

# Proposed Rule 1.5.1 [RPC 2-200]

## “Financial Arrangements Among Lawyers”

(Draft #9, 10/13/09)

**Summary:** Proposed Rule 1.5.1 governs the division of fees among lawyers. Unlike Model Rule 1.5(e), which permits lawyers to divide fees only in proportion to the work each lawyer does or if the referring lawyer assumes responsibility for the matter, the California Rule, like the rules in many other states (see State Rule(s) Variations, below), permits a referring lawyer to divide a fee without providing services or assuming responsibility, so long as the lawyer complies with the Rule’s requirements.

### Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input checked="" type="checkbox"/> ABA Model Rule substantially rejected	<input checked="" type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

- Existing California Law

Rule

RPC 2-200

Statute

Bus. & Prof. Code §§ 6147-6149, 6200-6206

Case law

*Chambers v. Kay; Mink v. Maccabee; Moran v. Harris*

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

AZ, AR, DE, D.C., FL, GA, IL, MI, NH, NJ, NY, NC, OH, OR, PA, RI, SC, VA, WI

- Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 9  
Opposed Rule as Recommended for Adoption 4  
Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart  Yes  No

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

The proposed Rule will change prerequisites for a valid fee sharing agreement.

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.5.1\* Financial Arrangements Among Lawyers

October 2009

(Draft rule revised following consideration of public comment.)

### *INTRODUCTION:*

Proposed Rule 1.5.1 amends current California rule 2-200 and continues the policy that allows for payment of referral fees and for the division of fees between lawyers who are not in the same law firm. This subject is covered in ABA Model Rule 1.5(e), which the Commission decided not to adopt.

The key difference between ABA Model Rule 1.5(e) and rule 2-200 is that the ABA Rule does not permit “pure” referral fees while the California rule does. A “pure” referral fee is one in which the referring lawyer does not continue to represent the client in the matter being referred. The Model Rule requires that both lawyers represent the client in the matter and that the division occur either in proportion to their work on the matter or on the basis that both are responsible for the client’s matter. Current rule 2-200 allows for a referral fee where the referring lawyer is not involved in the client’s representation. The Commission concluded that the current rule should be retained with revisions.

The Restatement (Third) of the Law of Lawyering § 47, cmt. *b*, explains the rationale for the ABA Model Rule approach as follows:

“The traditional prohibition of fee-splitting among lawyers is justified primarily as preventing one lawyer from recommending another to a client on the basis of the referral fee that the recommended lawyer will pay, rather than that lawyer's qualifications. The prohibition has also been defended as preventing overcharging that may otherwise result when a client pays two lawyers and only one performs services. Beyond that, the prohibition reflects a general hostility to commercial methods of obtaining clients.

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\* Proposed Rule, Draft 9 (10/13/09).

*INTRODUCTION (Continued):*

Those grounds do not warrant a complete ban on fee-splitting between lawyers. It is often desirable for one lawyer to refer a client to another, either because the services of two are appropriate or because the second lawyer is more qualified for the work in question. Allowing the referring lawyer to receive reasonable compensation encourages such desirable referrals. Lawyers are more able than other referral sources to identify other lawyers who will best serve their client. Even if a referring lawyer is compensated for the referral, that lawyer has several reasons to refer the client to a good lawyer rather than a bad one offering more pay. The referring lawyer will wish to satisfy the client, will to an extent remain responsible for the work of the second lawyer (see Subsection (1) & Comment c hereto), and, because fee-splitting arrangements most commonly occur in representations in which only a contingent fee is charged, will usually receive no fee at all unless the second lawyer helps the client to prevail. The reasonable-fee requirement of Subsection (3), moreover, reduces the likelihood that fee-splitting will lead to client overcharging. The balance between the dangers and advantages of fee-splitting is sufficiently close that informed clients should be able to agree to it, provided the safeguards specified in this Section are followed.”

California has taken an approach consistent with the Restatement, which recognizes that the policy allowing for referral fees may best serve client interests by not requiring the referring lawyer’s continuing involvement in the client’s matter. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, the court held that the payment of referral fees is not contrary to public policy. In so doing, the court stated, “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.)

No case since *Moran* has questioned the policy of permitting referral fees. The Commission did not receive public comment advocating that referral fees should not be permitted.

*INTRODUCTION (Continued):*

Because the Commission concluded that the payment of “pure” referral fees should continue, it was necessary to deviate from the Model Rule language. In addition, proposed Rule 1.5.1 incorporates a number of client protective provisions not found in the Model Rule.

Proposed Rule 1.5.1 is also a departure from current California rule 2-200. The proposed Rule will require that the agreement to divide a fee be in writing and that the client consent to the division after full disclosure at the time the lawyers enter into the agreement to divide the fee. These changes were made because an underlying reason for the rule is to assure that the client's representation is not adversely affected as a result of an agreement to divide a fee. Under the current rule, disclosure and client consent are not required until the fee is to be divided. The Commission concluded that deferring disclosure and client consent to the time the fee is divided denies the client a meaningful opportunity to consider the concerns the rule is intended address.

*Minority.* A minority of the Commission disagrees with the majority. The minority concludes that the amount of the fee to be divided is an important consideration in the client's decision to consent to a division of a fee. In the minority's view the client's consent should be obtained prior to the division of the fee when the amount of the fee that is being divided is known, as the current rule provides.

