



# The End of the HOUR

## Alternatives to traditional billing include capped, blended, collar, incentive, and value billing methods

by **David Graeler**  
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BEFORE THE TWENTIETH CENTURY, state law prescribed set fees for specific legal services, and litigation fees were usually paid by the losing parties. Over time, maximum-fee laws were repealed, and by the early twentieth century lawyers typically set fees for particular tasks, applied a discretionary fee based on an estimated value of the services rendered, charged annual retainers, or used contingency fees. Gradually, the practice of law became more complex, rendering flat-fee arrangements, fee schedules, and retainers impracticable. Clients also desired greater transparency and were dissatisfied with legal invoices that merely described a fee as “for services rendered.” These conditions eventually caused lawyers and clients to adopt hourly billing.<sup>1</sup>

Since the proliferation of the billable hour in the mid-twentieth century, lawyers have generally billed their clients in one of two ways—through billable hours or on a contingency. Years of experience with these two arrangements resulted in a comfort level regarding the operation of these billing methods and the ethical issues involved with each. In recent years, however, lawyers and clients

have again begun creating new alternative fee arrangements to address recent economic conditions and pressures and the general inefficiency promoted by hourly billing. These new arrangements not only help clients manage and often reduce their legal fees but also frequently encourage innovative approaches to problem solving while better meeting the expectations of attorneys and their clients. As the specific types of alternative billing arrangements expand, however, so too do the potential ethical issues surrounding them.

Numerous types of alternative fee arrangements have developed over recent years and are limited only by the imagination and practical limitations of lawyers and their clients. Because clients in diverse practice areas are demanding greater efficiency and risk sharing, alternative fee arrangements are employed by a wide array of lawyers, including solo practitioners, those within small firms, and those within international firms. Many alternative fee arrangements are variants of hourly

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or contingency billing, while others are entirely new creations. Each alternative is designed to address the criticism that traditional hourly fee agreements reward inefficiency and place all the risks of litigation on the client.<sup>2</sup> To succeed, the arrangements must provide a balance of risk and reward and avoid ethical pitfalls. Clients who expect an alternative fee arrangement to invariably cut costs are seeking to transfer risk but not reward and may inadvertently encourage attorneys to find ways to evade the purpose of the agreement. Attorneys who refuse to share risk should not expect a reward. A balanced alternative fee agreement only transfers risk to the attorney over which he or she has at least some control and provides a prospect for a reward if the attorney is successful in producing a good result.

Alternative fee arrangements derived from a traditional hourly billing approach may take various forms. For example, a capped fee arrangement involves time billed by the hour, but with an agreed-upon maximum for the total fees that will be paid. When using a task budget, a maximum number of hours that may be billed at an agreed rate is established for each separate task. Practitioners may also consider using discounted hourly rates under which a discount is established from the standard hourly billing rate and may often be applied progressively with the discount percentage growing at specified billing increments. Volume hourly rates are based on a discount from the standard hourly billing rate and used when there is a large volume of promised work over a period of time. Blended hourly rates consist of a single hourly rate established for all lawyers working on the file or single hourly rates for partners and associates. Under partner-based rate structures, the lead partner is paid a premium rate for time on the matter, but there is no charge for the work of others on the file. Finally, a phased billing arrangement is established when the client and lawyer negotiate an agreed-upon amount of fees for each phase of a matter. If the time on a phase exceeds that amount, the overage is reserved and may be recouped later through various means, including negotiation with the client. Alternatively, if the lawyer “beats” the maximum amount, the remainder may be assigned to another phase.

### **Alternative Contingency Arrangements**

There are at least three categories of alternative fee arrangements based on a contingency fee billing method. First, under an incentive and value billing arrangement, the client bases payment on the achievement of mutually agreed-upon goals resulting in the lawyer’s sharing the risk and the reward with the client. Fees and any bonuses are paid

based on the value of the services rendered and are designed to reward results instead of the investment of hours. Success in this type of arrangement should be defined in terms of ascertainable and objective criteria, such as time of disposition, stage of disposition, trial outcome, amount of settlement or verdict or other such criteria.

