

## RESOLUTION 2-02-03

### DIGEST

#### Attorney Fee Sharing: Notice to Client

Amends Rules of Professional Conduct, rule 2-200, to allow attorneys to share fees, except contingency fees on a percentage basis, without written client consent.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

None known.

#### Reasons:

This resolution amends Rules of Professional Conduct, rule 2-200, to allow attorneys to share fees, except contingency fees on a percentage basis, without written client consent. This resolution should be disapproved because it will undermine respect and confidence in the legal profession and degrade a client's ability to participate in his or her own case.

The overall purpose of the Rules of Professional Conduct is to protect the public and to promote respect and confidence in the legal profession. (See Rules Prof. Conduct, rule 1-100(A).) The purpose underlying rule 2-200 is to provide clients with the ability to make an informed decision whether to accept a proposed fee division and whether to retain or discharge a particular attorney. (*Chambers v. Kay* (2002) 29 Cal.4<sup>th</sup> 142, 156-158.) Requiring the client's written consent to fee divisions among participating attorneys impresses on the client the importance of consent and the right to reject a fee division. (*Ibid.*) Rule 2-200 does not apply to contract attorneys whose payment is premised strictly on the number of hours worked and are paid by the primary attorney/law firm whether the client pays or not. (*Id.* at p. 154.)

This resolution would allow fee sharing without the client's written consent if the fees are shared on any basis other than contingency fees divided by percentage. Thus, in the majority of fee sharing situations, the primary attorney could withhold information from the client about what attorneys are working on the client's case and the secondary attorneys' fee arrangements. As a result, the client might be unable to participate in his or her case if the primary attorney blocks or alters communication between the client and the secondary attorney. The client will certainly be unable to make an informed decision regarding whether to retain or discharge the secondary attorney. It should be noted that the case cited by the proponent in response to these concerns, *Huskinson & Brown, LLP v. Wolf* (2002) 29 Cal.4<sup>th</sup> 142, has been taken up for review by the California Supreme Court.

If this resolution became law, it is unclear whether the work of a virtually unsupervised secondary attorney would be protected by the work product privilege; or whether the primary attorney's malpractice insurance would cover such secondary attorney. These issues are not addressed in the proposed amendments.

Given all these considerations, the burden of obtaining written consent is certainly outweighed by the potential harm to clients and the profession.

### SECTION/COMMITTEE REPORT

### OFFICE OF PROFESSIONAL COMPETENCE OF THE STATE BAR OF CALIFORNIA

Recommendation: **DISAPPROVE**

Reasons:

State Bar staff agrees in principle with the proponent of resolution 2-2-2003 that rule 2-200 of the Rules of Professional Conduct should be studied in light of the Supreme Court's decision in *Chambers v. Kay* (2002) 29 Cal.4th 142. However, State Bar staff disapproves this resolution because the issues addressed represent a small part of an exceedingly complex set of interrelated ethical issues which the State Bar through its Commission for the Revision of the Rules of Professional Conduct ("Rules Revision Commission") currently is addressing in comprehensive fashion.

The Rules Revision Commission is charged with conducting a cover-to-cover review of the entirety of the California rules and proposing comprehensive amendments for Board consideration. In particular, the Rules Revision Commission's charter includes the task of "considering developments in the attorney professional responsibility field since the last comprehensive revision of the California Rules occurred in 1989 and 1992." (The charter of the Rules Revision Commission is found online in the Ethics Information area of the State Bar website: [www.calbar.ca.gov](http://www.calbar.ca.gov).) The developments arising from *Chambers v. Kay* and the anticipated developments from the pending Supreme Court review of *Huskinson & Brown, LLP v. Wolf* (2002) 98 Cal.App.4th 113 (rev. granted, May 02, 2002) are in this category and fall within the purview of the Rules Revision Commission.

The work of the Rules Revision Commission involves many complex interrelated rule amendment issues, overarching policy matters, as well as technical drafting considerations that render it imprudent to consider rule 2-200 issues on a piece-meal basis. The Rules Revision Commission primarily meets in open session and interested persons are welcome at these meetings. State Bar staff encourages the proponents of resolution 2-2-2003 to attend the meetings and offer their views on rule 2-200 amendments.

This position is solely that of the State Bar's Office of Professional Competence and has not been adopted or endorsed by the State Bar's Board of Governors.

**TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Board of Governors of the State Bar of California and the California Supreme Court amend Rules of Professional Conduct, rule 2-200, to read as follows:

- 1     Rule 2-200  
2             (A) A member shall not divide a contingency fee for legal services on a percentage basis  
3 with a lawyer who is not a partner of, associate of, or shareholder with the member unless:  
4             (1) The client has consented in writing thereto after a full disclosure has been made in  
5 writing that a division of fees will be made and the terms of such division; and  
6             (2) The total fee charged by all lawyers is not increased solely by reason of the provision  
7 for division of fees and is not unconscionable as that term is defined in rule 4-200.  
8             (B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not  
9 compensate, give, or promise anything of value to any lawyer for the purpose of recommending  
10 or securing employment of the member or the member's law firm by a client, or as a reward for  
11 having made a recommendation resulting in employment of the member or the member's law firm  
12 by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a  
13 recommendation resulting in the employment of the member or the member's law firm shall not  
14 of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any  
15 promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that

16 referrals would be made or encouraged in the future.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of Northern San Diego County

#### STATEMENT OF REASONS

Existing Law: Provides that a member shall not divide a fee with another member who is not a partner, associate, or employee unless the client consents to such fee sharing arrangement in writing after full disclosure. This provision does not explicitly distinguish between hourly fees and contingent and/or percentage fees.

This Resolution: Changes the provision regarding fee sharing arrangements to clarify that the requirement for client disclosure and written consent is restricted to percentage fees payable on a contingency basis.

The Problem: Frequently attorneys who are not partners, associates, or in a formal employment arrangement will join together to perform services for a client, usually in a contingency case. The nature of these arrangements can range from a referral only, to association in as an attorney of record and performance of significant legal services in the case. A problem arises when, for whatever reason, the arrangement is not sufficiently documented. In the recent case of *Chambers v. Kay* (2002) 29 Cal.4th 142, the Supreme Court held that an attorney could not enforce a percentage fee sharing agreement in a contingency fee case in the absence of written consent from the client. Although the Court left standing the portion of the Court of Appeal Opinion that allowed the plaintiff attorney to collect a quantum meruit recovery for actual time spent, it did not specifically hold that such a quantum meruit recovery is always permissible. In *Huskinson & Brown, LLP v. Wolf* (2002) 98 Cal.App.4th 113 (review granted), the Second District Court of Appeal held, in effect, that legal fees are legal fees, such that an attorney providing legal services based on a verbal agreement would be precluded from collecting any fees at all, whether hourly or percentage. This resolution would assist in the adjustment of the rule to preclude any premium based on a contingency percentage from being collected, while leaving open the availability of a recovery on a quantum meruit basis for the time actually spent by the attorney on the successful prosecution of the case.

#### IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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#### COUNTERARGUMENT

#### BEVERLY HILLS BAR ASSOCIATION

Although the Supreme Court's opinion in *Chambers v. Kay*, (2002) 29 Cal.4th 142, violated the expectations of many California attorneys, and appears to be inconsistent with California's policy of permitting the payment of referral fees, the proposed resolution would create more problems than it solves. Simply eliminating non-contingent fee engagements from the rule creates more problems than

it solves. While clients may consent to an attorneys involvement in many ways without a specific written consent (including actively working with the attorney on the matter), eliminating even acquiescence from the rule would likely increase the public's dissatisfaction with lawyers and lead to more malpractice actions.