*A Note on the Rule Number.* The Commission has also departed from the Model Rule by making this Rule on fee division a separate rule and giving it the number “1.5.1”. Because this Rule is a substantial departure from the Model Rule, the fact that the Commission is recommending several revisions to current rule 2-200 to impose more obligations on lawyers and enhance client protection, the fact that this Rule is a free-standing rule in the current California Rules of Professional Conduct, and the large amount of litigation this Rule has traditionally engendered, the Commission determined that this Rule should remain free-standing, rather than be part of a rule on legal fees as is the case of the Model Rule. Having a separate rule will help ensure that lawyers have notice and comply with the rule's provisions intended to enhance client protection.

Paragraph (B) of current rule 2-200: The Commission has moved the concept that is contained in current rule 2-200(B) to proposed Rule 7.2(b) to conform to the logic of the Model Rule organization.

<p align="center"><u>ABA Model Rule</u> Rule 1.5(e) Fees</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5.1 Financial Arrangements Among Lawyer</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(e) A division of a fee between lawyers who are not in the same firm may be made only if:</p>	<p><del>(e)</del> <del>A division of a fee between lawyers</del> <u>Lawyers</u> who are not in the same <u>law</u> firm <del>may be made only</del> <u>shall not divide a fee for legal services unless:</u></p>	<p>Proposed paragraph (a) is a variation on Model Rule 1.5(e). The Model Rule states that a division of fees between lawyers who are not in the same law firm "<u>may be made</u> only if" the lawyer complies with the subparts. The proposed rule states that lawyers who are not in the same law firm "<u>shall not</u> divide a fee for legal services" unless the lawyers comply with the subparts. Substantively, the difference reflects a policy to permit, but not encourage referral fees and other fee divisions. See discussion of <i>Moran v. Harris</i> (1982) 131 Cal.App.3d 913, in the Introduction, paragraph 4. Stylistically, proposed paragraph (a) is in the active voice, the preferred style for California Rules of Court.</p> <p>In addition, the draft rule refers to "a fee for legal services," which also is in current Rule 2-200. The Model Rule refers to a "division of a fee between lawyers" without specifying whether the fee is one for legal services. The Rule is intended to address issues that could affect legal representation of clients as a result of a division of fees obtained from the representation. As a result, the Commission believes that the Rule should be directed to fees for legal services rather than fees that are obtained in performing non-legal services. In light of the fact that the phrase "fee for legal services" is in the current California rule, deleting that phrase from the proposed Rule could be misinterpreted as an intent to broaden the scope of the Rule. Given the considerable litigation that has occurred under the current rule, the Commission concluded that the reference in Rule 2-200(a) should not be changed.</p>

\* Proposed Rule 1.8.1, Draft 9 (10/13/09). Redline/strikeout showing changes to the ABA Model Rule  
RRC\_-\_2-200\_[1-5-1]\_-\_Compare\_-\_Rule\_&\_Comment\_Explanation\_-\_DFT5.1\_(10-18-09)KEM-JS-HBS-LM.doc

<p align="center"><u>ABA Model Rule</u> Rule 1.5(e) Fees</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5.1 Financial Arrangements Among Lawyer</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;</p>	<p><del>(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;</del> <u>(1) The lawyers enter into a written agreement to divide the fee;</u></p>	<p>Proposed paragraph (a)(1) is new. It differs from paragraph (e)(1) of the Model Rule, which restricts fee divisions to lawyers who work on a client's matter or assume joint responsibility for it, and so precludes referral fees and other types of fee division arrangements.</p> <p>Proposed paragraph (a)(1) adds a requirement that the lawyers dividing a fee enter into a written agreement for the division. The requirement was added to aid in the enforcement of the rule. The overall concept in the proposed rule is that the client consent to the division at the time the lawyers agree to divide the fee. Requiring the lawyers to enter into an agreement sets the point at which consent is obtained. Requiring the agreement to be in writing makes the existence of the agreement verifiable in disciplinary proceedings and assures that compliance will occur when the agreement is made.</p>
<p>(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and</p>	<p><del>(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and</del> <u>(2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and</u></p>	<p>Proposed paragraph (a)(2) provides better client protection than Model Rule 1.5(e) by requiring full written disclosure and setting out the specific matters that must be disclosed to the client. The Model Rule states that the client must merely "agree to the arrangement, including the share each lawyer receives." Under the Model Rule, while the client's agreement must be in writing, the disclosure is not required to be in writing. Proposed paragraph (a)(2) requires not only client consent in writing, but also full disclosure in writing that a division will be made, the identity of the lawyers who are parties to the agreement and the terms of the division.</p> <p>Paragraph (a)(2) also substantially changes the requirements in current Rule 2-200 with respect to the timing of client consent. A division of fees raises concerns that should be disclosed to the client at the time the lawyers entered into the agreement to divide the fee. The concerns may include (1) whether the client is actually retaining a</p>

