirming, correcting, or vacating the award shall be the prevailing party except that, without regard to consideration of who the prevailing party may be, if a party did not appear at the arbitration hearing in the manner provided by the rules adopted by the board of governors, that party shall not be entitled to attorney's fees or costs upon confirmation, correction, or vacation of the award.

(d) (1) In any matter arbitrated under this article in which the award is binding or has become binding by operation of law or has become a judgment either after confirmation under subdivision (c) or after a trial after arbitration under Section 6204, or in any matter mediated under this article, if: (A) the award, judgment, or agreement reached after mediation includes a refund of fees or costs, or both, to the client and (B) the attorney has not complied with that award, judgment, or agreement the State Bar shall enforce the award, judgment, or agreement by placing the attorney on involuntary inactive status until the refund has been paid.

(2) The State Bar shall provide for an administrative procedure to determine whether an award, judgment, or agreement should be enforced pursuant to this subdivision. An award, judgment, or agreement shall be so enforced if:

(A) The State Bar shows that the attorney has failed to comply with a binding fee arbitration award, judgment, or agreement rendered pursuant to this article.

(B) The attorney has not proposed a payment plan acceptable to the client or the State Bar.

However, the award, judgment, or agreement shall not be so enforced if the attorney has demonstrated that he or she (i) is not personally responsible for making or ensuring payment of the refund, or (ii) is unable to pay the refund.

(3) An attorney who has failed to comply with a binding award, judgment, or agreement shall pay administrative penalties or reasonable costs, or both, as directed by the State Bar. Penalties imposed shall not exceed 20 percent of the amount to be refunded to the client or one thousand dollars (\$1,000), whichever is greater. Any penalties or costs, or both, that are not paid shall be

added to the membership fee of the attorney for the next calendar year.

(4) The board shall terminate the inactive enrollment upon proof that the attorney has complied with the award, judgment, or agreement and upon payment of any costs or penalties, or both, assessed as a result of the attorney's failure to comply.

(5) A request for enforcement under this subdivision shall be made within four years from the date (A) the arbitration award was mailed, (B) the judgment was entered, or (C) the date the agreement was signed. In an arbitrated matter, however, in no event shall a request be made prior to 100 days from the date of the service of a signed copy of the award. In cases where the award is appealed, a request shall not be made prior to 100 days from the date the award has become final as set forth in this section.

E. Bus & P C §6204 (for text of section operative January 1, 2010, see section following)

(a) The parties may agree in writing to be bound by the award of arbitrators appointed pursuant to this article at any time after the dispute over fees, costs, or both, has arisen. In the absence of such an agreement, either party shall be entitled to a trial after arbitration if sought within 30 days, pursuant to subdivisions (b) and (c), except that if either party willfully fails to appear at the arbitration hearing in the manner provided by the rules adopted by the board of governors, that party shall not be entitled to a trial after arbitration. The determination of willfulness shall be made by the court. The party who failed to appear at the arbitration shall have the burden of proving that the failure to appear was not willful. In making its determination, the court may consider any findings made by the arbitrators on the subject of a party's failure to appear.

(b) If there is an action pending, the trial after arbitration shall be initiated by filing a rejection of arbitration award and request for trial after arbitration in that action within 30 days after mailing of notice of the award. If the rejection of arbitration award has been filed by the plaintiff in the pending action, all defendants shall file a responsive pleading within 30 days following service upon the defendant of the rejection of arbitration award and request for trial after arbitration. If the rejection of arbitration award has been filed by the defendant in the pending action, all defendants shall file a responsive pleading within 30 days after the filing of the rejection of arbitration award and request for trial after arbitration. Service may be made by mail on any party who has appeared; otherwise service shall be made in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure. Upon service and filing of the rejection of arbitration award, any stay entered pursuant to Section 6201 shall be vacated, without the necessity of a court order.

(c) If no action is pending, the trial after arbitration shall be initiated by the commencement of an action in the court having jurisdiction over the amount of money in controversy within 30 days after mailing of notice of the award. After the filing of such an action, the action shall proceed in accordance with the provisions of Part 2 (commencing with Section 307) of the Code of Civil Procedure, concerning civil actions generally.

(d) The party seeking a trial after arbitration shall be the prevailing party if that party obtains a judgment more favorable than that provided by the arbitration award, and in all other cases the other party shall be the prevailing party. The prevailing party may, in the discretion of the court, be entitled to an allowance for reasonable attorneys' fees and costs incurred in the trial after arbitration, which allowance shall be fixed by the court. In fixing the attorneys' fees, the court shall consider the award and determinations of the arbitrators, in addition to any other relevant evidence.

