Rule 1.5.1 Fee Divisions Among Lawyers
(Proposed Rule Adopted by the Board on November 17, 2016)

(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 of: (i) the fact that a division of fees will be made, (ii) the identity of the lawyers or law firms* that are parties to the division, and (iii) the terms of the division; and

(3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.

(b) This rule does not apply to a division of fees pursuant to court order.

Comment

The writing* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.*

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.5.1
(Current Rule 2-200)
Fee Divisions Among Lawyers

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rule 2-200 (Financial Arrangements Among Lawyers) in accordance with the Commission Charter, including the national standard of the ABA counterpart, Model Rule 1.5(e) (concerning fee divisions among lawyers) and the Restatement of Law Governing Lawyers counterpart, Restatement § 47 (Fee Splitting Between Lawyers Not In The Same Firm). The result of the Commission's evaluation is proposed rule 1.5.1 (Fee Divisions Among Lawyers).

Rule As Issued For 90-day Public Comment

A key topic addressed by this proposed rule is the regulation of fee sharing by lawyers who are not in the same law firm, including typical referral fees. Most states follow Model Rule 1.5(e) that permits lawyers to divide a fee only to the extent that the referring lawyer is compensated for work actually done on the matter or if the referring lawyer assumes joint responsibility for the matter. The California rule is one of a minority of states that permits a "pure referral fee," i.e., California permits lawyers to be compensated for referring a matter to another lawyer without requiring the referring lawyer's continued involvement in the matter. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, the California Court of Appeal held that the payment of referral fees is not contrary to public policy. 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." (*Id*. at 921-922.) The Commission's study found that no case since *Moran* had questioned the policy of permitting pure referral fees. In fact, the ABA's Ethics 2000 Commission itself had recommended that the Model Rules permit pure referral fees, but that position was rejected by the ABA House of Delegates.

That is not to say that the proposed rule remains the same as the current rule. Rather, proposed rule 1.5.1 implements two material changes intended to increase protection for clients. First, the agreement between the lawyers to divide a fee must now be in writing and second, the client must consent to the division after full disclosure at or near the time that the lawyers enter into the agreement to divide the fee. Under current rule 2-200, there is no express requirement that the agreement between the lawyers be in writing and case law has held that client consent to the fee division need not be obtained until the fee is actually divided, which might not occur until years after the lawyers have entered into their agreement. 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. 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 to address. (See *Mink v. Maccabee* (2004) 121 Cal.App.4th 835.)

In addition, proposed rule 1.5.1 tentatively includes the provision in current rule 2-200 permitting a gift or gratuity for a client referral (rule 2-200(B)). This is tentative because the Commission's work on the lawyer advertising and solicitation rule is pending and the provision on gifts or gratuities will be considered for inclusion in that rule.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made a non-substantive change to clarify that compliance with paragraphs (a)(1) and (a)(2) may be satisfied in either a single document, or through separate documents. The Commission also made other non-substantive stylistic changes.

With these changes, the Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.5.1 [2-200]

Commission Drafting Team Information

Lead Drafter: James Ham
Co-Drafters: Daniel Eaton, Robert Kehr

I. CURRENT CALIFORNIA 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.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 1.5.1 [2-200]
Vote: 11 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 1.5.1 [2-200]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.5.1 [2-200] Fee Divisions Among Lawyers

(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 of: (i) the fact that a division of fees will be made, (ii) the identity of the lawyers or law firms* that are parties to the division, and (iii) the terms of the division; and

(3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.

(b) This rule does not apply to a division of fees pursuant to court order.

Comment

The writing* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.*

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 2-200)

Rule 1.5.1 [2-200] ~~Financial Arrangements~~ Fee Divisions Among Lawyers

(~~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~~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 of: (i) the fact that a division of fees will be made ~~and~~, (ii) the identity of the lawyers or law firms* that are parties to the division, and (iii) the terms of ~~such~~the division; and

(~~2~~3) ~~The~~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~~agreement to divide fees.