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		<p>lawyer appropriate for the client's matter or whether the lawyer's involvement is based only on the agreement to divide the fees, (2) whether the lawyer dividing the fee will devote sufficient time to the client's matter in light of the fact that the lawyer is receiving a reduced fee, and (3) whether the client would prefer a different arrangement.</p> <p>Neither the Model Rule nor the current California rule mandates that the client be informed at the time the lawyers enter into the agreement to divide the fee. See <i>Mink v. Maccabee</i> (2004) 121 Cal.App.4th 835, 838 (the rule's requirement that the client's consent be obtained before the fee division "cannot reasonably be read to require the client's written consent prior to the lawyer's entering into a fee-splitting arrangement, or prior to the commencement of work, or at any time other than prior to the division of fees.") Both require a client's agreement to occur before the fee is divided, which could occur at the end of the case.</p> <p>The Commission concluded that allowing client consent to occur prior to the division and after the lawyers have agreed to divide the fee would not allow the client to assess the issues the Rule is intended address. If the agreement is entered into at the outset of the engagement and the division occurs after the matter has concluded, the client would have no meaningful opportunity to address any of the foregoing concerns. The arrangement could have an adverse effect on the lawyer-client relationship and the client would have no opportunity to avoid those consequences by refusing to consent to the arrangement. For all of these reasons, the Commission concluded that the time for client consent needed to be advanced to the time the lawyers enter into the agreement to divide the fee.</p> <p>A minority of the Commission dissented from the Commission's decision to revise the timing of the disclosure and consent requirement. In their opinion, the client will have a better understanding of the consequences of the agreement to divide fees when the fee is about to be divided than at the beginning of the arrangement between the lawyers, because at the time the fee will be</p>

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		<p>divided, the amount of fees to be divided will be known instead of speculative. In the minority's view, under existing law, which allows for consent to occur prior to the division, the client can address the foregoing concerns by refusing the consent to the division and is in a better position to decide whether to consent to the division when the client knows the amount of the fee to be divided. In the minority's view, under existing law, which allows for consent to occur prior to the division, the client can address the foregoing concerns by refusing the consent to the division and is in a better position to decide whether to consent to the division when the client knows the amount of the fee to be divided.</p> <p>Paragraph (a)(2) also revises current Rule 2-200 by adding requirements for the disclosure to the client. Rule 2-200(A)(1) currently requires disclosure that a division will be made and the terms of the division. Paragraph (a)(2) adds a requirement that the identity of the lawyers who are parties to the division be included in the disclosure. This element is derived from concepts in the Model Rule.</p>
<p>(3) the total fee is reasonable.</p>	<p>(3) <del>the</del>The total fee <u>charged by all lawyers</u> is <del>reasonable</del><u>not increased solely by reason of the agreement to divide fees.</u></p>	<p>Proposed paragraph (a)(3) deviates from Model Rule paragraph (e)(3) in order to afford greater client protection. The Model Rule provides that the total fee must be reasonable. Under the Model Rule, clients can end up paying higher fees as a result of the division of fees, so long as the total fee is reasonable. Proposed paragraph (a)(3) prevents that result from occurring, so that the division of fees does not result in a higher cost to the client.</p> <p>The question of whether a lawyer may charge an unreasonable fee or an illegal and unconscionable fee is addressed in proposed Rule 1.5. It is unnecessary to repeat the limitation in this Rule. Proposed Comment [7] to this Rule informs lawyers that proposed Rule 1.5 also applies to the fee to be divided.</p>

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<p><b>Division of Fee</b></p> <p>[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.</p>	<p><del><b>Division of Fee</b></del></p> <p><del>[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.</del></p>	<p>Model Rule Comment [7] defines a division of a fee as a single billing covering the fee of two or more lawyers who are not in the same firm. The Model Rule Comment is directed to the narrow focus of the Model Rule. The Comment notes that the Model Rule typically applies in contingency fee cases where a referring lawyer brings in a specialist, but remains involved in the case.</p> <p>The Commission elected not to retain this Comment for two reasons. First, the Comment reflects the limited focus of the Model Rule and is inconsistent with the proposed Rule. Second, the Comment presents a limited definition of a fee division (a single billing covering the fees of two or more lawyers not in the same firm). It does not cover situations where one lawyer bills the client, but divides the fee the client pays with another lawyer. The California Supreme Court recognized that such an arrangement would be a division of a fee in <i>Chambers v. Kay</i> (2002) 29 Cal.4th 142 (adopting a test stated in State Bar Formal Opinion 1994-138). The Commission believes that the division of a fee in this manner presents the same need for client protection in the form of full disclosure and consent as the form of division referenced in the Model Rule Comment.</p> <p>Based on the Model Rule Comment, it might be possible for one lawyer to bill a client and divide the fee the client pays with another lawyer without having to obtain the client's consent. The Commission concluded that a broader definition provides greater client protection, reflects the manner in which fee divisions occur in practice and closes a loophole in the Model Rule that would allow a lawyer to avoid the disclosure requirements in the Rule.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.5(e) Fees</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.5.1 Financial Arrangements Among Lawyer</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.</p>	<p><del>[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.</del></p>	<p>Model Rule Comment [8] states that the rule does not apply to a division of fees for work done when the lawyers were associated in the same law firm. The Comment is tied to the narrow definition of a division of a fee in Comment [7], which is tied to a single billing of two lawyer's fees. Although poorly worded, Comment [8] attempts to state that if the lawyers were in the same law firm at the time the fees were billed, the Rule does not prohibit the payment of the divided fee if, at the time the fee is paid, the lawyers are no longer in the same law firm.</p> <p>The Commission concluded that the Comment is inconsistent with the proposed Rule in that it is based on a narrower, less client-protective concept of what constitutes a division of a fee. Furthermore, as written the Comment could exempt situations that should be covered by the rule. For example, if two lawyers in the same law firm had an agreement to divide a contingency fee in a case, but shortly after the case commences, one of the lawyers leaves the firm, the client would be in the same position as the client would be in if the lawyers had never been in the same law firm. Yet, if the Comment is applied to the proposed Rule, the former situation would be exempt from the proposed Rule.</p>
	<p><a href="#">[1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see <i>Chambers v. Kay</i> (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].</a></p>	<p>Proposed Comment [1] replaces the first sentence in Model Rule Comment [7] with a definition of a division of a fee that the Supreme Court endorsed in <i>Chambers v. Kay</i> (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].</p>

