DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-200

Lead Drafter: Ham
Co-Drafters: Eaton, Kehr
Meeting Date: September 25 – 26, 2015

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. DRAFTING TEAM'S RECOMMENDATION AND VOTE

A majority of the drafting team members recommend a proposed amended rule as set forth below in Section III.

III. PROPOSED RULE (CLEAN)

Rule 2-200 [1.5.1] 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 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 who 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.

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

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

(~~A) A member~~a) 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~~ 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 who are parties to the division and (iii) 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 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.~~

V. PUBLIC COMMENTS SUMMARY

- None.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 9/2/2015:**

  OCTC recommends that this rule remain a stand-alone rule and not part of rule 4-200. Financial agreements among lawyers is an issue distinct from charging a client an

unconscionable or unreasonable fee.

Rule 2-200 should be amended to require that the client's written consent to a fee-sharing agreement be obtained prior to entering the agreement, not after, and certainly not after a fee has been divided. Additionally, the fee-sharing agreement should be in writing, a copy of which should be retained by the lawyers and a copy provided to the client. The rule should apply to court-awarded fees as well.[1]

- **RUSSELL WEINER, OCTC, 6/15/2010:**

Many of the Comments to this rule are more appropriate for treatises, law reviews, or ethics.

OCTC is concerned that Comment [4] appears more limited than the purposes stated in *Chambers v. Kay* p. 156-157 and, thus, could be confusing and misleading. If the purposes of the rule are to be stated, all the purposes should be stated.

OCTC disagrees with Comment [5]. There is nothing in the rule which would void or limit the rule regarding fee sharing by a court's approving a fee, which is what Comment [5] seems to be saying, although it provides no authority for this proposition. (OCTC believes this Comment is not in the Model Rules.) In *In the Matter of Harney*, the attorney argued that he could not be disciplined for his illegal fee because a court had approved his fee. The Review Department rejected this claim. Likewise, an attorney is currently arguing to the Supreme Court that the State Bar Court erred in finding he violated Rule 2-200 because they are court awarded fees. (*In the Matter of Phillip Kay*, 01-O-1930, Supreme Court Case No. S180405.) Unless and until the Supreme Court agrees with this argument, the Comment should be stricken.

OCTC strongly disagrees with Comment [6]. Comment [6]'s statement that the rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee is inconsistent with subparagraph (a)(2) of the rule, which states that attorneys must obtain the client's consent "at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable." While there are civil cases that have held that Current Rule 2-200 does not apply until the actual division of fees, those cases addressed the civil enforceability of fee agreements between lawyers, not attorney discipline. Comment [6] would permit attorneys to violate the rule with no consequences.

Further, Comment [6] would be overbroad, confusing, and misleading, implying that there can be no disciplinary consequences for a failure to advise the clients of the agreement between the lawyers and obtaining the client's informed written consent to the fee sharing at the time the lawyers enter into the agreement to divide fees if the fees are not actually paid. However, the State Bar Court has found attorneys culpable of soliciting, assisting, or inducing a violation of Current Rule 1-120 and violating the duty to keep clients informed of significant developments under Current Rule 3-500 and B&P Code section 6068(m) when attorneys

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[1] See the attached September 4, 2015 email message from James Ham to Andrew Tuft responding to the September 2, 2014 comment from OCTC.

enter into an agreement to share fees without advising clients of the agreement and obtaining the client's informed written consent, even when the fees were not ultimately shared. (See e.g. *In the Matter of David D. Mangar*, Case No. 06-O-10183, Supreme Court Case No. S180863; *In the Matter of Philip E. Kay*, Case No. 01-O-1930, Supreme Court Case No. S180405. The Supreme Court approved the haring department's findings and ordered the disbarment of Mr. Mangar.)

