



OPINION 2023-1

[Issue date: April 2023]

ISSUE:

Should certain contract provisions sometimes used by California lawyers in attorney-client fee agreements (also known as engagement agreements or engagement letters) be revised or omitted because they violate California's ethical standards?

DIGEST:

The State Bar of California ("State Bar") provides on its website sample hourly fee agreements and a sample contingency fee agreement, along with instructions and comments. The sample fee agreements are advisory only and include provisions that are generally permissible under California's Rules of Professional Conduct ("CRPC") and the State Bar Act (Business & Professions Code § 6000 et seq.). The sample fee agreements, however, do not discuss other provisions sometimes used by California attorneys, some of which violate California's ethics rules and laws. These provisions include, but are in no way limited to, those that (1) shift authority to the lawyer to decide the client's ultimate objectives; (2) require the client's advance consent to settlement regardless of the circumstances, condition settlement on the lawyer or law firm's approval, or give the lawyer unlimited authority to settle on the client's behalf; (3) designate a fee for providing legal services as nonrefundable; (4) charge fees in excess of statutory limits; (5) permit the lawyer's unilateral withdrawal from the representation without compliance with California ethics rules and laws; or (6) allow for unqualified destruction of the client's file, or conditional return of the file, upon termination of the representation.

DISCUSSION:

Generally, the negotiation of an initial fee agreement with a client is an arms-length transaction. *Ramirez v. Sturdevant*, 21 Cal. App. 4th 904, 913 (1994) (*Ramirez*). Absent issues such as duress or unconscionability, the attorney is "entitled to negotiate the terms on which [the attorney] would accept employment," and the client has "no cause to complain that the terms [the attorney] negotiated were favorable to him." *Id.*

Nonetheless, Business and Professions Code sections 6147 and 6148 contain requirements for contingency fee agreements and hourly fee agreements, respectively. On its website, the State Bar provides optional but advisory written fee agreement forms – for an hourly fee in litigation

matters, an hourly fee in non-litigation matters, or a contingency fee – along with certain optional clauses and disclosure forms.¹ As indicated by the sample forms and the accompanying instructions, “[a]ttorneys 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.”

Attorneys generally include terms and conditions in their fee agreements that are not found in the State Bar’s sample forms. While the fact that a provision does not appear in the State Bar forms does not in itself make the provision improper, lawyers must make sure that any added provisions do not violate the CRPC and/or the State Bar Act.

The consequences of including an improper provision in a fee agreement can be severe. A violation of the CRPC may result in attorney discipline. The provision may be held to be unenforceable, and its inclusion may void the entire fee agreement and/or result in a loss of fees, disqualification, or even civil liability. See CRPC 1.0, Comment [1] and cases cited therein; *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co.*, 6 Cal 5th 59, 74, 94-95 (2018) (attorney’s contract that has as its object conduct violating the CRPC is contrary to public policy and is therefore unenforceable; law firm’s “ethical breach will ordinarily require it to relinquish some or all of the profits for which it negotiated”); see also *Hance v. Super Store Industries*, 44 Cal. App. 5th 676 (2020) (collecting cases).

The following exemplify some of the most commonly-observed provisions that are inconsistent with California’s ethical laws and rules. This list is not exhaustive, and lawyers must make sure that their fee agreements adhere to the CRPC and other applicable law.²

1. Shifting Authority over Client’s Objectives from Client to Lawyer

“Law Firm is entitled to pursue the representation of Client as it sees fit. Client gives Law Firm full discretion to dismiss claims or parties if, in Law Firm’s professional judgment, it is in Client’s best interests.”

Provisions to this effect implicate ethical rules regarding the division of authority between lawyer and client. Subject to limitations in CRPC 1.2.1, a lawyer is required to “abide by a client’s decisions concerning the objectives of representation.” CRPC 1.2(a). This rule “confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.” CRPC 1.2, Comment [1].

¹ The State Bar’s sample provisions can be found at www.calbar.ca.gov. See <https://www.calbar.ca.gov/Attorneys/For-Attorneys/Mandatory-Fee-Arbitration/Forms-Resources>.

² The State Bar of California and BASF offer ethics hotlines for their members.