(b) This rule does not apply to a division of fees pursuant to court order.

~~(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

The writing* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.*

V. RULE HISTORY

Prior to 1972, no rule of professional conduct prohibited lawyers not in a firm from dividing fees, even if the referring lawyer performed no work or assumed no responsibility. See *Moran v. Harris* (1982) 131 Cal.App.3d 913, 920 [182 Cal.Rptr. 519] ("*Moran*"). On September 20, 1972, the Supreme Court adopted rule 22, which was derived nearly verbatim from the 1969 ABA Model Code of Professional Responsibility ("ABA Code"), DR 2-107. Rule 22 provided:

> 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*; [emphasis added] 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.

Thus, rule 22 permitted a division of fees only if the referring lawyer continued to participate in the representation *or* assumed responsibility. In this respect, rule 22 diverged from the ABA DR 2-107, which required that the referring lawyer both continue to participate in the representation *and* assume responsibility for the matter.

In 1975, as part of a comprehensive revision of the California Rules of Professional Conduct, rule 22 was renumbered 2-108. Two substantive changes were made. First, rule 22(a)(3) [renumbered rule 2-108(a)(3)] was modified to require that the total fee charged "is not increased solely by reason of the division of fees" in place of "the total fee of the attorneys does not clearly exceed reasonable compensation for all legal services they render to the client." Second, the concept in rule 22(b) was revised, deleted, and moved to then-new rule 2-109 (Agreements Restricting the Practice of a Member of the State Bar).[1]

In 1979, rule 2-108 was revised to permit "pure" fee referral arrangements, i.e., a fee division arrangement between lawyers that does not require the referring lawyer to continue to provide legal services or to assume responsibility for the matter. In addition, a new paragraph (B) was added to the rule. The following redline version of the 1979 rule shows the changes to the 1975 rule:

Rule 2-108 ~~Division of Fees~~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 his~~in 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

[1] Rule 2-109 generally prohibited lawyers from entering into restrictive covenants but did not prohibit an employment or partnership agreement that involved payments to an attorney upon retirement from the practice of law. The substance of rule 2-109 is now in current rule 1-500.

or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

A memorandum to the Board from the Chair of the Board Committee on Professional Responsibility provided a three-part rationale for eliminating the requirement that the division be proportional to the services provided or responsibility assumed by each lawyer. The first factor was promoting the public interest in enhanced lawyer competence and specialization. The memorandum provided the following observation of legal ethics scholars:

> The lawyer practicing alone or in a small firm has no self-sufficient competence. He must go outside if his clients are to be adequately represented. In the public interest, it is not enough for the organized bar to take the negative position of forbidding a lawyer to accept a case in a field in which he is not competent. There is a need for standards and methods which will encourage and make feasible the association of generalists and specialists . . . . So far, however, this duty has not been met. The present standards against fee-splitting may actually discourage the use of needed specialists . . . ."

(Patterson and Cheatham, *The Profession of Law* (Foundation Press, 1970), Ch. XV, Section 1 "Competence and Care," p. 250.)

Second, the difference between rule 2-108 and the ABA DR counterpart was causing confusion. The memorandum cited *Altschul v. Sayble* (1978) 83 Cal.App.3d 153 [147 Cal.Rptr. 716] and stated:

> In the recent Altschul case, the court of appeal interpreted subdivision (2) of rule 2-108 to be identical to similar provisions in DR 2-107 of the ABA Code of Professional Responsibility, but it is not. In the ABA version, DR 2-107(A)(2) provides for allocation according to "services performed and responsibilities assumed." On the other hand, rule 2-108(2) approves a division made in proportion to the "services performed or responsibilities assumed" by each attorney. The change in the conjunctive is significant. It was intended to weigh "responsibility" assumed by the referring lawyer (e.g. for a wise referral to the right lawyer, for monitoring or for quality of the work) equally with the legal services performed – even if performed entirely by the other attorney.