Second, when utilizing result-based billing, the lawyer is paid by the hour and receives a bonus if a matter is successfully concluded. If there is no successful result, the lawyer accepts a discounted hourly rate for the time invested. In structuring this arrangement, the lawyer should clearly define at the outset the discount or “hold back” (what the lawyer is risking) and the performance bonus or premium (what the client is risking). If a bonus is paid, it should be mutually beneficial for the client and lawyer, i.e., the client obtains a desired result in a timely and cost-efficient manner, and the lawyer is rewarded for a willingness to share in the risks of an unfavorable outcome.

Third, there are alternative fee arrangements that involve investment in the client. In addition to or instead of fees, the lawyer receives stock or some other ownership interest in the client. Another general type of alternative fee arrangement relies on some form of a flat fee for the lawyer’s services. For instance, in a retainer arrangement, a lawyer agrees to provide a specified set of services for a particular time and a particular fee. Retainer fees can also be combined with hourly or contingent fee arrangements. Unlike other fees, there is no requirement to return unearned fees when a fee is specified as a “true” or “classic” retainer in which the expressed purpose is simply to ensure the attorney’s availability. In this case, the fees are fully earned when paid.<sup>3</sup> Task-based flat fees involve counsel’s charging a preset fee for each defined task. In transactional matters, the use of percentage fees permits a lawyer to accept a percentage of the value of the transaction as his or her fee. Finally, in a loaned lawyer arrangement, a firm loans a lawyer to a client for a defined term in exchange for a set payment.

A fourth type of alternative fee arrangement uses an hourly fee, some form of alternative fee arrangement (apart from a pure contingency fee), or a combination of fee arrangements but provides that the fees will be paid by one or more investors who purchase a share of the anticipated proceeds from the suit. Unlike a traditional contingency fee arrangement, a syndication arrangement or litigation financing arrangement transfers the risks of an adverse outcome from the lawyer to a third-party investor. Unlike a traditional contingency fee arrangement, a syndication arrangement likely con-

stitutes an investment contract and requires compliance with state and federal securities laws.<sup>4</sup> In addition, syndication arrangements can likely only involve an assignable claim, making them potentially unavailable for personal injury suits.<sup>5</sup> The enforceability of syndication arrangements requires care to represent only the client in the litigation in order to avoid conflicts of interest with the investors in the syndication.

The above list, while not exhaustive, provides a good framework for considering various ethical issues related to implementing alternative fee arrangements. The concept in many arrangements is to incentivize efficiency or results. This is in contrast to the motivations at play in the traditional billable hour arrangement, which encourages the investment of time. As economic motivations potentially come into conflict with duties of advocacy and competent representation, ethical pitfalls may arise.

One key to ensuring that the attorney-client relationship is not derailed by an alternative fee arrangement is clear and effective communication when the arrangement is established. Clients are motivated to contain legal costs and promote efficiency while obtaining the best possible representation for their limited legal-service dollars. Practitioners likewise want to deliver excellent service and results to the client but must first evaluate the economics of their practices and determine whether the proposed fee arrangement comports with their (and the firm’s) profit and revenue goals. For this reason, in negotiating an alternative fee arrangement that is less susceptible to ethical concerns, each party should seek to accommodate, at least in part, the interests of the other in order to ensure that the goals of each are likely to be met by the proposed arrangement. Otherwise, if the final fee arrangement fails to meet the expectations of either party there will likely be dissatisfaction with the representation, the fee, or both.

The rules governing attorney billing in California (and many other jurisdictions) are general in nature and not, as of yet, specific to particular alternative fee arrangements. Nor have any State Bar of California ethics opinions been issued on these alternative arrangements. Accordingly, attorneys must apply general principles in new ways. This is made more difficult because billing arrangements are made prospectively (when the client and lawyer both desire the representation relationship), but ethical issues are judged retrospectively and frequently after the relationship has soured.