At the very least, the Comment should advise that attorneys may be disciplined for (1) failing to advise the client of the agreement at the time of the agreement, in violation of their duty to advise the client of significant developments under B&P Code 6068(m) and Rule 1.4 (Current Rule 3-500) (see *Chambers v. Kay*); and (2) assisting in, soliciting, and/or inducing a violation of the Rules of Professional Conduct or the State Bar Act in violation of Proposed Rule 8.4(a) (Current Rule 1-120).2. There are way too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comments 7 and 12 should be in the rule, not a comment.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

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

  Revise the rule as follows:

  (A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder ~~with the member~~ in the same law firm as the member unless:

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

  ~~(1)~~(2) The client has consented in writing ~~thereto~~ after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

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

  Discussion

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

  OCTC COMMENTS:

OCTC recommends that this rule be changed to make it clear that it applies to attorneys from different firms representing the same client. In 2001, two appellate courts came to different interpretations of this rule. In *Sims v. Charness* (2001) 86 Cal.App.4th 884 the court of appeals refused to apply this rule even though the attorneys were in separate law firms. The court concluded that they were associates. However, in *Chambers v. Kay* (2001) 88 Cal.App.4th 903, the court rejected the Sims interpretation of rule 2-200 and held that even if Sims was correct the facts of their case establish they were not associates. The California Supreme Court recently granted certiorari and will hear the Chambers case. OCTC believes that the Chambers interpretation is correct. An Oregon court interpreting California's rule came to the same conclusion as Chambers. (See *Frost v. Lotspeich* (2001) 2001 Ore.App. LEXIS 974.) The ABA uses the term "not in the same firm" which leaves no doubt that the rule applies whenever attorneys from different firms share legal fees. (See proposed Model Rule 1.5(e).) For clarity, OCTC recommends that the Commission adopt this terminology.

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

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

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Only twelve states have adopted ABA Model Rule 1.5(e) verbatim. South Dakota is an example of one state that has adopted a rule identical to Model Rule 1.5(e):

South Dakota Rule 1.5(e) Fees

* * * * *

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

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

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

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

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc

_1_5.pdf

- Twelve states have adopted Model Rule 1.5(e) verbatim.[2] Fourteen states have adopted a slightly modified version of Model Rule 1.5(e).[3] Twenty-five jurisdictions have adopted a version of the rule that is substantially different to Model Rule 1.5(e).[4] One state has not adopted a version of 1.5(e).[5]

VIII. 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.

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. Include 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.

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

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

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

[5] The one state is Kansas.

- 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. Whether to add 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).

5. Whether to retain 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.

6. Delete the phrase "the provision for a division of fees and is not unconscionable as that term is defined in rule 4-200," and replace it with "agreement to divide fees." [See, Item IX.(6)]
   - Pros: The recommend change is intended to simplify the current rule. No substantive changes are intended.
   - Cons: None identified.

7. Add subparagraph (b) which states: "This Rule does not apply to a division of fees pursuant to court order." [See, Item IX.(2)]
   - 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.

B. Concepts Rejected (Pros and Cons):

1. Whether to adopt 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 straight 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. Whether to retain 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. (Note: this decision was made with the understanding that the substance of current rule 2-200(B) will be included in the advertising rules).
   - Pros: It is recommended that this paragraph be referred to the advertising team 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).
   - 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 used to 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.

3. Whether the Rule should provide, in text or in Comment, that disclosure to the client should be as soon as reasonably practical. [See, Item IX.(4), below]
   - 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).

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

1. The rule adds a new requirement that the fee sharing agreement between the lawyers is in writing and 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. 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.

2. The plural "lawyers" replaces the singular "member" to conform to the style used elsewhere in the Rules.
3. 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.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) Whether true "of counsel" lawyers (those who have "close, regular, personal and continuous" contact with a law firm) should be considered "in the law firm" for purposes of sharing legal fees?

(2) Whether the Rule should include a paragraph which states: "This Rule does not apply to a division of fees pursuant to court order"? [See, Item VIII.A.7.]

(3) Whether the Rule should include a comment clarifying that the fee sharing agreement may be between law firms, and that disclosure of the arrangement with the client does not require that the name of every lawyer in the law firm be identified in the written disclosure.