Thus, “[a] lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions,” but “[a] lawyer is not authorized merely by virtue of the lawyer’s retention to impair the client’s *substantive rights or the client’s claim itself*.” CRPC 1.2, Comment [1], emphasis added; see also *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 404 (1985). When the lawyer is faced with a decision affecting the client’s substantive rights, the lawyer must provide advice concerning the client’s choices and may make recommendations, but the decision ultimately must be made by the client. *Id.* See also CRPC 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).³

Examples of substantive decisions include, but are not limited to, whether to dismiss claims, dismiss parties, submit to binding arbitration, waive the right to a jury trial, concede essential elements or eliminate essential defenses in litigation, obtain a default judgment, and, as discussed further in the next section, settle a case or accept a negotiated plea offer. See *Stewart v. Preston Pipeline Inc.*, 134 Cal. App. 4th 1565, 1582 (2005). Examples of substantive decisions in transactional matters may include, for example, whether to enter into the transaction and whether to make material revisions to the transactional documents.

In light of CRPC 1.2, a fee agreement cannot contain a provision giving the attorney power to decide a substantive issue without the client’s informed consent. Moreover, there is a limit to which the fee agreement can be used to obtain a client’s informed consent to substantive decisions in advance. While certain decisions concerning the client’s substantive rights may be memorialized in the fee agreement following advice and consultation between the lawyer and the client, the fee agreement cannot confer advance consent to the lawyer to make future substantive decisions that would depend on facts and risks that may change after the execution of the fee agreement.⁴

As an example, the fee agreement may confirm the client’s decision that their lawsuit will include particular claims and not others, which may be viable but strategically disadvantageous. Absent a material change in circumstances, the attorney can rely on that authorization (although it can be revoked by the client). CRPC 1.2, Comment [2]. However, the fee agreement should not provide, for example, that the lawyer is “given full discretion to dismiss claims or parties, if, in the lawyer’s professional judgment, it is in the client’s best interests,” or words of similar import, because a client’s delegation to the lawyer of authority to make decisions on substantive matters in the future is not an “*informed decision*[] regarding the representation.” CRPC 1.4(b), emphasis added. Such a provision would be tantamount to an

³ A lawyer may be entitled to withdraw from representation if, for example, the client “insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” ABA Model Rule 1.16 Comment [7]; see CRPC 1.16(b).

⁴The definition of “informed consent” under CRPC 1.0.1 is instructive. “Informed consent” means “a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.”

“improper intrusion on the unilateral right of clients to control the outcome of their cases.” *Matter of Van Sickle*, 4 Cal. State Bar Ct. Rptr. 980, 989 (Rev. Dept. 2006) (fee agreement provision prohibiting client from settling or dismissing case without lawyer’s consent was “strong evidence of [the lawyer’s] overreaching”).

2. Prohibiting or Restricting Client Authority to Settle

“Client agrees that he/she will make no settlement except in the presence of Attorney and with his approval, and should she do so in violation of this agreement he/she agrees to pay Attorney the sum and share above indicated.”

This type of provision implicates a subset of the rule precluding the lawyer from usurping authority over substantive decisions, namely the prohibition against limiting the client’s right to settle a civil case or accept a plea agreement in a criminal case.

As further set forth in CRPC 1.2(a), “[a] lawyer shall abide by a client’s decision whether to settle a matter.” See *In re Guzman*, 5 Cal. State Bar Ct. Rptr. 308, 314 (Rev. Dept. 2014) (“Clients have the unilateral right to control the outcome of their cases, including the right to settle or to refuse to settle a claim. Attempts by an attorney to restrict a client’s right to control his or her case are invalid and evidence of overreaching.”). In addition, CRPC 1.4.1(a)(2) mandates that the attorney “promptly communicate” to the client “all amounts, terms, and conditions of any written offer of settlement made to the client,” and “[a]n oral offer of settlement made to the client in a civil matter must also be communicated if it is a ‘significant development’ under [CRPC] 1.4.” CRPC 1.4.1, Comment; see also Cal. Bus. & Prof. Code § 6068(m); CRPC 1.8.7 (requiring informed consent of all joint clients to settlement offer). CRPC 1.4.1(a)(1) requires prompt communication of the terms of a proposed plea bargain.