### **Rules 4-200 and 3-300**

The primary rule in California for attorney billing arrangements is California Rule of

Professional Conduct 4-200, Fees for Legal Services. Rule 4-200(A) states that a lawyer “shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Unconscionability of a fee is determined on the basis of all the facts and circumstances existing at the time the agreement is entered into, except if the parties contemplate that the fee will be affected by later events.<sup>6</sup> Whether a fee is unconscionable or not is evaluated based on numerous factors: 1) the amount of the fee in proportion to the value of the services performed, 2) the relative sophistication of the lawyer 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 lawyer, 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 lawyer performing the services, 9) whether the fee is fixed or contingent, 10) the time and labor required, and 11) the informed consent of the client to the fee.<sup>7</sup>

Under Rule 4-200, a lawyer’s fee must not be “unconscionable” according to these 11 factors. Ensuring that the fee is not unconscionable in the context of alternative fees may prove more challenging than under a traditional billing approach. For example, if the alternative fee arrangement could in any way be viewed as the lawyer’s entering into a business transaction with, or acquiring an ownership or other pecuniary interest in, a client, Rule 3-300, Avoiding Interests Adverse to a Client, contains several important requirements. First, the terms of the arrangement must be fair and reasonable to the

client and disclosed in writing “in a manner which should reasonably have been understood by the client.”<sup>8</sup> Second, the client must be advised in writing that the client may seek an independent lawyer’s advice with respect to the arrangement, and the client has to be given a reasonable opportunity to seek that advice.<sup>9</sup> Lastly, the client must consent in writing to the specific terms of the arrangement.<sup>10</sup> These requirements are further underscored by the dictates of Rule 1-400, which provides that a lawyer shall not make any communication or solicitation to a prospective or present client that contains “any matter...in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public.”<sup>11</sup>

An alternative fee arrangement in the form of a syndication or litigation financing arrangement must also take care to comply with Rule 3-310(F), which states that a lawyer:

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 [lawyer] 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 [lawyer] is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.<sup>12</sup>

An alternative fee arrangement that is partially based on a contingency will be subject to the statutory requirements of a full con-

tingency agreement.<sup>13</sup> Failing to comply with statutory requirements for contingency agreements may render hybrid alternative fee arrangements that include contingency components voidable at the option of the client.<sup>14</sup>

Another way in which an alternative fee arrangement may be unconscionable is through reverse contingent fee agreements in which the fees are based on a percentage of what a defendant client saves in the course of the litigation. If the amount demanded in the complaint is purely speculative, a reverse contingency fee based upon the claims in the complaint may not be enforceable.<sup>15</sup> Because reverse contingent fee agreements are uncommon, the determination of what is a successful defense must be clearly defined for the client.<sup>16</sup>

A larger ethical concern that arises with alternative fee arrangements centers around a lawyer’s duties and abilities to provide independent advice and competent legal services, as addressed in Rules 3-310<sup>17</sup> and 3-110.<sup>18</sup> It is these two fundamental obligations that are most often called into question when the fee arrangement seeks to limit 1) the tasks that will be performed, 2) the amount that will be paid for a certain task, or 3) the entire engagement. These two fundamental obligations are also called into question when the arrangement creates outcome-based risk that is shared by the lawyer and client.

For example, in a fixed or capped fee arrangement, whether applied in phases or to the entire engagement, the incentive for the lawyer may be to spend as little time as possible on a particular task or to have it completed by an associate or other lower-cost lawyer. Particularly when the lawyer and client do not have a track record with fixed fee or similar arrangements, the lawyer and client must be aware of the inherent tension that may exist in this circumstance. Practitioners must be careful to avoid agreeing to fixed fees that are excessive or unreasonable, and clients should avoid negotiating a fixed or capped fee that is inadequate and thereby encourages, indirectly, the use of less experienced and skilled lawyers. Either scenario can lead to potential ethical issues for the lawyer: in the former, that the client is being charged an unconscionable fee under Rule 4-200, and in the latter, that the lawyer’s economic interests may interfere with the lawyer’s judgment and the quality of the lawyer’s representation so as to implicate Rule 3-110. It is also important to define exactly what is within the scope of the capped fee arrangement. If unanticipated tasks are essential to provide proper representation they must be performed regardless of whether the fee agreement makes provision for them. A fee agreement that fails to properly define what happens in such a situation will strain the

## The Collared Fee Arrangement

Another type of an alternative fee is a “collared” or “risk collar” agreement in which attorney and client agree to a carefully considered budget for the entire matter or one or more phases of the matter. In a collared fee agreement, normal hourly rates apply as long as the number of hours performed is within the budget or a set percentage above and below the budget. If the billing goes outside the collar, overruns and savings are shared.