(4) Whether the Rule should provide, in text or in comment, that disclosure to the client should be as soon as reasonably practical. [See, Item VIII.B.3.]

(5) Whether the title of the rule should be "Fee Divisions Among Lawyers" or "Referral Fees, Dividing a Fee and Gifts"?

(6) Whether the language "and is not unconscionable as that term is defined in rule 4-200" should be retained in the new rule. [See, Item VIII.A.6.]

(7) Whether the Rule should define "fee division" in the rule?

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Ham

- [Date]: Email Comment

Eaton

- [Date]: Email Comment

Kehr

- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 2-200 [1.5.1] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 2-200 [1.5.1] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

From: James Ham [mailto:jham@panskymarkle.com]
Sent: Friday, September 04, 2015 3:03 PM
To: Tuft, Andrew
Cc: Eaton, Dan; Robert Kehr; Kevin Mohr (#1) (kejmohr@gmail.com); Difuntorum, Randall; Lee, Mimi; McCurdy, Lauren
Subject: Re: Rule 2-200 [1.5.1] Drafting Team Report and Recommendation for September 25 & 26th Meeting: Due Tues., Sept. 8th

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I would like to comment on OCTC's proposals. Please add this email to the report.

Some of OCTC's comments are reflected in matters considered or which may be addressed by the proposed rule drafted by the subcommittee.

I have some concern about some of OCTC's proposals. For example, if the client must consent promptly to an agreement to split a fee, what is the public policy and public protection purpose served by imposing discipline if the client does not consent prior to entering into the agreement? There are countervailing pragmatic and practical considerations which make that type of requirement a potential technical trap. I am not sure I understand why an attorney should be disciplined if he makes a good faith fee division agreement -- ultimately for client benefit -- which must be promptly approved by the client. In properly drafted agreements, client approval is a condition precedent to the effectiveness of the agreement. In practice, attorneys will reach an understanding on a division that is subject to acceptance and confirmation by the client. I see nothing improper about that, and nothing that justifies discipline.

One might ask why we regulate fee sharing at all if the overall fee charged is reasonable and the results obtained for the client are competent and professional. In the absence of an unconscionable fee or incompetent performance -- both disciplinable offenses -- there is nothing inherently venal about two attorneys working together and sharing a fee, or from one attorney paying another a referral fee, that merits attorney discipline.

I would need to understand more about OCTC's policy concerns before I would feel comfortable agreeing with some of these recommendations.

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THE STATE BAR
OF CALIFORNIA

Date: September 2, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for September 2015 meeting

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C. Closing Comment

I.
OPENING COMMENT

The following comments address the rules to be considered at the Commission's September 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

II.

POINTS FOR CONSIDERATION

[TEXT OMITTED]

F. Rule 2-200: Financial Arrangements Among Lawyers [Model Rule 1.5(e)]

OCTC recommends that this rule remain a stand-alone rule and not part of rule 4-200. Financial agreements among lawyers is an issue distinct from charging a client an unconscionable or unreasonable fee.

Rule 2-200 should be amended to require that the client's written consent to a fee-sharing agreement be obtained prior to entering the agreement, not after, and certainly not after a fee has been divided. Additionally, the fee-sharing agreement should be in writing, a copy of which should be retained by the lawyers and a copy provided to the client. The rule should apply to court-awarded fees as well.

[TEXT OMITTED]

III.

CLOSING COMMENT

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

CURRENT CALIFORNIA RULE 2-200
"Financial Arrangements Among Lawyers"

I. Text of Current Rule:

(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. Background/Purpose:

A. Introduction

Current rule 2-200 reflects the Supreme Court and State Bar's rejection of the restrictive approach reflected in both the Model Rule 1.5(e) and Restatement § 47 and instead permits "pure" referral arrangements so long as the lawyers involved comply with specific requirements intended to protect the interests of the client. For example, ABA Model Rule 1.5(e) permits fee divisions by lawyers not in the same firm only to the extent the referring lawyer has performed legal services or jointly retains responsibility for the matter. Rule 2-200, on the other hand, permits lawyers to agree to the payment of "pure" referral fees[1] without requiring either provision of legal services or assumption of responsibility, an approach embodied in the California Rules since the Supreme Court approved proposed rule 2-108 in 1979.

