

**RE: Rule 2-200  
5/7&8/04 Commission Meeting  
Open Session Item III.I.**

## **Memorandum**

To: Rules Revision Commission  
From: Stanley W. Lamport  
Copy: Randall Difuntorum, Esq.  
Date: May 5, 2004  
File No: 42944  
Re: Rule 2-200

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This memorandum attempts to summarize issues that have arisen with respect to rule 2-200 over the years that the Commission may want to address in the rule. Each section concludes with a specific recommendation. I have also prepared a redraft of the rule incorporating the recommendations, which appears at the end of this memorandum.

### **A. California Rule vs. ABA Model Rule**

The key difference between ABA Model Rule 1.5(e) and rule 2-200 is that the ABA Rule does not embrace referral fees while the California rule does. ABA Model Rule 1.5(e) requires in addition to client consent and reasonableness of the fee that “the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.”

The ABA language tracks the language in former California rule 22, adopted in 1972. Former rule 22 required the division to be “in proportion to the services performed or the responsibility assumed by each.” “Thus under former rule 22, dividing a fee on the basis of a referral was absolutely banned, while dividing a fee between attorneys working jointly for the client was permitted if certain conditions were satisfied.” (*Chambers v. Kay* (2002) 29 Cal.4th 142, 148-149.) Former rule 22 was renumbered as rule 2-108 and was then revised in 1979 to eliminate the ban on referral fees. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, the court held “this amendment indicates not only that referral fee agreements are no longer contrary to public policy, but also that they were not contrary to

public policy before the original enactment of rule 2-108 (former rule 22) in November 1972.” No case since that time has questioned the policy of permitting referral fees.

*Moran* recognized that there are two sides to the referral fee debate. One the one hand:

The practice of forwarding fees among lawyers, part of our legal culture (see *Turner v. Donovan* (1935) 3 Cal.App.2d, 486-487 [39 P.2d 858]), remains with us even though the detrimental effect upon the client appears obvious. "In an era where recovery in tort is founded primarily upon socialization of the loss occasioned by injury to person and property [citation], the society which bears that loss must be protected against arrangements which prevent the recovery from reaching the party injured, reduced only by necessary legal fees and other expenses of litigation. The pure referral fee, which compensates one lawyer with a percentage of a contingent fee for doing nothing more than obtaining the signature of a client upon a retainer agreement while the lawyer to whom the case is referred performs the work, is far from necessary to the injured person's recovery. To the extent that the referral fee is paid for that purpose, loss has not been socialized. Rather, the obtaining of business by a lawyer who, by his own motion, has conceded his inability to handle it has been subsidized." (*Dunne & Gaston v. Keltner* (1975) 50 Cal.App.3d 560, 566-567 [123 Cal.Rptr. 430] (conc. opn. of Thompson, J.)) The honoring of a referral fee is even more puzzling where the referring attorney is merely heeding the Rules of Professional Conduct in rejecting a case which he does not have the requisite skill or experience to handle competently." (*Moran v. Harris, supra*, 131 Cal.App.3d at 921.)

However, *Moran* also recognized that there was another point of view, which is stated as follows:

“Regardless of the logic of this argument, there is another point of view. If the ultimate goal is to assure the best possible representation for a client, a forwarding fee is an economic incentive to less capable lawyers to seek out experienced specialists to handle a case. Thus, with marketplace forces at work, the specialist develops a continuing source of business, the client is benefited and the conscientious, but less experienced lawyer is subsidized to competently handle the cases he retains and to assure his continued search for referral of complex cases to the best lawyers in particular fields.” (*Moran v. Harris, supra*, 131 Cal.App.3d at 921-922.)

While *Moran* found that referral fees are not contrary to public policy, the court emphasized that it was not encouraging the use of such arrangements. The court stated, “Our expressed views should not be interpreted as an encouragement of referral fee

agreements. Nevertheless, there is considerable distance between prohibition and encouragement. That distance may be the ‘breathing space’ necessary to accommodate both the public nature of the legal profession and commercial milieu within which it must survive.” (*Moran v. Harris, supra*, 131 Cal.App.3d at 922.)

The Office of Chief Trial Counsel has requested that we reintroduce the “shared work” element in rule 2-200 in order to bring the rule into conformity with the ABA Model Rule. That would inevitably reestablish the ban on referral fees that existed between 1972 and 1979. In light of the history cited above, I do not recommend that we accept that proposal.