For example, if a matter is budgeted at \$100,000 with a 10 percent collar, all billings above \$110,000 would be at a 25 percent discount. Savings from billings below \$90,000 would be shared with the law firm at a 25 percent rate. Different percentages for the collar and the sharing may be chosen. This approach shares the risks and rewards and provides an incentive for efficiency.

Caution should be taken when using a collared fee arrangement. On the one hand, the client must be sure that the attorney does not set an unrealistically high budget. On the other, the lawyer must be wary of issues that are not under his or her control that can drive up costs. These include the poor record keeping of a party subject to discovery, which could lead to expensive e-discovery or intransigence in settlement negotiations, making early settlement impossible. Collared arrangements may be best for well-defined phases in more complicated matters to allow the parties to tighten or loosen the collar as events may warrant.— **D.G. & T.D.L**

# MCLE Test No. 238

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education legal ethics credit by the State Bar of California in the amount of 1 hour.

1. There is no requirement to return an unearned fee that is specified as a true or classic retainer.  
True.  
False.
2. In California, the primary rule governing attorney fee billing arrangements is California Rule of Professional Conduct 5-100.  
True.  
False.
3. Contingency fee agreements were first approved by the American Bar Association in 1929.  
True.  
False.
4. Rule 3-310(F) prohibits lawyers from entering into an alternative fee arrangement in the form of a syndication or litigation financing arrangement because a lawyer "shall not accept compensation for representing a client from one other than the client."  
True.  
False.
5. Whether a fee for legal services is unconscionable is determined on the basis of all facts and circumstances existing at the time the agreement is entered into unless the parties contemplate that the fee will be affected by later events.  
True.  
False.
6. If an alternative fee arrangement could be viewed as the lawyer's entering into a business transaction with, or acquiring an ownership or other pecuniary interest in, a client, which of the following is an important requirement?  
A. The terms of the arrangement must be fair and reasonable to the client and disclosed in writing that should reasonably be understood by the client.  
B. The client must consent in writing to the specific terms of the arrangement.  
C. The client must be advised in writing that the client may seek an independent lawyer's advice with respect to the arrangement, and the client has to be given a reasonable opportunity to seek that advice.  
D. None of the above.  
E. All of the above.
7. Does a syndication arrangement likely constitute an investment contract requiring compliance with state and federal securities laws?  
Yes.  
No.
8. Syndication arrangements are potentially unavailable for personal injury suits because personal injury suits are not assignable.  
True.  
False.
9. A reverse contingency fee based upon the claims expressly stated in the complaint is always enforceable even if the amount demanded in the complaint is speculative.  
True.  
False.

10. With reverse contingency fee agreements, the determination of what is a successful defense must be clearly defined for the client.  
True.  
False.
11. A partial contingency fee arrangement is not subject to the statutory requirements of a full contingency fee agreement.  
True.  
False.
12. A partial contingency fee arrangement that does not comply with the statutory requirements of a full contingency agreement gives the client an option to void the fee arrangement.  
True.  
False.
13. A lawyer shall not make any communication or solicitation to a prospective or present client that contains any matter in a manner or format that is false, deceptive, or tends to confuse, deceive, or mislead the public.  
True.  
False.
14. When fee arrangements seek to limit the tasks that will be performed, the amount that will be paid for certain tasks, or the entire engagement, a larger ethical concern that arises centers around a lawyer's duties and abilities to provide independent advice and competent legal services.  
True.  
False.
15. Fixed or capped fee arrangements or arrangements using blended or discounted rates, which result in inadequate fees that encourage the use of less experienced and skilled lawyers, is common, acceptable, and raises no ethical concerns.  
True.  
False.
16. A lawyer's contingent fee is considered a "pecuniary or financial interest in the client's property" within the meaning of the California Rules of Professional Conduct.  
True.  
False.
17. Contingency fee arrangements are acceptable when representing a client in a dissolution of a marriage or domestic relationship.  
True.  
False.
18. Once a contingency fee agreement is in place, renegotiating the percentage of terms of the agreement during the course of representation is not permitted.  
True.  
False.
19. California recognizes a public policy favoring contingent fee arrangements.  
True.  
False.
20. The financial capacity of the client to pay the fee is not considered in evaluating whether a fee for legal services is unconscionable.  
True.  
False.