The Court of Appeal in *Moran v. Harris* (1982) 131 Cal.App.3d 913, 920-921 ("*Moran*"), noted the public policies that are advanced by such a rule:

[1] "Pure" referral fees are also sometimes referred to as "bare" or "naked" referral fees.

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 (citation omitted).[2]

B. 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:

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[2] *Moran* also noted the rationale for the contrary viewpoint:

> "'In an era where recovery in tort is founded primarily upon socialization of the loss occasioned by injury to person and property [citation], the society which bears that loss must be protected against arrangements which prevent the recovery from reaching the party injured, reduced only by necessary legal fees and other expenses of litigation. The pure referral fee, which compensates one lawyer with a percentage of a contingent fee for doing nothing more than obtaining the signature of a client upon a retainer agreement while the lawyer to whom the case is referred performs the work, is far from necessary to the injured person's recovery. To the extent that the referral fee is paid for that purpose, loss has not been socialized. Rather, the obtaining of business by a lawyer who, by his own motion, has conceded his inability to handle it has been subsidized.'" [Citation omitted.] *Id.* at 920.

However, the court reasoned:

> Whether one argument is better than the other is unimportant. What is important is to recognize there are differing points of view on this subject and those points of view may well have influenced the Legislature, the Supreme Court and the State Bar to refrain from prohibiting referral fee contracts prior to 1972. Presumably, these institutions, each structurally geared to respond to its constituents or the public, acted in response to articulated perceptions. *Id.* at 921.

The court recognized that for the 43 years before the adoption of a fee division rule patterned on the ABA Code of Responsibility, DR 2-107, California effectively permitted "pure" referral fees. It was only during the period between 1972 and 1979 that this practice was restricted, requiring that both lawyers provide legal services *or* assume responsibility for the matter to realize the benefits of the rule.

(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).[3]

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

~~(2) The~~the terms of such division ~~is made in proportion to the services performed or responsibility assumed by each~~; and

[3] 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.

(~~3~~2) The total fee charged by all persons licensed to practice law is not increased solely by reason of the provision for division of fees and does not exceed reasonable compensation for all services they render to the client.

(B) Except as permitted in subdivision (A), a member of the State Bar shall not compensate, give or promise anything of value to any person licensed to practice law for the purpose of recommending or securing employment of the member or the member's firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's firm by a client. A member's offering of or giving a gift or gratuity to any person licensed to practice law, who has made a recommendation resulting in the employment of the member or the member's firm, shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

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."[4]

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

C. The first Commission's Proposed Rule

The first Commission proposed a rule that carried forward the pure referral fee concept in rule 2-200. That rule, proposed rule 1.5.1, retained two requirements in current rule 2-200(A) that are not found in the Model Rule or Restatement § 47. First, proposed rule 1.5.1 required *written* disclosure of the details of the fee division arrangement and the

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[4] 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).

client's written consent to the arrangement. Second, proposed rule 1.5.1 requires that the lawyers' total fee *not be increased* because of the fee division.

In addition, mindful of the Court of Appeal decision in *Mink v. Maccabee* (2006) 121 Cal.App.4th 835, which identified two possible deficiencies in rule 2-200, rule 1.5.1 included two new requirements. First, the fee sharing agreement between the lawyers was required to be in writing. Second, a timing element provided that the disclosure and client's consent must occur at the time the lawyers enter into their fee division agreement or as soon thereafter as would be reasonably practicable. Early disclosure and consent were intended to permit the client to address, in a timely manner, concerns that might arise over a division of fees and that could not be addressed if the client's consent is not obtained until the fee division occurs.

A minority of the Commission dissented from the decision to revise the timing of the disclosure and consent requirement. The minority took the position that 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 divided, the amount of fees to be divided will be known instead of being speculative. In the minority's view, under existing law, which requires only that consent be obtained prior to the division, the client is best positioned to address those concerns[5] at that time by refusing to consent to the division and is better informed to make a decision whether to consent to the division when the client knows the amount of the fee to be divided.