**Recommendation:** That we do not accept the ABA approach of limiting fee divisions to situations where the lawyer have both worked on the client’s matter.

### **B. Do We Retain 2-200(B)**

Rule 2-200(B) prohibits any other form of compensation by a member to a lawyer in connection with the referral of a matter to the member. It is designed to ban referral compensation other than in the manner specified in rule 2-200(A) so that all regulation of referral compensation occurs under the rule. Although it forecloses other forms of referral compensation that might have fewer potentially adverse results than referral fees paid as a division of a fee, I am not aware that the existing rule poses any real problem to the profession. Unless members of the Commission have a concern about this rule, I do not propose to change it.

**Recommendation:** That we not change rule 2-200(B).

### **C. The “Partner, Associate or Shareholder” Problem**

Rule 2-200(A) states that “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...” The ABA Model Rule states, “A division of a fee between lawyers who are not in the same firm may be made only if...”

There are two problems that have been discussed with respect to the rule 2-200(A) language. First, the word “associate” is not helpful. Rule 1-100(B)(4) defines “associate” as “an employee or fellow employee who is employed as a lawyer.” The definition is circular and begs the question, what is an employee? The definition of an employee is a legal question that depends on the context in which the issue of employment arises. The question then becomes, which context does one use to interpret the rule? Because of the complexities in the definition, ethics opinions have uniformly punted on the question. (See e.g. State Bar Formal Opn. 1994-138; LACBA Formal Opns. 467, 470, 473 & 511.)

The Supreme Court grappled with the “employee” definition in *Chambers v. Kay*. The Court distinguished the one-case working relationship presented to the Court from a “salaried employee” where the lawyer expects to be paid a salary or other wages as compensation for his work. (*Chambers v. Kay, supra*, at 152.) The Court indicated that

the lawyer in *Chambers* was not an employee because his employment was based solely on the division of the fee in a particular case. (See also LACBA Formal Opn. 511, “employment” relationship for a particular matter where compensation is based on a division of a fee may not pass muster under *Chambers*.)

This suggests that while partners and shareholders can be compensated solely on the division of fees, an associate in a law firm could not be compensated solely on that basis. There does not seem to be any principled reason for that distinction, other than the gymnastics necessary to make sense of the term “associate.”

The second criticism of the “partner, associate and shareholder” language is that it is too narrow. It does not pick up “of counsel” (unless they are associates) or other arrangements in a law firm. The Ethics Hotline has suggested that we add “of counsel” to the rule. The Los Angeles County Bar Association considered suggesting that we add joint ventures and effectively overrule a portion of *Chambers* that said that joint ventures did not fit within the rule.

The ABA approach could solve most of these issues by focusing on whether the lawyer is part of the firm. We probably would want to tie in a requirement that the relationship be close, personal, continuous and regular, which would link into the language in rule 1-400 Standard 8, which the Supreme Court embraced in *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135. I think we should address this when we look at the definition of “law firm.”

**Recommendation:** Change rule 2-200(A) to state, “A member shall not divide a fee with a lawyer who is not in the same law firm as the member unless.” Define “law firm” to include an element of close, personal, continuous and regular relationships among lawyers.

#### **D. Do We Conform the Consent Requirement to the ABA Rule?**

Rule 2-200 requires that before the division occurs “the client has consented in writing thereto after full disclosure has been made in writing that a division of fees will be made and the terms of such division.” The ABA rule states, “the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing.” Obviously, part of this includes the proportional involvement issue that I am suggesting we do not adopt. The rest of the sentence is less inclusive than our rule. I think our current formulation is superior.

**Recommendation:** That we do not change rule 2-200(A)(1).

#### **E. Reasonable Fee vs. No Increased or Unconscionable Fee?**

The ABA Model rule requires that “the total fee is reasonable.” Rule 2-200(A)(2) requires that “the total fee charged by all lawyers is not increased solely by reason of the provision for the division of fee and is not unconscionable as that term is defined in rule 4-200.” The difference between these two formulations in part turns on the difference

between the ABA approach, which prohibits charging unreasonable fees, and our approach of prohibiting illegal and unconscionable fees.