Accordingly, provisions that give the attorney authority over settlement decisions are typically improper. Thus, a provision that “[c]lient acknowledges and agrees there shall be no settlement of the claim without mutual consent of Client and the Attorney” is void as against public policy. *Calvert v. Stoner*, 33 Cal.2d 97 (1948). A provision in a contingency fee agreement that clients “promise to take the case to trial or settlement to ensure plaintiff was paid for his legal representation” has been held invalid, as it is akin to a provision that prevents settlement without the attorney’s consent. *Lemmer v. Charney*, 195 Cal. App. 4th 99, 104 (2011). Also held improper was a provision stating that “Attorney shall receive 33 1/3% of any recovery, including settlement, but if Client settles without Attorney’s approval Client shall pay Attorney a minimum \$10,000 fee,” thereby imposing a financial penalty on the client for settling without attorney authority. *Hall v. Orloff*, 49 Cal. App. 745, 749 (1920).

As yet another example, a contingency fee agreement stating that the attorneys had “sole discretion” to accept settlement offers on the client’s behalf so long as the attorneys believed in good faith that the settlement offer was reasonable and in the client’s best interest “violates the Rules of Professional Conduct and is void to the extent it purports to grant an attorney the right to accept settlement over the client’s objection.” *Amjadi v. Brown*, 68 Cal. App. 5th 383,

385, 389-390 (2021) (reversing a judgment that had been based on the settlement, which was deemed void, and referring the attorneys to the State Bar for potential discipline).

On the other hand, it has been held there is “nothing inherently wrong or unfair” with a provision reflecting the client’s informed decision to settle for not less than a specified amount that is reasonable under the circumstances. *Ramirez, supra*, 21 Cal. App. 4th at 918. This holding should be considered in light of its factual context.

In *Ramirez*, a lawyer, who had represented the client when the court granted summary judgment on the client’s claim, negotiated with the client for a new fee agreement to represent the client on appeal from the summary judgment. The lawyer agreed to represent her only if, among other things, she agreed to accept any settlement offer of at least \$150,000; the lawyer advised the client that \$150,000 was the reasonable value of her claim, although he would attempt to obtain a greater amount. After the client agreed, the attorney negotiated a settlement of \$150,000 plus attorney fees and costs. The client thereafter filed a lawsuit against the attorney. *Ramirez, supra*, 21 Cal. App. 4th at 911-12.

The court in *Ramirez* observed that the client was “intelligent, experienced and sophisticated” and she “had already changed attorneys twice in the action and was perfectly aware she could do so again.” *Ramirez, supra*, 21 Cal. App. 4th at 917-18. The record also contained evidence, including expert testimony, demonstrating that the minimum settlement figure was “a generous assessment of the value of” the client’s claim. *Id.* at 918. Noting the settlement term reflected a reasonable assessment of the claim’s value and the attorney had promised to attempt to obtain more, the court did not find the provision improper. *Id.*

Given the unusual facts of *Ramirez*, including the discrete and limited scope of the representation covered by the agreement, the sophistication of the client, the stage of the case and the record at the time the agreement was reached, and the “generous” nature of the minimum settlement agreed to, we believe that attorneys should exercise great caution before relying on *Ramirez* to limit a client’s settlement authority in different circumstances.⁵ (We further note that *Ramirez* did not address whether the circumstances and risks existing when the client agreed to the minimum settlement term were different than the circumstances and risks existing when the attorney later accepted the settlement offer on the client’s behalf,

⁵ Citing *Ramirez*, the court in *Little v. Amber Hotel Co.*, 202 Cal. App. 4th 280, 296 (2011) stated that “fee agreements containing reasonable limitations on the client’s authority to settle an action are enforceable.” *Little*, however, did not involve a provision that had any effect on the client’s authority to settle. *Id.* at 296-97 (fee agreement that deferred a portion of an hourly rate, and created a lien in that amount on any attorney fee award made by the court, did not improperly interfere with client’s authority to choose how to settle the action).

which would raise an issue whether the client had truly provided informed consent to the settlement. *See* CRPC 1.0.1, 1.4, 1.4.1, 1.8.7.)⁶

3. Characterizing Fees as Nonrefundable

“Client shall pay to Attorney the sum of \$10,000 for Attorney’s legal services, which shall be deemed earned on receipt and non-refundable.”