The Commission responded that it had concluded that putting off the time of disclosure and client consent until after the lawyers have agreed to divide the fee and just prior to the fee division, when the matter will have been concluded, would not allow the client to assess the aforementioned concerns and have a meaningful opportunity to address them. As noted, a fee division arrangement could have had an adverse effect on the lawyer-client relationship in terms of how much effort the referred lawyer devoted to the matter, whether that lawyer was appropriate for the matter, or whether the client would have preferred a different arrangement. Rather than having a voice in the structuring the arrangement in a way that might avoid those adverse consequences, putting off disclosure and consent until just before the lawyers divide the fee leaves the client with no choice but to accept or reject the arrangement. For all of these reasons, the Commission recommended that the time for disclosure and client consent be advanced to the time when the lawyers enter into their fee division agreement.

In addition to the concepts discussed in the first two paragraphs of this section, the first Commission also substituted "law firm," a defined term in the proposed Terminology

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[5] The concerns are: (1) whether the client is actually retaining a 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.

Rule that was used throughout the first Commission's proposed rules, for the clause in the current rule, "not a partner of, associate of, or shareholder with the member."

Proposed rule 1.5.1 did not carry forward the gift or gratuity requirement in current rule 2-200(B). Instead, current rule 2-200(B) was transferred to proposed rule 7.2(b) (Advertising).

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. Jayne Kim (OCTC), _________, 2015:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. Russell Weiner (OCTC), June 15, 2010:

Rule 1.5.1. Financial Arrangements Among Lawyers

1. Many of the Comments to this rule are more appropriate for treatises, law reviews, or ethics opinions. OCTC is concerned that Comment 4 appears more limited than the purposes stated in *Chambers v. Kay* (2002) 29 Cal.4th 142, 156-157 and thus, could be confusing and misleading. If the purposes of the rule are to be stated, all of the purposes should be stated.

2. OCTC disagrees with Comment 5. There is nothing in the rule which would void or limit the rule regarding fee sharing by a court's approving a fee, which is what Comment 5 seems to be saying, although it provides no authority for this proposition. (OCTC believes this comment is not in the Model Rules.) In *In the Matter of Harney*, the attorney argued that he could not be disciplined for his illegal fee because a court had approved his fee. The Review Department rejected this claim. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 277-278.) Likewise, an attorney is currently arguing to the Supreme Court that the State Bar Court erred in finding he violated rule 2-200 because they are court awarded fees. (In the *Matter of Philip Kay*, 01-0-1930, Supreme Court Case No. S180405.) Unless and until the Supreme Court agrees with this argument, the Comment should be stricken.

3. OCTC strongly disagrees with Comment 6. Comment 6's statement that the rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee is inconsistent with subparagraph (a)(2) of the rule, which states that attorneys must obtain the client's consent "at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable." While there are civil cases that have held that current rule 2-200 does not apply until the actual division of fees, those cases addressed the civil enforceability of fee agreements between lawyers, not attorney discipline (see *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838; *Cohen v. Brown*

(2009) 173 Cal.App.4th 302, 320. The Supreme Court denied a petition for review in *Mink*, but two justices voted to take it up and a third justice was absent from the consideration.) Further, those decisions were based on the current rule, not the proposed rule. Other jurisdictions have found that the fee sharing rules require attorneys to disclose and obtain the client's written consent even if no payment has actually been made to the other attorney. (See *Saggese v. Kelley* (Mass. 2005) 837 N.E.2d 699, 706 [finding that attorneys must disclose fee sharing agreements and obtain the client's written consent before attorney refers client to second attorney]; *In the Matter of Mendelson* (Ill.Atty.Reg.Disp.Com.1996) IL Disp. Op. 95 CH 339, 1996 WL 931273 [holding that an attorney can be disciplined for entering into an agreement to split fees with another attorney, even though no payment has actually been made to the other attorney].) Comment 6 would permit attorneys to violate the rule with no consequences.