Third, the memorandum described the protection afforded through the continuing requirements of obtaining the client consent after a full disclosure and assuring that a fee is not inflated due to the fee division.

In 1989, as part of the comprehensive revisions of the Rules of Professional Conduct, rule 2-108 was renumbered 2-200 and paragraph (A) was modified as indicated below:

> (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~~ 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 ~~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.

The request filed with the Court noted: "No substantive changes are proposed to current rule 2-108. The amendments that are proposed are intended to foster brevity and clarity."[2]

Since 1989, there have been no further changes to rule 2-200.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

  1. OCTC supports this rule.

     Commission Response: No response required.

- **State Bar Court:** No comments received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, fourteen public comments were received. Five comments agreed with the proposed Rule, six comments disagreed, and three comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

[2] See, page 27 of the "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," Bar Misc. No. 5626, December 1987. In effect, the revisions to the rule implemented global revisions to the Rules, e.g., substitution of "member" for "member of the State Bar" and "lawyer" for "person licensed to practice law," both of which were defined in rule 1-100(B).

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- Insurance Code § 750 and § 750.5(a) (statutory prohibition against compensation for referral of insurance claims)
- *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (a failure to comply with the requirements of the fee sharing rule may preclude enforcement of the lawyers' fee sharing agreement)
- *Mink v. Maccabee* (2006) 121 Cal.App.4th 835 [17 Cal.Rptr.3d 486] (required disclosure and client consent must be obtained prior to the actual division of fees by the involved lawyers)
- *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453 [9 Cal.Rptr.3d 693] (equitable remedy may be appropriate where fee sharing agreement is unforeceable for failure to comply with the rule)
- *Olsen v. Harbison* (2010) 191 Cal.App.4th 325 [119 Cal.Rptr.3d 460] (attorney could not recover from co-counsel under theory of quantum meruit where client initially had consented to a division of fees but later fired one of the lawyers and entered into a new agreement with the other lawyer)
- State Bar Formal Op. No. 1994-138 (client disclosure requirement when a firm shares fees with an outside lawyer, such as a contract attorney for a particular case or matter
- L.A. County Bar Ethics Op. 516 (3/20/2006, revised 7/21/14) (ethical considerations where an attorney who is in an of counsel relationship with a firm also maintains a separate solo practice)
- L.A. County Bar Ethics Op. 511 (12/15/2003) (sharing in fees as a partner or an employee of two separate firms)
- L.A. County Bar Ethics Op. 503 (1/24/2000) (prepaid referral fees on workers compensation cases)

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 1.5(e), which is the counterpart to current rule 2-200, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.pdf [Last visited 2/7/17]

- As noted, ABA Model Rule 1.5(e) does not permit pure referral fees. Twelve jurisdictions have adopted Model Rule 1.5(e) verbatim.[3] Fourteen jurisdictions have

[3] The twelve jurisdictions are: Idaho, Indiana, Minnesota, Montana, Nebraska, New Mexico, North Carolina, Rhode Island, South Carolina, South Dakota, Utah, and Vermont.

adopted a slightly modified version of Model Rule 1.5(e).[4] Twenty-six jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.5(e).[5]

- In addition, it should be noted that thirty-six jurisdictions require that the fee division be proportional to the services performed by each lawyer or that each lawyer assume joint responsibility, i.e., these jurisdictions have adopted the ABA policy against pure referral fees. However, fifteen jurisdictions permit pure referral fees, at least to some extent. Besides California, the following twelve jurisdictions permit pure referral fees without expressly limiting the kind of matter involved or the lawyer to whom the matter is referred: Connecticut, Delaware, Kansas, Maine, Massachusetts, Michigan, Nevada, New Hampshire, Oregon, Pennsylvania, Virginia and West Virginia. One jurisdiction, Alabama, permits pure referral fees only in contingent fee cases. Finally, New Jersey permits, through a separate Rule of Court, pure referrals only when the lawyer to whom the matter is referred is certified in a designated area of practice.[6]

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Changing the title of the current rule.