<p align="center"><b><u>ABA Model Rule</u></b> <b>Rule 1.5(e) Fees</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 1.5.1 Financial Arrangements Among Lawyer</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
	<p><a href="#">[2] Paragraph (a) applies to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.</a></p>	<p>Proposed Comment [2] replaces the balance of Model Rule Comment [7]. It explains the situations in which the proposed Rule applies.</p>
	<p><a href="#">[3] Paragraph (a) requires both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.</a></p>	<p>Proposed Comment [3] was added in response to comments from the Office of Chief Trial Counsel ("OCTC"). OCTC requested that the Rule make clear that each lawyer who is a party to the division has the obligation to assure the client is fully informed and consents to the arrangement. OCTC was concerned that each lawyer might attempt to avoid the obligations under the rule by claiming that the other was supposed to inform the client and obtain the client's consent. Proposed Comment [3] states that the proposed Rule requires both the lawyer dividing the fee and the lawyer receiving the fee to comply with the proposed Rule's requirements.</p>

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	<p><a href="#">[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.</a></p>	<p>Proposed Comment [4] explains the rationale for requiring disclosure and client consent at the time the lawyers enter into the agreement to divide the fee. It is intended to inform lawyers about the considerations to be addressed when fully informing the client about the agreement to divide the fee.</p>
	<p><a href="#">[5] This Rule does not apply to a division of fees pursuant to court order.</a></p>	<p>Proposed Comment [5] excludes divisions of fees pursuant to court order. The Commission concluded that the courts are in a position to protect client interests when issuing an order to divide fees. Lawyers who divide fees pursuant to the direction of a court should not be subject to discipline for complying with the order.</p>

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	<p><a href="#">[6] This Rule does not subject a lawyer to discipline unless a lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).</a></p>	<p>Proposed Comment [6] addresses an issue that arose about what act constitutes the grounds for discipline. As written the Model Rule, the current California rule and the proposed Rule all state the prohibition as being the division of the fee without complying with the rules' requirements. OCTC submitted a comment stating that OCTC considers the agreement to divide the fee to be the violation rather than the division. OCTC requested the Commission clarify this point in the proposed Rule.</p> <p>The Commission unanimously disagreed with OCTC's construction, but agreed that the proposed Rule should make clear when a lawyer is subject to discipline. Comment [6] provides that clarification.</p> <p>Numerous court decisions have unanimously held that an agreement to divide a fee made in violation of existing Rule 2-200 is void. (See <i>Chambers v. Kay</i> (2002) 29 Cal.4th 142; <i>Margolin v. Shemaria</i> (2000) 85 Cal.App.4th 891; <i>Scolinos v. Kolts</i> (1995) 37 Cal.App.4th 635.) Under the proposed Rule, that result would extend to any agreement not in writing, or about which a client has not been informed, or to which the client has not consented at the time the agreement is made. The Commission concluded that it would not be appropriate to subject lawyers to discipline for entering into a void agreement that does not result in the division of a fee.</p>
	<p><a href="#">[7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.</a></p>	<p>Proposed Comment [7] addresses the concept contained in Model Rule 1.5(e)(3) by making clear that the fee to be divided must comply with the restrictions on illegal and unconscionable fees in proposed Rule 1.5.</p>

**Rule 1.5.1 Financial Arrangements Among Lawyers**  
(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

(a) Lawyers who are not in the same law firm shall not divide a fee for legal services unless:

- (1) The lawyers enter into a written agreement to divide the fee;
- (2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and
- (3) The total fee charged by all lawyers is not increased solely by reason of the ~~provision for division of fees.~~

~~(b) Except as permitted in paragraph (a) of this Rule or Rule [1.17], a lawyer shall not compensate, give, or promise anything of value to another lawyer for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client. A lawyer's offering of or giving a gift or gratuity to another lawyer who has made a recommendation resulting in the employment of the lawyer or the lawyer'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~~ to divide fees.

**COMMENT**

- [1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2 536]; ~~State Bar Formal Opn. 1994-138.~~
- [2] Paragraph (a) ~~is intended to apply~~ applies to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.
- [3] Paragraph (a) ~~is intended to require~~ requires both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.
- [4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into

the agreement to divide the fee in order to address matters that may be of concern to the client; and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

- [5] This Rule ~~is~~does not ~~intended to~~ apply to a division of fees pursuant to court order.
- [6] This Rule ~~is~~does not ~~intended to~~ subject a lawyer to discipline unless atthe lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).
- [7] Under Rule [1.5], a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule ~~{1.5}~~ a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.
- ~~[8] — This Rule differs from ABA Model Rule 1.5(e) in that it does not require that the division be in proportion to the services performed by each lawyer, that each lawyer assume joint responsibility for the representation or that the client consent to the participation of the lawyers involved as required in Model Rule 1.5(e)(1) & (2).~~

## Rule ~~2-200~~1.5.1: Financial Arrangements Among Lawyers

(Comparison of the Current Proposed Rule to Current California Rule)