(e) Except as provided in this section, the award and determinations of the arbitrators shall not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding.

Bus & P C §6204 (operative on January 1, 2010)

(a) The parties may agree in writing to be bound by the award of arbitrators appointed pursuant to this article at any time after the dispute over fees, costs, or both, has arisen. In the absence of such an agreement, either party shall be entitled to a trial after arbitration if sought within 30 days, pursuant to subdivisions (b) and (c), except that if either party willfully fails to appear at the arbitration hearing in the manner provided by the rules adopted by the board of governors, that party shall not be entitled to a trial after arbitration. The determination of willfulness shall be made by the court. The party who failed to appear at the arbitration shall have the burden of proving that the failure to appear was not willful. In making its determination, the court may consider any findings made by the arbitrators on the subject of a party's failure to appear.

(b) If there is an action pending, the trial after arbitration shall be initiated by filing a rejection of arbitration award and request for trial after arbitration in that action within 30 days after service of notice of the award. If the rejection of arbitration award has been filed by the plaintiff in the pending action, all defendants shall file a responsive pleading within 30 days following service upon the defendant of the rejection of arbitration award and request for trial after arbitration. If the rejection of arbitration award has been filed by the defendant in the pending action, all defendants shall file a responsive pleading within 30 days after the filing of the rejection of arbitration award and request for trial after arbitration. Service may be made by mail on any party who has appeared; otherwise service shall be made in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure. Upon service and filing of the rejection of arbitration award, any stay entered pursuant to

Section 6201 shall be vacated, without the necessity of a court order.

(c) If no action is pending, the trial after arbitration shall be initiated by the commencement of an action in the court having jurisdiction over the amount of money in controversy within 30 days after service of notice of the award. After the filing of such an action, the action shall proceed in accordance with the provisions of Part 2 (commencing with Section 307 of the Code of Civil Procedure, concerning civil actions generally.

(d) The party seeking a trial after arbitration shall be the prevailing party if that party obtains a judgment more favorable than that provided by the arbitration award, and in all other cases the other party shall be the prevailing party. The prevailing party may, in the discretion of the court, be entitled to an allowance for reasonable attorney's fees and costs incurred in the trial after arbitration, which allowance shall be fixed by the court. In fixing the attorney's fees, the court shall consider the award and determinations of the arbitrators, in addition to any other relevant evidence.

(e) Except as provided in this section, the award and determinations of the arbitrators shall not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding.

F. Bus & P C §6204.5

(a) The State Bar shall provide by rule for an appropriate procedure to disqualify an arbitrator or mediator upon request of either party.

(b) The State Bar, or the local bar association delegated by the State Bar to conduct the arbitration, shall deliver a notice to the parties advising them of their rights to judicial relief subsequent to the arbitration proceeding.

G. Bus & P C §6206

The time for filing a civil action seeking judicial resolution of a dispute subject to arbitration under this article shall be tolled from the time an arbitration is initiated in accordance with the rules adopted by the board of governors until (a) 30 days after receipt of notice of the award of the arbitrators, or (b) receipt of notice that the arbitration is otherwise terminated, whichever comes first. Arbitration may not be commenced under this article if a civil action requesting the same relief would be barred by any provision of Title 2 (commencing with Section 312) of Part 2 of the Code of Civil Procedure; provided that this limitation shall not apply to a request for arbitration by a client, pursuant to the provisions of subdivision (b) of Section 6201, following the filing of a civil action by the attorney.

IV. SELECTED CALIFORNIA RULES OF PROFESSIONAL CONDUCT

A. Rule 1-320. Financial Arrangements With Non-Lawyers

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

(1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member's death to the member's estate or to one or more specified persons over a reasonable period of time; or

(2) A member of law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or

(3) A member of law firm may include non-member employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and Professions Code section 6000 et. seq.; or

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or

other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communication media in exchange for advertising the member's or law firm's availability for professional employment.

B. Rule 2-200. Financial Arrangements Among Lawyers

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in Rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or Rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

C. Rule 3-300. Avoiding Interests Adverse to a Client

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Discussion:

Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by Rule 4-200.

Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, Rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.

Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees.

D. Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

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

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

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, *e.g.*, Business and Professions Code §6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by Rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past

relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (*e.g.*, Evid C §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In *State Farm Mutual Automobile Insurance Company v Federal Insurance Company* (1999) 72 CA4th 1422 [86 CR2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v Superior Court* (1983) 149 CA3d 931 [197 CR 185]; *Klemm v Superior Court* (1977) 75 CA3d 893 [142 CR 509]; *Ishmael v Millington* (1966) 241 CA2d 520 [50 CR 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v Cumis Insurance Society* (1984) 162 CA3d 358 [208 CR 494].)

E. Rule 3-400. Limiting Liability to Client

A member shall not:

(A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice; or

(B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Discussion:

Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation.

F. Rule 3-410. Disclosure of Professional Liability Insurance (operative January 1, 2010)

(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.

(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.

(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.

(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.

Discussion:

The disclosure obligation imposed by paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.

A member may use the following language in making the disclosure required by Rule 3-410(A), and may include that language in a written fee agreement with the client or in a separate writing:

"Pursuant to California Rules of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."

A member may use the following language in making the disclosure required by Rule 3-410(B):

"Pursuant to California Rules of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."

Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state, or local governmental entity, that entity presumably knows whether the member is covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. (Added by order of the Supreme Court, operative January 1, 2010.)

G. Rule 3-500. Communication

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Discussion:

Rule 3-500 is not intended to change a member's duties to his or her clients. It is intended to make clear that, while a client must be informed of significant developments in the matter, a member will not be disciplined for failing to communicate insignificant or irrelevant information. (See Bus & P C §6068, subd. (m).)

A member may contract with the client in their employment agreement that the client assumes responsibility for the cost of copying significant documents. This rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

Rule 3-500 is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the member to provide work product to the client shall be governed by relevant statutory and decisional law. Additionally, this rule is not intended to apply to any document or correspondence that is subject to a protective order or non-disclosure agreement, or to override applicable statutory or decisional law requiring that certain information not be provided to criminal defendants who are clients of the member.

H. Rule 3-510. Communication of Settlement Offer

(A) A member shall promptly communicate to the member's client:

- (1) All terms and conditions of any offer made to the client in a criminal matter; and
- (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.

(B) As used in this rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Discussion:

Rule 3-510 is intended to require that counsel in a criminal matter convey all offers, whether written or oral, to the client, as give and take negotiations are less common in criminal matters, and, even were they to occur, such negotiations should require the participation of the accused.

Any oral offers of settlement made to the client in a civil matter should also be communicated if they are "significant" for the purposes of Rule 3-500.

I. Rule 3-700. Termination of Employment

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with Rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:

(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If Rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or

(b) seeks to pursue an illegal course of conduct, or

(c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or

(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or

(f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

(D) Papers, Property, and Fees.

A member whose employment has terminated shall:

(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and

(2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

Subparagraph (A)(2) provides that "a member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the clients." What such steps would include, of course, will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and Rule 3-700(D) has been satisfied.

Paragraph (D) makes clear the member's duties in the recurring situation in which new counsel seeks to obtain client files from a member discharged by the client. It codifies existing case law. (See *Academy of Cal. Optometrists v Superior Court* (1975) 51 CA3d 999 [124 CR 668]; *Weiss v Marcus* (1975) 51 CA3d 590 [124 CR 297].) Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. If a client disputes the amount to be returned, the member shall comply with Rule 4-100(A)(2).

Paragraph (D) is not intended to prohibit a member from making, at the member's own expense, and retaining copies of papers released to the client, nor to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding.

J. Rule 4-100. Preserving Identity of Funds and Property of a Client

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the

Board, as from time to time amended, shall be effective and binding on all members.

K. Rule 4-200. Fees for Legal Services

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

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

- (1) The amount of the fee in proportion to the value of the services performed.
- (2) The relative sophistication of the member and the client.
- (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
- (5) The amount involved and the results obtained.
- (6) The time limitations imposed by the client or by the circumstances.
- (7) The nature and length of the professional relationship with the client.
- (8) The experience, reputation, and ability of the member or members performing the services.
- (9) Whether the fee is fixed or contingent.
- (10) The time and labor required.
- (11) The informed consent of the client to the fee.

L. Rule 4-210. Payment of Personal or Business Expenses
Incurred by or for a Client

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:

- (1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or
- (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or
- (3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in Rule 4-210 shall be deemed to limit Rules 3-300, 3-310, and 4-300.

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