A provision purporting to make a fee nonrefundable implicates two rules of ethics. CRPC 1.5(d) prohibits a lawyer from treating a fee as nonrefundable except in a single circumstance: “[a] lawyer may make an agreement for, charge, or collect a fee that is denominated as ‘earned on receipt’ or ‘non-refundable,’ or in similar terms, *only if the fee is a true retainer and the client agrees in writing after disclosure* that the client will not be entitled to a refund of all or part of the fee charged.” Emphasis added. In addition, CRPC 1.16(e)(2) provides that, upon termination of the representation, any paid but unearned fee *is* refundable to the client unless it constituted a true retainer: “the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer had not earned or incurred,” but “[t]his provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.”

In light of these rules, an attorney cannot include in the fee agreement a provision for a non-refundable fee unless (1) the fee is a “true retainer” (CRPC 1.5(d), 1.16(e)(2)) and (2) the client agrees in writing after adequate disclosure (CRPC 1.5(d)).

a. True Retainer

CRPC 1.5(d) provides that “[a] true retainer is a fee that a client pays to a lawyer to *ensure the lawyer’s availability* to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.” Emphasis added. *See also* CRPC 1.16(e)(2).

As the California Supreme Court explained: “A [true] retainer is a sum of money paid by a client to secure an attorney’s availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he

⁶ There may be instances in which an attorney can properly rely on a client’s advance agreement to a settlement amount. However, the attorney may not accept any proposed settlement that contains substantive terms at variance with the authority conferred by the client. *See, e.g.,* Cal. State Bar Formal Opn. No. 2002-160. The circumstances and risks of a future settlement are not likely known in full at the time the client signs a fee agreement. *See* CRPC 1.0.1, 1.4, 1.4.1, 1.8.7; *see also* CRPC 1.7, Comment [9] (addressing a client’s advance consent to a conflict of interest). Although consent to a future conflict of interest is not the same as consent to a future settlement, Comment [9] to CRPC 1.7 may shed light on factors to consider in evaluating a provision by which a client purportedly agrees to a settlement in advance. In addition, a lawyer should evaluate whether the lawyer’s representation would be materially limited by the lawyer’s own interests relating to the settlement provision. *See* CRPC 1.7(b) and Comment [4].

actually performs any services for the client.” *Baranowski v. The State Bar*, 24 Cal.3d 153, 164 fn. 4 (1979) (decided under former rule 8-101); see *Banning Ranch Conservancy v. Superior Court*, 193 Cal.App.4th 903, 916-917 (2011). By contrast, a payment that is an advance payment for services to be performed in the future, or to serve as a security deposit for the payment of fees, remains the property of the client until earned by the attorney, such that any unearned portion is to be returned to the client upon termination.

Whether a fee payment is a “true” retainer, and is thus non-refundable, does not depend on what it is called in the fee agreement but on the purpose of the fee and how it is treated. After the agreement is executed, the attorney must adhere to the true retainer and be available to handle the matter. This might entail not only blocking out time to perform the required services but also declining a representation that would create a conflict or render the attorney unavailable. If the lawyer bills against the retainer for services rendered, it could be construed that the funds were not a true retainer but an advance fee payment.⁷

b. Agreement in Writing After Disclosure

As mentioned, CRPC 1.5(d) provides that the client must “agree[] in writing after disclosure that the client will not be entitled to a refund of all or part of the fee charged.” While CRPC 1.5(d) does not explicitly call for the disclosure to the client to be in writing, a written disclosure will avoid later disputes about whether it was made. The disclosure can be included in the fee agreement where the nature and amount of the fee are stated; the client’s signature at the end of the agreement should constitute the client’s written consent.