~~(a)(A)~~ ~~A member~~ Lawyers who are not in the same law firm 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 lawyers enter into a written agreement to divide the fee;

~~(1)(2)~~ The client has consented in writing thereto, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure has been made in writing to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of such the division; and

~~(2)(3)~~ The total fee charged by all lawyers is not increased solely by reason of the provision for division of agreement to divide 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.~~

### COMMENT

- [1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2 536].
- [2] Paragraph (a) applies to referral fees in which a lawyer, who does not work on the client's matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.
- [3] Paragraph (a) requires both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.
- [4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client's written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

- [5] This Rule does not apply to a division of fees pursuant to court order.
- [6] This Rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).
- [7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

**Rule 1.5.1: Financial Arrangements Among Lawyers**  
**(Commission’s Proposed Rule – Clean Version)**

(a) Lawyers who are not in the same law firm shall not divide a fee for legal services unless:

- (1) The lawyers enter into a written agreement to divide the fee;
- (2) The client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client that a division of fees will be made, the identity of the lawyers who are parties to the division, and the terms of the division; and
- (3) The total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.

**COMMENT**

- [1] A division of a fee under paragraph (a) occurs when a lawyer pays to a lawyer who is not in the same law firm a portion of specific fees paid by a client. For a discussion of criteria for determining whether a division of a fee under paragraph (a) has occurred, see *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].
- [2] Paragraph (a) applies to referral fees in which a lawyer, who does not work on the client’s matter, receives a portion of any fee paid to another lawyer who is not in the same law firm. Paragraph (a) is also intended to apply to a division of a fee between lawyers who are not in the same law firm but who are working jointly for a client.

[3] Paragraph (a) requires both the lawyer dividing the fee and the lawyer receiving the division to comply with the requirements of the Rule.

[4] Paragraph (a)(2) requires lawyers to make full disclosure to the client and to obtain the client’s written consent when the lawyers enter into the agreement to divide the fee in order to address matters that may be of concern to the client and that may not be addressed adequately later in the engagement. These concerns may include 1) whether the client is actually retaining a lawyer appropriate for the client’s matter or whether the lawyer’s involvement is based on the lawyer’s agreement to divide the fee; 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee; and 3) whether the client may prefer to negotiate a more favorable arrangement directly with the lawyer dividing the fee.

[5] This Rule does not apply to a division of fees pursuant to court order.

[6] This Rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee to a lawyer who is not in the same law firm without having complied with the requirements in paragraph (a).

[7] Under Rule 1.5, a lawyer cannot enter into an agreement for, charge, or collect an illegal or unconscionable fee. Under Rule 1.5 a lawyer cannot divide or enter into an agreement to divide an illegal or unconscionable fee.

## Rule 1.5.1: Financial Arrangements Among Lawyer

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew Perlman. The text relevant to proposed Rule 1.5.1 is highlighted)

**Arizona:** Rule 1.5(b) requires lawyers to enter written fee agreements “before or within a reasonable time after commencing the representation.” Arizona adds Rule 1.5(d)(3), which provides that when a lawyer denominates a fee as “earned upon receipt” or “nonrefundable,” the client must be informed “in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to paragraph (a).” Finally, Comment 6 says that Rule 1.5(d) allows a contingent fee “for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns” as other domestic relations matters.

**Arkansas:** Rule 1.5(d)(1) adds that in a domestic relations matter, “after a final order or decree is entered a lawyer may enter into a contingent fee contract for collection of payments which are due pursuant to such decree or order.”

**California:** Rule 4-200 forbids lawyers to “enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Unconscionability is determined based on facts “existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.” The rule contains 11 factors to weigh in determining

conscionability, many of them derived from the Model Rules. In addition, see Business & Professions Code §§ 6147-6149 (governing contingency fee contracts and other fee arrangements), and Business & Professions Code §§ 6200-6206 (establishing a system and procedures for arbitrating fee disputes).

**Colorado:** Rule 1.5(b) requires a lawyer who has not regularly represented a client to communicate the basis or rate of the fee and expenses “in writing.” Rule 1.5(b) also provides: “Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a),” which imposes stringent requirements on business transactions with clients. Colorado Rule 1.5(c) also requires more elaborate disclosures in contingency fee cases than ABA Model Rule 1.5.

**Delaware:** Rule 1.5(e) does not require that the client know how lawyers in different firms are dividing a fee. Delaware adds Rule 1.5(f), which allows the lawyer to require the client to pay fees in advance, provided that the lawyer gives the client “a written statement” explaining, among other things, that “the fee is refundable if not earned.”

**District of Columbia:** D.C. Rule 1.5(b) requires a written fee agreement where the lawyer has not “regularly represented” the client. Rule 1.5(d) forbids contingent fees in

criminal cases but not in matrimonial cases. Rule 1.5(e) does not require that the client be told how much each lawyer is to receive when fees are divided between lawyers not in the same firm, but the client must be told “the effect of the association of lawyers outside the firm on the fee to be charged.”

**Florida:** Rule 4-1.5(a) prohibits any fee “generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar” or that is “clearly excessive.” A clearly excessive fee includes (1) a fee that exceeds a reasonable fee by so much that it constitutes “clear overreaching or an unconscionable demand,” or (2) a fee sought or secured “by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.” Florida also caps the percentage amount of any contingent fee.