   - Pros: The change results in a rule title that more precisely describes the subject matter addressed by the rule.

   - Cons: None identified.

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[4] The fourteen jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Illinois, Kentucky, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, Washington, and West Virginia.

[5] The twenty-five jurisdictions are: Alabama, Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Wisconsin, and Wyoming.

[6] New Jersey Rule of Court, Rule 1:39-6(d) provides:

> (d) **Division of Fees**. A certified attorney who receives a case referral from a lawyer who is not a partner in or associate of that attorney's law firm or law office may divide a fee for legal services with the referring attorney or the referring attorney's estate. The fee division may be made without regard to services performed or responsibility assumed by the referring attorney, provided that the total fee charged the client relates only to the matter referred and does not exceed reasonable compensation for the legal services rendered therein. The provisions of this paragraph shall not apply to matrimonial law matters that are referred to certified attorneys.

2. In proposed paragraph (a), substitute the phrase "Lawyers who are not in the same law firm" for "a lawyer who is not a partner of, associate of, or shareholder with the member."

    - Pros: These changes simplify the language of current rule 2-200(A). No substantive changes are intended. The term "lawyers not in the same firm" replaces "a lawyer who it not a partner of, associate of, or shareholder with the member" to delimit when the rule applies at a time when the titles and terms used to describe lawyers in law firms and other organizations that practice law are not limited to those terms.

    - Cons: This change might be viewed as a substantive change by excluding "of counsel" lawyers from the ambit of paragraph (a). Is it clear whether this rule's requirements are intended to address the obligations of an "of counsel" lawyer?

3. Including proposed paragraph (a)(1) which requires the lawyers who are dividing the fee to enter into a written agreement for the division between themselves.

    - Pros: Adding this requirement will aid in the enforcement of the rule. 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.

    - Cons: May be viewed as an unnecessary regulation of an agreement between attorneys, as opposed to an agreement between the lawyer and the client. No such requirement currently exists in rule 2-200 and an inability to enforce the current rule has not been identified as a result of an absence of such requirement.

4. Requiring that disclosure to the client should be as soon as reasonably practical.

    - Pros: If one of the purposes of the Rule is to give the client greater control over who provides legal services and on what basis, the disclosure should be made as soon as is practical.

    - Cons: The precise division of the fee to be shared might await the conclusion of work on the matter (e.g. where agreement is to divide the fee based on a loadstar approach which looks to the amount of time each lawyer invests in the case, as well as the value the lawyer delivered to the client's cause).

5. Adding the requirement "(ii) the identity of the lawyers who are parties to the division" in proposed paragraph (a)(2).

    - Pros: This requirement will provide better client protection than the current rule by adding that the written disclosure must provide the identity of the lawyers who are parties to the fee division agreement. This facilitates a client's informed choice of counsel.

- Cons: It may not be known which lawyers may be working on a matter at the outset when a division of fee agreement is executed between law firms (e.g. when a law firm is retained for expert services in discreet task, or limited scope, capacities).

6. Retaining the phrase "full written disclosure" under proposed paragraph (a)(2).

   - Pros: Current rule 2-200 contains the same language. The specific disclosure requirements are described in paragraphs (a)(2)(i) through (a)(2)(iii) of the rule.

   - Cons: The term "full written disclosure," standing by itself, is vague and does not give lawyers sufficient guidance as to what should be disclosed.

7. Deleting the phrase "the provision for a division of fees and is not unconscionable as that term is defined in rule 4-200," and replacing it with "agreement to divide fees."

   - Pros: The recommend change is intended to simplify the current rule. No substantive changes are intended.

   - Cons: None identified.