The disclosure must be clear and state that the client will not be entitled to a refund of the fee. Because a client may reasonably believe that an advance payment is to cover future services rather than to secure the attorney’s availability to provide those services, the fee agreement should clarify that the amount is for the promise of being *available* to perform specified services rather than as compensation *for* those services. The attorney might further explain that the payment is to compensate the attorney for declining other potential employment over a specified period, and not in consideration of performing particular services, which will be billed at a specified rate or pursuant to a separate fee agreement.⁸

⁷ An advance fee payment implicates another ethical rule. The payment must be deposited into a trust account unless “(1) the lawyer or law firm discloses to the client in writing (i) that the client has a right to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and (2) if the flat fee exceeds \$1,000.00, the client’s agreement to deposit the flat fee in the lawyer’s operating account and the disclosures required [under (1)] are set forth in a writing signed by the client.” CRPC 1.15(b)(1)-(2).

⁸ An attorney whose employment has terminated must promptly refund any part of a fee paid in advance that has not been earned (except a “true” retainer). Keeping unearned fees after the conclusion of representation is an ethical breach subjecting the attorney to disciplinary action. CRPC

1.16(e)(2); see *Farnham v. State Bar*, 47 Cal. 3d 429, 446 (1988); *Matter of Lindmark*, 4 Cal. State Bar Ct. Rptr. 668, 673-676 (Rev.Dept. 2004). If, upon termination of the representation, there is a dispute over whether the funds constituted a true retainer, the lawyer should deposit the disputed portion in a trust account to avoid violating CRPC 1.16(e)(2) and provisions regarding trust accounts (CRPC 1.15(c)(2)).

4. Charging Fees in Excess of Statutory Limits

“Fees will be charged at the statutory rate. Additional fees will be charged as set forth in this Agreement....”

Some statutes set a maximum fee or maximum amount of compensation for specified legal services. See, e.g., Prob. C. § 10810 (compensation for “ordinary services” of attorney for personal representative in probate proceedings); Bus. & Prof. 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” specified limits.). Charging fees in excess of statutory limits may be prohibited by CRPC 1.5(a), which provides that “[a] lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.”⁹ For instance, where the statute prohibits contracting for fees in excess of the statutory limits (see, e.g., Bus. & Prof. C. § 6146(a)), including provisions in a fee agreement that would entitle the attorney to fees beyond those limits would be illegal and prohibited by CRPC 1.5(a).

5. Authorizing Unilateral Attorney Withdrawal Without Sufficient Notice

“Attorney may unilaterally withdraw without prior notice or client consent.”

“Attorney may withdraw with Client’s consent or for good cause. Among the circumstances under which Attorney may unilaterally withdraw without prior notice or client consent are: (a) Client’s conduct renders it unreasonably difficult for the Attorney to carry out the representation effectively, and/or (b) Client fails to pay Attorney’s fees or costs as required by this Agreement.”

⁹ Fees may be unconscionable in other circumstances, as described in CRPC 1.5(b). In addition, the CRPC contains further limitations and requirements regarding fees. For example, CRPC 1.5(c)(1) prohibits any fee “contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof.” CRPC 1.5(c)(2) prohibits contingency fees in criminal matters. CRPC 1.4 and 1.5 indicate that the engagement agreement should not state that hourly rates are subject to increase at any time *without notice* to the client. CRPC 1.5.1 requires the client’s informed written consent to an attorney sharing fees with another attorney outside the law firm. This consent must be obtained as soon as reasonably practicable after the lawyers enter into an agreement to share the fee, and the “full written disclosure to the client” must include “(i) the fact that a division of fees will be made; (ii) the identity of the lawyers or law firms that are parties to the division; and (iii) the terms of the division.” Rule 1.5.1(a). Note also that the State Bar of California Committee on Professional Responsibility and Conduct (“COPRAC”) circulated Proposed Formal Interim Opinion No. 20-0005, which addresses the ethical propriety of “conversion clauses” by which a contingent fee arrangement is converted to an alternative fee arrangement upon a triggering event such as the client’s discharge of, or rejection of a settlement recommended by, the lawyer.

Provisions concerning an attorney's withdrawal from the representation must comply with CRPC 1.16(d), which requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e)." CRPC 1.16 does not give an attorney the right to withdraw without providing adequate notice to avoid reasonably foreseeable prejudice to the client. The problematic provisions quoted above are not consistent with CRPC 1.16(d) because they empower the attorney to withdraw without providing such notice.¹⁰

CRPC 1.16(b) allows an attorney to withdraw from a representation in numerous situations, such as where the client has breached an obligation to pay fees (*if* the lawyer has given reasonable warning that withdrawal will result if fees remain unpaid) or where the client "by conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively." However, if permission for termination is required by a tribunal, the attorney must obtain that permission before terminating the representation. CRPC 1.16(c). Moreover, the attorney must still comply with CRPC 1.16(d).