Regarding fee sharing between lawyers in different firms, Rule 4-1.5(f)(2) requires that each participating lawyer “shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved.” Florida also tightly controls the terms on which lawyers in different firms may share fees. Rule 4-1.5(f)(4)(D) provides that “the lawyer assuming primary responsibility for the legal services” must receive “a minimum of 75% of the total fee,” and “the lawyer assuming secondary responsibility” can receive “a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.” But if two or more lawyers expect to “accept substantially equal active participation in the providing of legal services,” then they may seek court authorization to divide the fee however they propose “based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed.”

Florida Rule 4-1.5(g) provides that if lawyers in different firms share fees on a basis not in proportion to the amount of work done, then each lawyer must not only agree to assume “joint legal responsibility for the representation” but must also agree “to be available for consultation with the client.”

The Florida Supreme Court may also order any lawyer found guilty of violating the fee rules “to forfeit the fee or any part thereof,” either by returning the excessive part of any fee to the client or by forfeiting all or part of an otherwise improper fee to the Florida Bar Clients' Security Fund. See Florida Supreme Court Rule 3-5.1(h).

Finally, Rule 4-1.5(i) provides that, if a retainer agreement includes a mandatory arbitration clause, the agreement must include a verbatim, bolded recitation of the notice that appears at the end of Rule 1.5(i).

**Georgia** adds to Rule 1.5(c) that a lawyer must include in the written statement at the conclusion of a contingent fee matter the amount of the attorney's fee and “(D) if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.” Georgia also adds to Rule 1.5(e)(2) that the client must be “advised of the share that each lawyer is to receive” when lawyers in different firms share a fee.

**Illinois** provides that “the prohibition set forth in Rule 1.5(d)(1) shall not extend to representation in matters subsequent to final judgments in such cases.” Illinois also adds the following subparagraphs:

(e) Notwithstanding Rule 1.5(c), a contingent fee agreement regarding the collection of commercial accounts or of insurance company subrogation claims may be made in accordance with the customs and practice in the locality for such legal services....

(g) A division of fees [between lawyers not in the same firm] shall be made in proportion to the services performed and responsibility assumed by each lawyer, except where the primary service performed by one lawyer is the referral of the client to another lawyer and

(1) the receiving lawyer discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit, and

(2) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer....

(i) For purposes of Rule 1.5 “economic benefit” shall include:

(1) the amount of participation in the fee received with regard to the particular matter;

(2) any other form of remuneration passing to the referring lawyer from the receiving lawyer, whether or not with regard to the particular matter; and

(3) an established practice of referrals to and from or from and to the receiving lawyer and the referring lawyer.

(j) Notwithstanding Rule 1.5(f), a payment may be made to a lawyer formerly in the firm, pursuant to a separation or retirement agreement.

**Massachusetts:** Rule 1.5(c) does not require a contingent fee to be in writing if it concerns “the collection of commercial accounts” or “insurance company subrogation claims,” but all other contingent fee agreements must be in writing and must

contain greater detail than ABA Model Rule 1.5(c) requires. Rule 1.5(e) permits a lawyer to pay a fee to a referring lawyer even when the referring lawyer does not perform any services or take joint responsibility for the matter. Although the client must consent to such a referral fee, the client's consent need not be in writing, and a comment indicates that the lawyer does not have to disclose the size of the referral fee unless the client asks.

**Michigan:** Rule 1.5(d) forbids contingent fees in “a domestic relations matter” without qualification. In personal injury and wrongful death claims, Michigan Court Rule 8.121 sets a maximum contingent fee of “one-third of the amount recovered” and provides that receiving, retaining, or sharing a larger contingent fee “shall be deemed to be the charging of a ‘clearly excessive fee’ in violation of” Rule 1.5(a). Michigan omits ABA Model Rule 1.5(e)(1).

**New Hampshire:** Rule 1.5(e) permits fee sharing between lawyers in different firms if the division is made “either: (a) in reasonable proportion to the services performed or responsibility or risks assumed by each, or (b) based on an agreement with the referring lawyer,” provided that in either case the lawyers obtain the client's signed written agreement to the division of fees and the total fee charged by all lawyers “is not increased by the division of fees and is reasonable.”

**New Jersey:** Rule 1.5(b) requires a fee agreement to be in writing if the lawyer has not regularly represented the client. In addition, New Jersey has adopted various court rules that tightly control contingent fees, especially in tort cases.

**New York:** DR 2-106 forbids an “illegal or excessive fee” and lists eight factors to determine whether a fee satisfies the rule. New York provides heightened protection for clients in domestic relations matters, including a prohibition on nonrefundable fees.

In civil matters, New York lawyers must resolve fee disputes “by arbitration at the election of the client” pursuant to 22 N.Y.C.R.R. Part 137, which requires New York attorneys to offer fee arbitration to clients in most civil matters, and to submit to fee arbitration if a client in a civil matter requests it. Under §137.1(b), the fee arbitration program does not apply to (1) criminal matters; (2) fee disputes involving “less than \$1,000 or more than \$50,000” (unless an arbitral body and the parties all consent); (3) “claims involving substantial legal questions, including professional malpractice or misconduct”; (4) claims for relief other than adjusting a legal fee; (5) disputes over a legal fee set by a court; (6) disputes where no legal services have been rendered for more than two years; (7) disputes with out-of-state attorneys who either have no office in New York or did not render any material portion of the services in New York; and (8) disputes where the person requesting arbitration is neither the client nor the client's legal representative.