C. Mike Nisperos (OCTC), September 27, 2001:

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

Revise the rule as follows:

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder ~~with the member~~ in the same law firm as the member unless:

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

~~(1)~~(2) The client has consented in writing ~~thereto~~ after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

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

Discussion

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

OCTC COMMENTS:

OCTC recommends that this rule be changed to make it clear that it applies to attorneys from different firms representing the same client. In 2001, two appellate courts came to different interpretations of this rule. In *Sims v. Charness* (2001) 86 Cal. App.4th 884 the court of appeals refused to apply this rule even though the attorneys were in separate law firms. The court concluded that they were associates. However, in *Chambers v. Kay* (2001) 88 Cal.App.4th 903, the court rejected the *Sims* interpretation of rule 2-200 and held that even if *Sims* was correct the facts of their case establish they were not associates. The California Supreme Court recently granted certiorari and will hear the *Chambers* case. OCTC believes that the *Chambers* interpretation is correct.[6] An Oregon court interpreting California's rule came to the same conclusion as *Chambers*. (See *Frost v. Lotspeich* (2001) 2001 Ore. App. LEXIS 974.) The ABA uses the term "not in the same firm" which leaves no doubt that the rule applies whenever attorneys from different firms share legal fees. (See proposed Model Rule 1.5(e).) For clarity, OCTC recommends that the Commission adopt this terminology.

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

IV. Potential Deficiencies in the Current Rule:

A. See above input from OCTC. Deficiencies in the current rule observed by OCTC include:

1. The current rule's sanctioning of a pure referral fee. (See III.C., above.)

2. The current rule's failure to make clear that the rule applies to lawyers from different firms. (See III.C., above.)

3. The current rule's failure to clarify that both lawyers must comply with the requirements of the rule. (See III.C., above.)

4. Although OCTC did not address the first Commission's recommended changes to the black letter in its proposed rule 1.5.1 in its 6/15/2010 comments, the fact that it did not contest any of those changes suggests that it accepted them and thus viewed their absence in the current rule as deficiencies. (See section B, below.)

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[6] The Supreme Court affirmed the Court of Appeal. See *Chambers v. Kay* (2002) 29 Cal.4th 142.

C. Other possible deficiencies:

1. The failure of the current rule to require that the fee division agreement between the lawyers be in writing.

2. The failure of the current rule to require that the disclosure and the client's consent be obtained contemporaneously with the fee division agreement between the lawyers.

3. The reliance of the current rule on several terms, i.e., "partner," "associate," and "shareholder" to delimit the rule's application at a time when the titles and terms to describe lawyers in law firms and other organizations that practice law are not limited to those terms.

V. California Context:

See section II and the authorities cited in section IX as these sections provide the relevant California context for rule 2-200.

VI. Approach In Other Jurisdictions (National Backdrop):

A. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.5: Fees," revised May 13, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_5.pdf

1. The relevant provision in the Model Rules is Model Rule 1.5(e).

2. Thirty-six jurisdictions require that the fee division be proportional to the services performed by each lawyer or that each lawyer assume joint responsibility.

3. Fifteen jurisdictions permit pure referral fees, at least to some extent. Besides California, the following 12 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. 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.

4. The first Commission's proposed rule used the plural "lawyers" in its introductory clause to clarify that both lawyers in a fee division must comply with the rule. No other jurisdiction frames the operative language of the introductory clause (i.e., "lawyer . . . shall not divide") in the plural. Nearly all other jurisdictions follow the model rule in employing the permissive verb form of "may" and the passive voice that does not indicate whether the rule applies to the referring lawyer, the referred lawyer, or both. Exceptions are found in Pennsylvania Rule 1.5(e), Maine, and New Jersey, all of which permit pure referral fees to some extent and utilize the active voice and the singular form, "lawyer." The active voice is the preferred style of California Rules of Court.