## MCLE Answer Sheet #238



THE END OF THE HOUR

Name \_\_\_\_\_

Law Firm/Organization \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

Phone \_\_\_\_\_

State Bar # \_\_\_\_\_

### INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the \$20 testing fee (\$25 for non-LACBA members) to:

Los Angeles Lawyer  
MCLE Test  
P.O. Box 55020  
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
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### ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.  True  False
2.  True  False
3.  True  False
4.  True  False
5.  True  False
6.  A  B  C  D  E
7.  True  False
8.  Yes  No
9.  True  False
10.  True  False
11.  True  False
12.  True  False
13.  True  False
14.  True  False
15.  True  False
16.  True  False
17.  True  False
18.  True  False
19.  True  False
20.  True  False

attorney-client relationship.

Similar issues arise when examining the use of blended or discounted rates. Under these alternative fee arrangements, the law firm is incentivized to use lower billing attorneys to accomplish the majority of the work. If lawyers are selected to perform tasks without due regard to the skills and experience necessary to accomplish them, ethical boundaries may be crossed particularly the obligation to render competent legal services. Even if a supervising partner or other lawyer reasonably believes that a matter has been staffed appropriately, a poorly executed task or negative outcome can lead to a client's claiming, in hindsight, that the supervising partner or attorney did not exercise the appropriate amount of judgment in assigning work on the case but, instead, was motivated by economic interests.

As for contingency fee-based alternative fee arrangements, most are still employed by lawyers representing plaintiffs. However, these arrangements are increasingly being considered and implemented by defense lawyers as well. Whether used by the plaintiffs' bar or defense counsel, these alternative fee arrangements present their own set of ethical issues.

The American Bar Association Committee on Ethics and Professional Responsibility has opined on the issue of contingency fees, including their use in nontraditional ways such as in business transactions. The ABA committee stated that "[t]he use of contingent fees in these areas, for plaintiffs and defendants, impecunious and affluent alike, reflects the desire of clients to tie a lawyer's compensation to her performance and to give the lawyer incentives to improve returns to the client."<sup>19</sup> While it is true that "[f]rom the client's perspective the contingent fee arrangement tends to encourage quality and discourage excessive work,"<sup>20</sup> ethical concerns may arise because the lawyer now has a financial interest in the case (or transaction) that could affect the lawyer's judgment. As such, the greatest ethical risk to a lawyer who will be paid with a traditional contingency fee or some variant thereof is that a situation will arise in which the client's best interests come

into conflict with those of the lawyer. Even if the lawyer refrains from acting in his or her best interests when facing a conflict, tension may result if and when the client has reason to question whether a lawyer is providing the best legal advice as opposed to advice that advances the lawyer's financial interests. Most importantly, whatever the specific al-

ternative fee arrangement, lawyers must therefore continue to represent their clients zealously even if the arrangement becomes unprofitable.

California recognizes a public policy favoring contingent fee arrangements. "The client may and often is very likely to be a person of limited means for whom the contingent fee arrangement offers the only realistic hope of establishing a legal claim."<sup>21</sup> It is likely for this reason that a lawyer's contingent fee interest is not considered a "pecuniary or financial interest in the client's property" within the meaning of the California Rules of Professional Conduct.<sup>22</sup>

ternative fee arrangement, lawyers must therefore continue to represent their clients zealously even if the arrangement becomes unprofitable.

### Public Policy

Contingency fee arrangements, and likely hybrid arrangements including contingencies, are subject to public policy limitations. For example, contingency fee arrangements for the dissolution of a marriage or domestic relationship are void against public policy.<sup>23</sup> Although contingency fee arrangements may be appropriate in valuing community assets or in enforcing support awards, the latter are subject to statutory regulation in California. Contingency fee arrangements are not appropriate for "ordinary services" in probate proceedings in which compensation is set by statute. Contingency fee arrangements are also limited if an attorney represents a government entity. There can be no contingent fees for prosecutors because the attorney representing the government in a criminal prosecution is supposedly neutral.<sup>24</sup> Contingency fee contracts are also forbidden as to attorneys' representing government agencies in prosecuting eminent domain matters and actions to abate public nuisances. To have a prospect of being enforceable, contingency fee arrangements between private attorneys and governmental agencies must

provide that the private counsel does not control the litigation and must meet other criteria to distinguish the litigation from cases in which contingency fees are forbidden.<sup>25</sup>