CRPC 1.16(a) requires an attorney to withdraw from the representation in specified situations. Even in this context, however, the attorney's obligation under CRPC 1.16(d) to avoid "reasonably foreseeable prejudice" to the client applies. In the absence of a court order to the contrary, therefore, the attorney may not withdraw from the representation without providing sufficient notice under CRPC 1.16(d), and attorneys should not state in their fee agreements that they can.

6. Withholding, Destroying or Conditioning Return of Client File Upon Termination

"At the end of the engagement, Client may request the return of Client's matter file. If Client has not requested the return of Client's file, and to the extent Attorney has not otherwise delivered it or disposed of it consistent with Client's directions, Attorney may have the file destroyed. The Client matter file includes Client papers and property but does not include Attorney work product."

¹⁰ Lawyers may sometimes include provisions in fee agreements explaining that an engagement will automatically terminate without notice to the client upon the completion of the lawyer's advice or legal services on the matter(s) for which they were engaged. These "automatic termination" provisions are generally intended to address situations in which there is no pending legal work and the lawyer has completed the agreed-upon legal services, as opposed to situations in which the lawyer is attempting to unilaterally withdraw from an ongoing matter without sufficient notice to the client. Such automatic termination provisions do not present ethical problems under CRPC 1.16(d), as the legal services have been completed and there is no pending matter from which the lawyer is withdrawing, and therefore, no prejudice to the client if the attorney-client relationship terminates at that time.

“Upon termination of the representation, Client’s file shall be returned to the Client upon Client’s request, provided that Client has paid Law Firm all amounts owed for fees, costs, and expenses as set forth herein.”

CRPC 1.16 (e)(1) mandates that, upon the termination of representation for any reason (and subject to any applicable protective order, non-disclosure agreement, statute or regulation), a lawyer must “promptly . . . release” to the client, at the client’s request, “all client materials and property.” The two provisions above therefore present the following issues: whether attorney work product may be excluded from the material released to the client; whether the release of the client file can be conditioned on the client’s payment of amounts purportedly owed to the attorney; and to what extent the attorney may destroy the client file.

As to the first issue, CRPC 1.16(e)(1) defines “client materials and property” to include “correspondence, pleadings, deposition transcripts, experts’ reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client’s representation, whether the client has paid for them or not.”

In many cases, attorney work product will not be “reasonably necessary to the client’s representation” and does not form part of the client file. See ABA Formal Opinion 471 at 4; see also Cal. State Bar Formal Opn. 2001-157, n. 3 (noting that “there is an unresolved division in the authorities as to the client’s right to receive uncommunicated work product of the attorney”). However, a provision that attempts to carve out attorney work product from the client’s materials and property even if those materials are “reasonably necessary to the client’s representation” is inconsistent with CRPC 1.16(e)(1). See Bar Association of San Francisco Legal Ethics Opn. 1990-1 (“An attorney may not ethically withhold . . . the attorney’s work product . . ., from a present or former client or the client’s new attorney, when to do so would reasonably foreseeably prejudice the client’s representation.”).¹¹

Regarding the second issue, CRPC 1.16(e)(1) does not permit an attorney to hold a client’s materials and property as ransom for the payment of fees or other amounts. A provision in an engagement agreement conditioning the return of the client file on the client having “paid Law Firm all amounts owed for fees, costs, and expenses” violates that rule. (The lawyer and client

¹¹ If there is attorney work product that is reasonably necessary to the client’s representation, the existing lawyer is not necessarily required to provide such attorney work product in its original form, which, in some instances, may be illegible, incomplete, or misleading because it was intended for the lawyer’s own use, not for another’s use. Instead, the existing lawyer may choose to discuss the attorney work product with the client or its new counsel, prepare a new document containing the relevant information for the client or its new counsel, or provide the relevant information in another form that otherwise satisfies the lawyer’s ethical obligations. To be clear, while the lawyer may elect to prepare a new document in lieu of providing the attorney work product in its original form, the lawyer is not required to do so, as lawyers are not obligated to create documents that do not already exist when providing a client with its file.

can agree that the client will pay a reasonable sum for copying the client file. See CRPC 1.16 Comment [6].)