5. No jurisdiction that follows the Model Rule approach, which effectively prohibits pure referral fees by requiring participating lawyers to either provide legal services or assume joint responsibility, requires that the lawyers' fee division agreement be in writing. However, some of those jurisdictions require that the lawyers' agreement to assume joint responsibility be in writing. For example, Alaska Rule 1.5(e)(1) provides: "(1) the division is in proportion to the contribution of each firm or, *by written agreement with the client,* each firm assumes joint responsibility for the representation." (emphasis added). Alabama, Arkansas, Florida, New York, and North Dakota have similar provisions.

6. The first Commission's proposed rule added a time element requiring that the client's consent to the fee division arrangement be obtained substantially contemporaneously with the fee division agreement into which the lawyers enter. Only three other jurisdictions, Massachusetts, Texas, and Virginia, have a similar requirement that advances the time by which the client consent to the fee division must be obtained. Massachusetts Rule 1.5(e) provides in relevant part:

> A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made *only if the client is notified before or at the time the client enters into a fee agreement* for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable. [emphasis added]

Texas Rule 1.04(f)(2) provides in relevant part:

> "(2) the client consents in writing to the terms of the arrangement *prior to the time of the association or referral proposed*, ..." (emphasis added).

Virginia Rule 1.5(e) provides:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
>
> > (1) the client is advised of and consents to the participation of all the lawyers involved;
> >
> > (2) the terms of the division of the fee are disclosed to the client and the client consents thereto;
> >
> > (3) the total fee is reasonable; and
> >
> > (4) the division of fees and the client's consent is obtained *in advance of the rendering of legal services*, preferably in writing. (Emphasis added).

7. The current rule requires that both the disclosures to the client and the client's consent be in writing. The Model Rule does not require written disclosure, nor does it require that the client's consent be in writing. Rather, Model Rule 1.5(e) requires only that the client's consent be confirmed in writing, which would require only that the lawyer send a confirming e-mail to the client. Some jurisdictions diverge from the Model Rule provision and require that either the disclosure to the client be in writing (e.g., Connecticut, Delaware, District of Columbia, and Louisiana), or that the client consent be in writing (e.g., Arizona, Louisiana, New Hampshire, North Dakota, Ohio, and Wisconsin). One jurisdiction, Virginia, provides that the disclosure and the client consent be obtained, "preferably in writing."

8. No other jurisdiction provides that the total fee for all lawyers may not be increased solely by reason of the division of fees. All jurisdictions follow some version of the Model Rule and state only that the total fee must be "reasonable" or use similar language. With respect to the latter, several jurisdictions require that the total fee "is not clearly excessive" or "is not excessive" (e.g., Alabama, New York, Oregon, and Pennsylvania), or is not "illegal" (e.g., Pennsylvania and Texas).

B. Division of fees with a non-California lawyer or firm where that lawyer or firm is permitted to share fees with a nonlawyer. Some jurisdictions, such as the District of Columbia or the United Kingdom permit fee sharing or ownership interests by a nonlawyer. Even if a California lawyer complies with rule 2-200, may a California lawyer share fees with lawyers in those jurisdictions? While this

may not be the national trend, it is being recognized as a fee sharing issue for lawyers who are bound by Model Rule 1.5(e) or similar rules. See ABA Formal Op. No. 464 (August 19, 2013).

VII. Public Comment Received by the First Commission:

The clean text of a proposed new rule 1.5.1 drafted by the first Commission and adopted by the Board to replace rule 2-200 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 2-200, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 2-200 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

1. Whether current rule 2-200 should be retained as a standalone rule or whether it should be moved into the rule on fees, current rule 4-200 [1.5],

where provisions regulating fee divisions among lawyers are located in nearly every other jurisdiction.

2. If retained as a standalone rule, whether the title of the rule should be changed to more accurately describe its content, e.g., "Fee Divisions Among Lawyers," particularly if issue #9 is answered in the affirmative.

3. Whether California should continue to permit pure referral fees or adopt the approach in the Model Rules, as followed by 36 jurisdictions, that require the referring lawyer to either continue to participate in, or assume joint responsibility for, the matter. (See Introduction and Rule History in section II.A. & B., above. See also 2001 OCTC comment in III.C.)