Once an agreement is in place, particular care must be taken when renegotiating the percentage of terms of the contingency fee agreements. Increasing percentages of a contingency (for example, a higher percentage after the complaint is filed or after the commencement of trial or entry of judgment) will likely be upheld if the agreement for the increased percentages is delineated in the initial engagement agreement. But if the agreement is renegotiated during the course of representation, Rule 3-300 likely requires full disclosure and advice to the client to seek independent counsel.<sup>26</sup> Problems can also arise if an attorney seeks payment of the full fee owing at the time a structured settlement is entered into without having specified in the the initial agreement that the full fee was payable at that time and having provided a means for measuring the value of the structured settlement.

Before finalizing an alternative fee arrangement, clients and outside counsel should determine whether the potential arrangement aligns their interests and goals, promotes a healthy, long-term working relationship (including an increased understanding of their respective enterprises and needs), seeks to avoid surprise, and achieves an optimal mix of thorough work product and cost-effectiveness. When both the client and the lawyer get an equally good or equally bad deal, the fee arrangement is more likely than not to be deemed fair, reasonable, and not unconscionable. On the other hand, if a lawyer receives a fee at the end of the engagement that is out of proportion to both the time invested and the risk undertaken, this is more likely to create conflicts with the client and ethical issues for the lawyer.

The use of alternative fee arrangements is likely to continue to grow as lawyers and clients look for billing arrangements that meet each other's substantive and financial expectations for the representation. In implementing such fee arrangements, the parties must be cognizant of the motivations and economic pressures that come with each type of arrangement. Lawyers and their clients should ensure that the final fee arrangement will help them meet their goals while still providing for a working relationship based on trust and independent advice as opposed to other considerations. If a practitioner believes that an alternative fee arrangement may create risks that the lawyer will not be able to exercise complete independent judgment or provide competent representation, the practitioner should simply not agree to the arrangement, no matter how profitable it may prove to be.

## The use of alternative fee arrangements is likely to continue to grow as lawyers and clients look for billing arrangements that meet each other's substantive and financial expectations for the representation.

Choosing this course is especially important because if the fee arrangement is ultimately consummated, it will probably be subjected to far closer scrutiny after a bad result or after other problems have arisen in the attorney-client relationship. To withstand such scrutiny, clients and lawyers must engage in frank, thorough discussions and should be meticulous in defining the parameters of the final fee arrangement. ■

<sup>1</sup> See Final Report of the Committee on Code of Professional Ethics (Aug. 1908), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/1908\\_canons\\_ethics\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/1908_canons_ethics_authcheckdam.pdf).

<sup>2</sup> Much of the information regarding these types of alternative fee arrangements is sourced from the Committee on Lawyer Business Ethics of the Section of Business Law of the American Bar Association, *Business Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements*, 54 Bus. Law. 175, 183-84 (Nov. 1998) and James D. Shomper & Gardner G. Courson, *Alternative Fees for Litigation: Improved Control and Higher Value*, ACCA DOCKET 18, No. 5 (2000). Another good discussion of alternative fee arrangements and criticism of traditional hourly agreements from the perspective of corporate clients is found at <http://www.dupontlegalmodel.com/alternative-fees-for-litigation-improved-control-and-higher-value>.

<sup>3</sup> CAL. RULES OF PROF'L CONDUCT R. 3-700(D)(2). The attorney is entitled to the fee paid regardless of whether he or she actually performs work for the client. *Baranowski v. State Bar*, 24 Cal. 3d 153, 164 (1979). However, the "true" retainer must be a retainer not paid

for any specific work to be done but rather paid simply for the attorney to be available for a specified time. Applying the retainer to other work done changes the nature of the agreement with the client. Confusion is often caused by the use of "retainer" to describe a deposit for work to be done under an hourly fee or other type of engagement that is not a retainer and by reference to engagement agreements generally as retainer agreements.