8. Adding subparagraph (b) which states: "This Rule does not apply to a division of fees pursuant to court order."

   - Pros: The paragraph would make it clear that a lawyer should not be disciplined when a division of fees is reviewed and approved by a bench officer.

   - Cons: Lawyers might mistakenly believe that they need not advise the client of the writing of an agreement to divide the fee, and the terms of that agreement, in cases where statutory law provides for an award of attorneys' fees.

9. Adding a Comment that clarifies the written agreements (i) between lawyers and (ii) among lawyers and client may be a single writing.

   - Pros: Added in response to public comment, this Comment clarifies that the process of obtaining and documenting the client's consent and the lawyers' agreement among themselves can be simplified by including all in a single document.

   - Cons: There is nothing in the rule that prohibits a single writing; the Comment is superfluous.

B. Concepts Rejected (Pros and Cons):

1. Adopting the approach of ABA Model Rule 1.5(e) that restricts fee divisions to situation where the lawyers are sharing responsibility or work.

   - Pros: Permitting a pure referral fee is the current policy in California (see *Moran v. Harris* (1982) 131 Cal.App.3d 913) and encourages lawyers to refer cases to competent counsel by retaining an economic incentive for the referring lawyer to seek experienced representation on behalf of the client.

   - Cons: A lawyer should not be compensated for doing nothing more than passing a client onto another lawyer without having to share any responsibility or work.

2. Retaining current rule 2-200(B) concerning giving or promising things of value for the purpose of recommending or securing employment, or as a reward for having made a recommendation resulting in employment.

   - Pros: This paragraph was referred to the Commission members charged with reviewing the advertising rule for inclusion in the advertising rules. It is more economical to state a prohibition on promising or giving something of value to either a lawyer, or non-lawyer, for the purpose of recommending or securing the lawyer's services in one rule. This is the approach taken in ABA Model Rule 7.2(b) and is the approach that this Commission has taken. See Rule 7.2 Report and Recommendation.

   - Cons: Retaining the rule about giving an occasional gift or gratuity as a thank you for providing a referral does not belong in an advertising rule because lawyers in California are familiar with the current organization of the California rules. Further, the effect of 2-200(B) is to prevent evasion of the disclosure requirement by financial arrangements that don't amount to the sharing of a fee.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The Rule adds three new requirements: (i) that the fee division agreement between the lawyers is in writing; (ii) that the client's consent to the fee division arrangement be obtained as soon as practicable; and (iii) the identity of the lawyers who are parties to the fee division be disclosed to the client.

2. The phrase "Lawyers who are not in the same law firm" in paragraph may alter the scope of who is covered under the rule. Existing rule 2-200 prohibits dividing a fee for legal services with a "lawyer who is not a partner of, associate of, or

shareholder with the member…." Lawyers today operate "in the same firm" under various different titles that are not limited to partner, associate or shareholder.

3. The Rule would expressly exclude division of fees pursuant to court order.

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. The changes to paragraph (a) primarily simplify the language of current rule 2-200(A). Proposed paragraph (a) retains the policy of the current rule allowing lawyers to divide fees and pay a referral fee, and rejects the approach in ABA Model Rule 1.5(e) that restricts fee divisions to situations where the lawyers are sharing responsibility or work. Other states have also rejected the narrow ABA Model Rule formulation.

4. The phrase “and is not unconscionable as that term is defined in rule 4-200” which exists in existing rule 2-200 has been removed because it is unnecessary and duplicative. Under California law a lawyer cannot charge an unconscionable fee. This disciplinary standard is set forth in a separate rule. There is no need to repeat it here.

E. Alternatives Considered:

1. The Subcommittee considered ABA Model Rule 1.5(e) and reviewed other States’ versions of Model Rule 1.5(e) and concluded that California’s policy is appropriate because it encourages public protection and the efficient and competent practice of law.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.5.1 [2-200] in the form attached to this Report and Recommendation

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.5.1 [2-200] in the form attached to this Report and Recommendation.