4. Whether the rule should substitute the phrase "not in the same law firm" in place of the current rule's reliance on several terms, i.e., "partner," "associate," and "shareholder" to delimit the rule's application at a time when the titles and terms to describe lawyers in law firms and other organizations that practice law are not limited to those terms.[7]

5. Whether the rule should be revised to require that the fee division agreement among lawyers in different firms must be in writing.

6. Whether the existing requirement for obtaining written client consent should be revised to specify that the consent must be obtained at the time that the lawyers in different firms enter into their agreement to divide a fee. (See *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838 [17 Cal.Rptr.3d 486].)

7. Whether an exemption for court awarded fees should be added to the rule. (Compare first Commission proposed Rule 1.5.1, Comment [5].)

8. Whether the rule should be revised to require that copies of the written fee split agreement and the written client consent be retained by the lawyers who are parties to the fee split and that the copies be made available to the State

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[7] Model Rule 1.0(c) provides that "firm" or "law firm" means "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." The first Commission recommended a definition of "law firm" that was substantially similar to the Model Rule definition. By defining "law firm" throughout the rules by reference to its organizational attributes (i.e., law partnership, professional law corporation, sole proprietorship, etc.) rather than its constituent members, the first Commission avoided the problem of having to rely on other areas of law, e.g., tax law, to determine when the rule does not apply when sharing fees within a law firm. See, e.g., L.A. County Bar Ethics Op. 516 (3/20/2006, revised 7/21/14) (Because rule 1-100(B)(4) defines associate to mean "an employee or fellow employee who is employed as a lawyer," an "associate" within the meaning of rule 2-200 might be limited to those lawyer employees in a firm who are issued W-2 forms.)

Bar in the event of a disciplinary investigation of the lawyer involving the fee split agreement.

9. Whether current rule 2-200(B), which concerns compensation or gifts provided to a lawyer "for the purpose of recommending or securing employment of the member or the member's law firm by a client," should be moved to a different rule, e.g., in the advertising series as is done in the ABA Model Rules and was recommended by the first Commission.[8]

IX. Research Resources:

- *Moran v. Harris* (1982) 131 Cal.App.3d 913 [182 Cal.Rptr. 519]
- CAL 1994-138 (Fee-splitting with outside lawyer and disclosure to client)
- *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement)
- *Mink v. Maccabee* (2006) 121 Cal.App.4th 835
- *Barnes, Crosby, Fitzgerald & Zeman LLP v. Ringler* (2012) 212 Cal.App.4th 172 [151 Cal.Rptr.3d 134]
- *Anderson, McPharlin & Connors v. Yee* (2005) 135 Cal.App.4th 129 [37 Cal.Rptr.3d 627]
- *Scolinos v. Kolts* (1995) 37 Cal.App.4th 635 [44 Cal.Rptr.2d 31]
- *Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453 [9 Cal.Rptr.3d 693]
- *Fair v. Bakhtiari et al.* (2011) 195 Cal.App.4th 1135 [125 Cal.Rptr.3d 765]
- *Olsen v. Harbison* (2010) 191 Cal.App.4th 325 [119 Cal.Rptr.3d 460]
- L.A. County Bar Ethics Op. 516 (3/20/2006, revised 7/21/14) (Ethical Considerations Relating to an Attorney Who Concurrently Serves in an Of Counsel Relationship with a Law Firm and Maintains a Separate Solo Practice)
- L.A. County Bar Ethics Op. 511 (12/15/2003) (Sharing in Fees as Partner or Employee of Two Law Firms)
- L.A. County Bar Ethics Op. 503 (1/24/2000) (Prepaying Referral Fees on Workers Compensation Cases)
- Insurance Code § 750 and § 750.5(a) (re: compensation for referral of insurance claims)

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[8] Such an approach would also involve moving an analogous provision in current rule 1-320 (concerning financial arrangements with non-lawyers).