The Supreme Court has made it clear that it does not want the disciplinary process to be in the business of dealing with ordinary fee disputes. (*Herrscher v. State Bar* (1935) 4 Cal.2d 399, 402-403 [“We think the proper rule in such cases is that the mere fact that a fee is charged in excess of the reasonable value of the services rendered will not of itself warrant discipline of the attorney involved. Ordinarily, the propriety of the fee charged should be left to the civil courts in a proper action... Generally speaking, neither the Board of Governors nor this court can, or should, attempt to evaluate an attorney's services in a quasi-criminal proceeding such as this, where there has been no failure to disclose to the client the true facts or no overreaching or fraud on the part of the attorney. It is our opinion that the disciplinary machinery of the bar should not be put into operation merely on the complaint of a client that a fee charged is excessive, unless the other elements above mentioned are present.”].) For that reason our rule focuses on an unconscionable fee, but adds in one reasonable concept – that the fee not be increased by reason of the division.

Putting aside that our schizophrenic rule 4-200 does not define what an unconscionable fee is [a problem I hope we fix in the near future], I think we should keep the language we have.

**Recommendation:** That we do not change rule 2-200(A)(2).

## **F. Timing of Consent**

Rule 2-200 requires consent prior to the division, not at the time the agreement to divide the fee occurs. The LACBA Ethics Commission recognized this problem in Formal Opinion No. 467. The Committee stated, “There is nothing in the rule to indicate that the consent of the client must be obtained prior to the representation or at the time of the referral fee agreement.” (Emphasis supplied.) However, the Committee noted:

“Nonetheless, it is preferable that the written consent be given prior to entering into the agreement. Failure to do so is fraught with peril. It may be construed as a breach of the fiduciary duties to the client as well as the lawyer's duty to keep the client reasonably apprised of developments relating to the engagement. Certain factors that may be of concern to the client cannot be addressed at the conclusion of the engagement. These concerns may include 1) whether the client is actually retaining the best attorney for the work or whether Attorney B was recommended simply because of his agreement to pay a referral fee; 2) whether Attorney B will devote sufficient time to the matter in light of the fact that he will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with Attorneys A & B.” (Emphasis supplied.)

These considerations make sense and are consistent with the duty to inform the client.

**Recommendation:** That we add a requirement that the client's consent be obtained prior to or as a condition of entering into the agreement to divide the fee.

### **G. Defining a Division of a Fee**

In Formal Opinion 1994-138, COPRAC adopted a test for when a fee is not a division that I first wrote in LACBA Formal Opn. 457 (in connection with fee sharing with a non-lawyer) and which LACBA then applied to lawyer fee divisions in Formal Opinions 467, 470 and 473. COPRAC stated the test as follows:

“[T]he committee believes that the criteria for determining whether a compensation method constitutes a division of fees should focus on the division of specific fees paid by a client rather than on compensation arrangements which are not directly tied to a client's payment of fees. Accordingly, the committee concludes that the criteria to determine whether there is a division of fees is whether (1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no division of fees.

The Supreme Court cited Formal Opinion 1944-138 with approval in *Chambers v. Kay*. The Court relied extensively on Formal Opinion 1994-138 and even quoted and applied the three-part test. (*Chambers v. Kay, supra*, 29 Cal.4<sup>th</sup> at 154.) Given that the test is now firmly entrenched in the landscape of the rule, we should incorporate it into the rule.

**Recommendation:** That we add the definition from the COPRAC opinion into a new Discussion. I suggest the following:

“A division of a fee under rule 2-200 occurs when an outside lawyer receives a portion of specific fees paid by a client. The criteria to determine whether there is a division of fees is whether (1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no division of fees. (*Chambers v. Kay* (2002) 29 Cal.4<sup>th</sup> 142; State Bar Formal Opn. 1994-138.)

## **PROPOSED REVISED RULE 2-200**

(A) A member shall not divide a fee with a lawyer who is not in the same law firm as the member unless.

(1) Prior to or as a condition of entering into the agreement to divide the fee, the client has consented in writing thereto after 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

**Discussion:**

A division of a fee under rule 2-200 occurs when an outside lawyer receives a portion of specific fees paid by a client. The criteria to determine whether there is a division of fees is whether (1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no division of fees. (*Chambers v. Kay* (2002) 29 Cal.4<sup>th</sup> 142; State Bar Formal Opn. 1994-138.)

## **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 in the same law firm as the member unless:

(1) ~~The~~ Prior to or as a condition of entering into the agreement to divide the fee, 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.

### **Discussion:**

A division of a fee under rule 2-200 occurs when an outside lawyer receives a portion of specific fees paid by a client. The criteria to determine whether there is a division of fees is whether (1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no division of fees. (Chambers v. Kay (2002) 29 Cal.4<sup>th</sup> 142; State Bar Formal Opn. 1994-138.)