As to the destruction of the client's file, no California rule of professional conduct states a specific time period for the material to be retained absent a client request for its release.¹² California lawyers should consider, however, several ethics opinions promulgated on this issue.

In a 1977 opinion, the American Bar Association Committee on Ethics and Professional Responsibility concluded that client files do not have to be retained permanently, but it cautioned against destroying original client documents (especially when not recorded or filed in the public record), information that may be useful in the assertion of a client's defense or position, information an attorney knows or should know may still be necessary or useful to the client's position in a matter for which the applicable statute of limitations has not expired, and information a client may need, has not previously been given, is not otherwise readily available to the client, and the client may reasonably expect the attorney to maintain.¹³ ABA Comm. On Ethics and Prof. Resp., Informal Opn. No. 1384 (1977).

California organizations have weighed in as well. In 1996, this committee opined that an attorney is a bailee of client property and therefore must retain the client's material unless it can be destroyed without reasonably foreseeable prejudice to the client. BASF Formal Opn. 1996-1. The Los Angeles County Bar Association Professional Responsibility and Ethics Committee (LACBA) concluded in 1994 that the client file in criminal matters should be retained for the life of the former client, while files in civil matters should be retained for at least five years, with material of intrinsic value (e.g., money, bonds, stocks, wills) not destroyed without client consent. LACBA Opn. No. 475 (1994). In 2001, the State Bar of California Standing Committee on Professional Responsibility and Conduct ("COPRAC") opined that client files in criminal matters should not be destroyed during the client's lifetime without the client's authorization. COPRAC also agreed with BASF that there should not be a fixed

¹² Penal Code section 1054.9 provides for client files in specified criminal cases to be retained for the term of the client's imprisonment. The purpose of that statute, however, is not to define a lawyer's ethical obligation, but to assure that the client file be available for litigation purposes.

¹³ It is unreasonable for clients to expect lawyers to maintain client files indefinitely or for the client's convenience. For example, if the lawyer offers to provide the client with its file instead of destroying the client file, but the client demands that the lawyer continue to retain the file, refuses to consent to the destruction of the file, or is able to but does not respond to the lawyer's request within a reasonable period of time, the lawyer may be entitled to destroy the client file. In addition, clients bear responsibility for both providing the lawyer with up-to-date contact information so that the lawyer can communicate with them regarding the management of their client file, and responding to communications from the lawyer (to the extent the clients are able to do so). Lawyers are not obligated to act as permanent data or document storage facilities.

timeframe for retention of client files, but the files should be retained as needed to avoid reasonably foreseeable prejudice to the client. Cal. State Bar Formal Opn. No. 2001-157.¹⁴

Accordingly, while the phrase in the first example provision above – “Attorney *may* have the file destroyed” – may not be contrary to the ethical rules, the provision should be applied by the attorney so as to avoid reasonably foreseeable prejudice to the client in civil cases, and to comply with Penal Code section 1054.9 in criminal cases.

CONCLUSION:

California attorneys should examine their fee agreements to determine whether they contain provisions that violate the CRPC and the State Bar Act, and revise or remove those provisions accordingly. Common provisions that violate California’s ethical rules and laws include, but are not limited to, those that (1) shift authority to the lawyer to decide the client’s ultimate objectives, (2) require the client’s advance consent to settlement regardless of the circumstances, condition settlement on the lawyer or law firm’s approval, or give the lawyer unlimited authority to settle on the client’s behalf; (3) designate a fee for providing legal services as nonrefundable, (4) charge fees in excess of statutory limits, (5) permit the lawyer’s unilateral withdrawal from the representation without sufficient notice to the client, and (6) improperly authorize the destruction or conditioning of the return of the client’s file after termination of the representation.

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¹⁴ COPRAC has also circulated Proposed Formal Opinion Interim No. 19-004, addressing the ethical obligations of lawyers in regard to attorney destruction and retention of client files, material, and property in civil and criminal matters.

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