Moreover, 22 N.Y.C.R.R. Part 1215 provides as follows:

*Part 1215 Written Letter of Engagement*

§1215.21 Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term “client” shall mean the entity that engages the attorney. Where there is a

significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and,

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

§1215.2 Exceptions

This section shall not apply to

(a) representation of a client where the fee to be charged is expected to be less than \$3000;

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

**North Carolina:** Rule 1.5(a) forbids a “clearly excessive fee” but otherwise substantially tracks ABA Model Rule 1.5(a). North Carolina adds Rule 1.5(f), which provides as follows:

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bars program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request.

**Ohio:** Rule 1.5(b) requires fee agreements to be in writing unless the lawyer has “regularly represented” the client and is charging on the same basis or the fee is \$500 or less. Any change in the basis of a fee previously communicated must be “promptly communicated to the client in writing.” Rule 1.5(e), in permitting division of fees, does not require that the client be informed of the amount each lawyer is receiving.

**Oregon:** Among other variations, Rule 1.5(d) permits a division of fees between lawyers in different firms if “(1) the client gives informed consent to the fact that there will be a division of fees, and (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.”

**Pennsylvania:** Rule 1.5(a) prohibits an “illegal or clearly excessive fee” (rather than an “unreasonable” one) and makes

no reference to expenses. Rule 1.5(b) requires a fee agreement to be “in writing” if a lawyer has not “regularly” represented a client. Pennsylvania Rule 1.5(e) requires only that “(1) the client is advised of and does not object to the participation of an the lawyers involved, and (2) the total fee of the lawyers is not illegal or clearly excessive....”

**Rhode Island:** Rule 1.5(b) provides that if a lawyer has not regularly represented a client, the basis or rate of the fee “shall be communicated to the client in writing.” The same rule requires lawyers to send quarterly bills unless the client agrees to a different billing schedule or the fee is fixed or contingent.

**South Carolina:** Rule 1.5(d)(1) expressly permits a lawyer to charge a contingency fee “in collection of past due alimony or child support.”

**Texas:** Rule 1.04(a) forbids “illegal” or “unconscionable” fees and lists the same considerations as in ABA Model Rule 1.5. The Texas Rules do not forbid contingent fees in family law matters but the Comment says they are “rarely justified.” Rule 1.04(f), which governs the division of fees between lawyers in different firms, generally parallels ABA Model Rule 1.5(e) but requires client consent “in writing to the terms of the arrangement prior to the time of the association or referral proposed...”

**Virginia:** Rule 1.5(b) provides in part: “The lawyer's fee shall be adequately explained to the client.” Rule 1.5(d)(1) forbids contingent fees in “a domestic relations matter, except in rare instances.” Comment 3a says that those rare instances include situations where “the parties are divorced and reconciliation is not a realistic prospect.” Rule 1.5(e) requires full disclosure to the client when lawyers are dividing a fee. The “terms of the division of the fee” must be “disclosed to the client,” the client must consent, the total fee must be reasonable, and the fee division and client consent must be

“obtained in advance of the rendering of legal services.”  
However, while a writing is said to be preferable, none is required.

**Wisconsin:** Rule 1.5(e) permits lawyers in different firms to divide a fee only if the total fee is reasonable and the lawyers satisfy several other specific requirements.

**Rule 1.5.1 Financial Arrangements Among Lawyers.  
[Sorted by Commenter]**

**TOTAL = 9**    **Agree =**  
**Disagree = 2**  
**Modify = 7**  
**NI =**

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M			Consider clarifying the requirement for client consent in writing, does this requirement contemplate "informed written consent"?	Commission did not make the requested revision. The Commission believes that COPRAC's concern is already addressed in the proposed Rule, which states what the disclosure must contain and the nature of the issues that need to be addressed with the client.
2	Feldman, Phillip	D			"Comment 7 to ABA Rule 1.5 says it more succinctly and better. Attempts to harmonize current appellate decisions based on sui generic facts/law/equity is misguided and detracts from the broad, divergent goals of professional responsibility."	Commission disagreed. The ABA Model Rule is more limited than the existing California Rule. Comment [7] corresponds to the more limited ABA Model Rule. The California Rule embraces referral fees, which the California Supreme Court has upheld in case law. The proposed Rule continues that policy. As a result, Comment [7] is not consistent with the approach in California law or policy.
3	Knapton, Gerald G.	M			<i>Mink v. Macabee</i> "provides that written consent must be obtained a bit later than the time of retention as long as the client gives written permission before the fees are actually distributed." He recommends that the consent in (a)(2) occur "at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable ( <i>but in no event later than the disbursement of the funds</i> )"	Commission disagreed and did not make the requested revision. <i>Mink v. Macabee</i> recognized that the existing rule does not require consent before the division. Furthermore, the <i>Mink</i> decision suggests that changing the standard to require client consent when the agreement to divide the fee is made would enhance the ability of a client to make a meaningful decision on whether to consent to a fee division arrangement. The proposed Rule is based on the recognition of a principle that the client should consent to the division at that time.