**RE: Rule 2-200  
5/7&8/04 Commission Meeting  
Open Session Item III.I.**

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(March 25, 2004)

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**NOTE:** Refer to comment no. 2003-37 (Samuel L. Bufford), referencing rule 2-200 and related topics, included in the clear public comment binder.

# RULE AMENDMENT HISTORY (2004)

## Rule 2-200. Financial Arrangements Among Lawyers

### Current Rule

#### 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.

### Amendments Operative 1992

N/A

### Amendments Operative 1989 (Comparison of 1989 Rule to Former Rule 2-108)

#### Rule ~~2-200. 2-108~~. Financial Arrangements Among Lawyers.

(A) A member of the State Bar shall not divide a fee for legal services with ~~another person licensed to practice law~~ a lawyer who is not a partner of, or associate of, in the member's law firm or law office, or shareholder with the member unless:

(1) The client ~~consents~~ has consented in writing to ~~employment of the other person licensed to practice law~~ there to 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 ~~persons licensed to practice law~~ lawyers is not increased solely by reason of the provision for division of fees and ~~does not exceed reasonable compensation for all services they render to the client~~ is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in ~~subdivision~~ paragraph (A) of this rule or rule 2-300, a member of the State Bar shall not compensate, give, or promise anything of value to any ~~person licensed to practice law~~ 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 ~~person licensed to practice~~

## RULE AMENDMENT HISTORY (2004)

~~law, 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.

### Summary of 1989 Amendments

No substantive changes are proposed to current rule 2-108. The amendments that are proposed are intended to foster brevity and clarity.

[December, 1987 grey bound rule filing at pg. 27]

### Rule as Adopted Operative October 1, 1979 (Former Rule 2-108) (Comparison of 10/1/79 Rule to 4/1/79 Rule

#### **Rule 2-108. Financial Arrangements Among Lawyers**

(A) A member of the State Bar shall not divide a fee for legal services with another person licensed to practice law who is not a partner in or associate of in his or her the member's law firm or law office, unless:

(1) The client consents in writing to employment of the other person licensed to practice law 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 division is made in proportion to the services performed or responsibility assumed by each; and~~

~~(3)~~

(2) The total fee charged by all persons licensed to practice law is not increased solely by reason of the provision for division of fees and does not exceed reasonable compensation for all services they render to the client.

(B) Except as permitted in subdivision (A), a member of the State Bar shall not compensate, give or promise anything of value to any person licensed to practice law for the purpose of recommending or securing employment of the member or the member's firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's firm by a client. A member's offering of or giving a gift or gratuity to any person licensed to practice law, who has made a recommendation resulting in the employment of the member or the member's 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.

### Excerpt from 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility (Proposed Rule 2-108)

Rule 2-108. Division of Fees Among Lawyers.

## RULE AMENDMENT HISTORY (2004)

(A) A member of the State Bar shall not divide a fee for legal services with another member of the State Bar who is not a partner in or association of his law firm or law office, unless:

- (1) The client consents to employment of the other member of the State Bar after a full disclosure that a division of fees will be made; and
- (2) The division is made in proportion to the services performed and responsibility assumed by each; and
- (3) The total fee of the members of the State Bar does not clearly exceed reasonable compensation for all legal services they render the client.

(B) This Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

Comment: Rule 2-108 will provide the first disciplinary authority in California for division of fees among members of the State Bar under certain circumstances (i.e., in the absence of a sharing of services and responsibility and without advance disclosure to the client). Rule 2-108 has been patterned after ABA Code DR 2-107 with some amendments by the Committee. See Rule 3-102, *infra*, page 25.

On September 20, 1972, the California Supreme Court approved Rule 22, Rules of Professional Conduct, in the form adopted by the Board. That Rule reads as follows:

“Rule 22 (a) A member of the State Bar shall not divide a fee for legal services with another attorney who is not a partner in or associate of his law firm or law office, unless:

- (1) the client consents to employment of another attorney after a disclosure that a division of fees will be made; and
- (2) the division is made in proportion to the services performed or responsibility assumed by each; and
- (3) the total fee of the attorneys does not clearly exceed reasonable compensation for all legal services they render to the client.

(b) This rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.”