<sup>4</sup> *SEC v. Latta*, 250 F. Supp. 170 (N.D. Cal. 1965), *aff'd* 356 F. 2d 103 (9th Cir. 1966), *cert. denied*, 384 U.S. 940 (1966).

<sup>5</sup> See *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 942 (1976); *Riechert v. General Ins. Co. of Am.*, 68 Cal. 2d 822, 834 (1968), holding that wrongs founded upon personal injury are not assignable. See also *Killian v. Millard*, 228 Cal. App. 3d 1601, 1606 (1991) (reversing trial court's order invalidating plaintiff's syndication of their recovery to finance the lawsuit holding that defendant lacked standing to bring the challenge and indicating in dicta that syndication may be invalid if the case is brought "not because of any belief in its merits but purely as an investment").

<sup>6</sup> CAL. RULES OF PROF'L CONDUCT R. 4-200(B); see *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.*, 187 Cal. App. 4th 1405, 1418-19 (2010).

<sup>7</sup> CAL. RULES OF PROF'L CONDUCT R. 4-200(B)(1)-(B)(11); see *Cotchett, Pitre & McCarthy*, 187 Cal. App. 4th 1405, 1418-19.

<sup>8</sup> CAL. RULES OF PROF'L CONDUCT R. 3-300(A).

<sup>9</sup> CAL. RULES OF PROF'L CONDUCT R. 3-300(B).

<sup>10</sup> CAL. RULES OF PROF'L CONDUCT R. 3-300(C).

<sup>11</sup> CAL. RULES OF PROF'L CONDUCT R. 1-400(D)(2).

<sup>12</sup> CAL. RULES OF PROF'L CONDUCT R. 3-310(F).

<sup>13</sup> *Arnall v. Superior Court*, 190 Cal. App. 4th 360, 386 (2010).

<sup>14</sup> *Id.*; see also BUS. & PROF. CODE §§6147, 6148.

<sup>15</sup> *Wunschel Law Firm, PC v. Clabaugh*, 291 N.W. 2d 331, 336-37 (Ia. 1980).

<sup>16</sup> *Beard v. Goodrich*, 110 Cal. App. 4th 1031, 1039 (2003). A reverse contingent fee agreement giving the attorney 40% of "total net recovery," which included "the forgiveness or discharge of debt," was interpreted in *Beard* to not include the amount demanded in the plaintiff's complaint, which the plaintiff did not receive.

<sup>17</sup> CAL. RULES OF PROF'L CONDUCT R. 3-310 generally prohibits a lawyer from representing clients with adverse interests unless the lawyer obtains the informed, written consent of the client.

<sup>18</sup> CAL. RULES OF PROF'L CONDUCT R. 3-110 prohibits a lawyer from intentionally, recklessly, or repeatedly failing to perform legal services with competence.

<sup>19</sup> ABA STANDING COMM. ON ETHICS AND PROF'L RESPONSIBILITY, FORMAL OP. 94-389 (1994).

<sup>20</sup> *Richard J. Rawson, Lee S. Cutliff, William F. Alderman, & Richard E. Donovan, Ethical Considerations—Contingency Fees*, 1 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL §8:23 (2010).

<sup>21</sup> *Fracasse v. Brent*, 6 Cal. 3d 784, 792 (1972).

<sup>22</sup> CAL. RULES OF PROF'L CONDUCT R. 3-300; *Matter of Silverton*, 4 Cal. State Bar Ct. Rptr. 252, 256 (Rev. Dept. 2001).

<sup>23</sup> *Newman v. Freitas*, 129 Cal. 283, 289-90 (1900); see also ABA MODEL RULES OF PROF'L CONDUCT 1.5(d)(1).

<sup>24</sup> "Contingent fee contracts for criminal prosecutors have been recognized to be unethical and potential unconstitutional." *People ex rel. Clancy v. Superior Court (Ebel)*, 39 Cal. 3d 740, 748 (1985).

<sup>25</sup> See *County of Santa Clara v. Superior Court (Atlantic Richfield Co.)*, 50 Cal. 4th 35, 52, 55 (2010); see also *Orange County Water Dist. v. The Arnold Eng'g Co.*, 196 Cal. App. 4th 1110, 1123-25 (2011).

<sup>26</sup> See CAL. STATE BAR FORMAL OP. 1994-135.

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