<sup>1</sup> A = AGREE with proposed Rule    D = DISAGREE with proposed Rule    M = AGREE ONLY IF MODIFIED    NI = NOT INDICATED

**Rule 1.5.1 Financial Arrangements Among Lawyers.  
[Sorted by Commenter]**

**TOTAL = 9**    **Agree =**  
**Disagree = 2**  
**Modify = 7**  
**NI =**

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Langford, Carol M.	M			A client's consent under this rule should be required immediately upon the signing of a fee agreement with the client, as too often clients think they have hired a specific lawyer but subsequently find that they are practically represented by another lawyer	Commission did not make the requested revision. The Commission agrees that the client consent should be obtained at the time the lawyers enter into the agreement to divide the fee. However, there can be circumstances where it may be impracticable to obtain the client's consent immediately upon the lawyers entering into an agreement to divide the fee. In such circumstances that proposed Rule requires that the lawyers obtain the client's consent as soon thereafter as reasonably practicable.
5	Orange County Bar Association	M			Because the proposed Rule provides that the client must receive full written disclosure of the fee division and consent in writing to the division, the requirement for a written fee split agreement serves no real purpose	Commission disagreed. The requirement aids in the enforcement of the rule. The overall concept in the proposed rule is that the client consent to the division at the time the lawyers agree to divide the fee. Requiring the lawyers to enter into an agreement sets the point at which consent is obtained. Requiring the agreement to be in writing makes the existence of the agreement verifiable in disciplinary proceedings and assures that compliance will occur when the agreement is made.
6	Poll, Edward	M			The policy of whether referral fees are permitted or prohibited should be stated in a clear and concise manner	Commission did not make the requested revision. The Commission does not believe that a general rule cannot be stated as the commenter proposes. There are circumstances where a division of a fee would be detrimental to the lawyer client relationship and circumstances where the division would not be detrimental to a lawyer client relationship. The proposed Rule allows for referral fees, but also requires lawyers to address the potential adverse effects on the lawyer client relationship.

**Rule 1.5.1 Financial Arrangements Among Lawyers.  
[Sorted by Commenter]**

**TOTAL = 9**    **Agree =**  
**Disagree = 2**  
**Modify = 7**  
**NI =**

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
7	San Diego County Bar Association	M			<p>Some supported the new timing requirement for client consent</p> <p>others prefer the current rule that imposes no strict timing requirement</p> <p>still others suggest that the rule be changed to require disclosure to a client in a signed retainer agreement</p>	<p>Commission did not make any revisions in response to this comment</p> <p>As the Commission explained in Comment [4], there are three client concerns associated with this rule: 1) whether the client is actually retaining the lawyer appropriate for the client's matter or whether the lawyer's involvement is based on the lawyer's agreement to divide the fee, 2) whether the lawyer dividing the fee will devote sufficient time to the matter in light of the fact that the lawyer will be receiving a reduced fee, and 3) whether the client may prefer to negotiate a more favorable arrangement. These concerns cannot be address if the client's consent is not required until the fee is divided. If the division affect's the lawyer's performance or client decides that the lawyer was not appropriate, it is too late to do anything about it. The rule was drafted to give the client the opportunity to address the issues in advance rather than after the fact.</p> <p>The proposed Rule recognizes that the agreement to divide a fee may not occur until after the client has signed a fee agreement. The Commission concluded that tying client consent to the time that the lawyers enter into the agreement affords the most client protection.</p>

**Rule 1.5.1 Financial Arrangements Among Lawyers.  
[Sorted by Commenter]**

**TOTAL = 9**    **Agree =**  
**Disagree = 2**  
**Modify = 7**  
**NI =**

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
8	San Francisco, Bar Association of (BASF)	M			Do not use a vague “as soon as practicable” standard, instead, modify the requirement to say “either at the time the lawyers enter into the agreement to divide the fee or before disbursement of the proceeds”	<p>Commission disagreed and did not make the requested revision. The reason for requiring consent at the time the lawyers enter into the agreement to divide the fee is to allow the client to address the concerns that underlie the Rule. The Commission recognized that the lawyers need to have an agreement before they can obtain the client’s consent under the Rule. As a practical matter, obtaining a client’s consent may not be contemporaneous with the agreement to divide the fee. At the same time, to fulfill the client protection policies behind the Rule, the client’s consent needs to be closer in time to the agreement than to the division.</p> <p>The “as soon thereafter as reasonably practicable” language attempts to account for the practical timing issues, while attempting to focus compliance to a time that is in proximity to the time the lawyers enter into the agreement to divide the fee. The language proposed in the public comment would allow for client consent at the end of the engagement in circumstances that would not advance the policies behind the Rule.</p>

**Rule 1.5.1 Financial Arrangements Among Lawyers.  
[Sorted by Commenter]**

**TOTAL = 9**    **Agree =**  
**Disagree = 2**  
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**NI =**

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	Traeumer, Margo A.	D			<p>Recommends that the Rule allow the lawyer who does the work to obtain the client's consent if the referring lawyer fails to do so.</p> <p>The rule appears to protect unscrupulous or greedy lawyers rather than the client.</p> <p>The Rule should allow for implied consent if the client is informed in writing but does not respond.</p>	<p>Commission disagreed and did not make the requested revision. Comment [3] already states that both lawyers who are parties to the agreement to divide the fee are required to comply with the Rule, which would include the consent requirement. Under the proposed rule, either lawyer may obtain the client's consent. Tying the written agreement requirement and timing client consent more closely to the time the lawyers enter into the agreement may reduce the problems that have arisen among lawyers. Many of the reported cases appear to result from either disputes about the terms of the agreement or a delay in obtaining client consent. For the most part, our rules have required written consent in order to avoid situations where the proof of the client's consent cannot be clearly established. There is no reason to deviate from those principles in the Rule.</p>