EXCERPT FROM SEPTEMBER 27, 2001 MEMORANDUM

**DATE:** September 27, 2001  
**TO:** MEMBERS OF THE COMMISSION  
**FROM:** MIKE NISPEROS, JR., CHIEF TRIAL COUNSEL  
**SUBJECT:** Rule 2-200

**Rule 2-200. Financial Arrangements Among Lawyers**

OCTC's recommends clarifying this rule so there is no doubt it applies to members of different firms representing the same client, and not just in pure referral fee situations.

Revise the rule as follows:

(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~~ in the same law firm as the member unless:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

~~(1)~~ (2) 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)~~ (3) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unreasonable as that term is defined in rule 4-200.

DISCUSSION

(A) All the attorneys or law firms involved in the representation of the client have the obligation to ensure that all the conditions of rule 2-200 are performed. It will be no excuse to claim that another lawyer was suppose to inform the client and obtain the client's consent.

**OCTC COMMENTS:**

OCTC recommends that this rule be changed to make it clear that it applies to attorneys from different firms representing the same client. In 2001, two appellate courts came to different interpretations of this rule. In *Sims v. Charness* (2001) 86 Cal. App.4th 884 the court of appeals refused to apply this rule even though the attorneys were in separate law firms. The court concluded that they were associates. However, in *Chambers v. Kay*

(2001) 88 Cal. App.4th 903, the court rejected the Sims interpretation of rule 2-200 and held that even if Sims was correct the facts of their case establish they were not associates. The California Supreme Court recently granted certiorari and will hear the Chambers case.<sup>1</sup> OCTC believes that the Chambers interpretation is correct. A n Oregon court interpreting California's rule came to the same conclusion as Chambers. (See *Frost v. Lotspeich* (2001) 2001 Ore. App. LEXIS 974.) The ABA uses the term "not in the same firm" which leaves no doubt that the rule applies whenever attorneys from different firms share legal fees. (See proposed Model Rule 1.5(e).) For clarity, OCTC recommends that the Commission adopt this terminology.

OCTC also suggests that California adopt the requirement that the division of the fees be either in proportion to the services performed or each lawyer assumes joint responsibility. This would place California in line with the ABA's proposed rules. (See proposed Model Rule 1.5(e).)

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<sup>1</sup>Chamber v. Kay , SO 98007, 2001 WL 826073.

**DATE:** March 25, 2004  
**TO:** MEMBERS OF THE COMMISSION  
**FROM:** ETHICS HOTLINE STAFF  
**SUBJECT:** RULE 2-200

### **Rule 2-200. Financial Arrangements Among Lawyers**

1. **Proposed Amendment:** Clarify at what point does the rule apply, whether at the outset of employment, in the contract, at the moment another attorney is brought in, or up to the moment the fee is being disbursed.

#### **Question(s) to the Hotline that this proposed amendment would address:**

May an attorney, consistent with Rule 2-200, obtain client consent to a fee split at the time of disbursement of the client's recovery?

2. **Proposed Amendment:** Add text: "A member shall not divide a fee for legal services with another law firm or with a lawyer who is not a partner of, associate of, or shareholder with the member or who is not of counsel to the member unless:"

An alternative is to specify in the discussion that fee sharing with an "of counsel" lawyer requires the client's written client consent.

**Reason:** Clarify the law: A firm that lists a lawyer as "of counsel" on its stationery or otherwise "is making an affirmative representation to its clients that the services of [this lawyer] are available to clients of the firm." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153, quoting Bar Assn. of San Francisco Formal Opn. No. 1985-1.) An "of counsel" lawyer is close enough to a firm for an imputation of disqualification. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc., supra*, 20 Cal.4th at pp. 1153-1156.) The "of counsel" relationship appears clear and close enough for fee-sharing without special written client consent. 2-200(A).

#### **Question(s) to the Hotline that this proposed amendment would address:**

May an attorney split a fee with an "of counsel" attorney without the client's consent?

3. **Proposed Amendment:** In the discussion, add text recognizing whatever action the California Supreme Court takes in *Chambers v. Kay* (no longer citeable as precedent, previously at 88 Cal.App.4th 903). Also consider *Margolin v. Shemaria* (2000) 85 Cal.App.4th 891.

**Question(s) to the Hotline that this proposed amendment would address:**

If an outside attorney is consulted on a client's case and his services are billed directly to the client, must rule 2-200 be complied with or may his services be considered a cost?

Must both, or all, attorneys doing a fee split comply with rule 2-200, or, just the attorney who has the relationship with the client?