LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 511
December 15, 2003

SHARING IN FEES AS PARTNER OR EMPLOYEE OF TWO LAW FIRMS

SUMMARY

An attorney may not concurrently serve as a partner or associate in two law firms and share in the fees generated by each firm unless the attorney complies with California Rules of Professional Conduct, Rules 1-400 and 2-200. The attorney must also address such matters as conflicts of interest and client confidences as a participant in each law firm.

AUTHORITIES CITED

Business & Professions Code §§ 6068 (m) and 6106

California Rules of Professional Conduct, Rules 1-100, 1-400, 2-200, 3-310 and 3-500

California State Bar Formal Opinion No. 1994-138

Los Angeles County Bar Association Formal Opinion No. 473

Bank of California v. Connolly (1973) 36 Cal. App. 3d 350

Chambers v. Kay (2002) 29 Cal. 4th 142

Martinez v. County of Los Angeles (1978) 87 Cal. App. 3d 189

Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176

People v. Speedee Oil Systems, Inc. (1999) 20 Cal. 4th 1135

Weiner v. Fleischman (1991) 54 Cal. 3d 476

FACTS AND ISSUES PRESENTED

Attorney is a partner in ABC law firm. Attorney has a long standing professional relationship with Client. Client is about to embark on project which requires certain expertise not possessed by the lawyers in ABC. Client wants the benefit of Attorney's counsel in connection with the project, and to have Attorney work with lawyers with the expertise necessary for project. Law firm DEF has such expertise.

Attorney proposes to form a joint venture with DEF for such work, and proposes to share in the fees generated at DEF from Client's work, including matters at DEF in which Attorney does not provide services. Attorney proposes to continue to serve as a partner at ABC and participate in its profits.

Alternatively, Attorney proposes to become an employee of DEF while at the same time continuing to serve as a partner of ABC.

Attorney does not intend to provide client with the disclosure concerning the division of fees or obtain the written consent required by Rule 2-200(A).

DISCUSSION

The inquiry does not provide great detail concerning the proposed relationships, but the committee is of the opinion that in most situations contemplated by the inquiry Rule 2-200 (A) requires disclosure of such an arrangement to the client, and the client's written consent. The proposed arrangements also raise a host of potential issues, including potential conflict of interest considerations and lawyer advertising issues. These are discussed below.

California Rules of Professional Conduct, Rule 2-200(A) provides:

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 . . . .

Rule 1-100(B) provides in part:

(1) "Law firm" means (a) two or more lawyers whose activities constitute the practice of law, and who share in its profits, expenses, and liabilities; or (b) A law corporation which employs more than one lawyer . . . .

(4) "Associate" means an employee or fellow employee who is employed as a lawyer.

In *Chambers v. Kay,* (2002) 29 Cal. 4th 142, Chambers attempted to enforce an agreement with Kay for the division of fees received by Kay from the successful prosecution of a sexual harassment action on behalf of Kay's client. During the course of the litigation Kay requested Chambers to act as co-counsel with him. Chambers performed substantial services in connection with that action and advanced several thousand dollars in costs. Kay listed Chambers as an attorney of record for the client on pleadings and disclosed to the client the proposed division of fees between them, but neither Chambers nor Kay obtained the client's written approval of the arrangement.

Kay and Chambers had separate offices at different locations and used different letterheads. Kay paid Chambers a monthly fee to use Chambers' conference room and other facilities and was listed as a co-tenant in the directory of the building in which Chambers maintained his office. Chambers assisted Kay with his work on several other cases as well. During the course of the sexual harassment litigation, Kay and Chambers disagreed on certain matters, and Kay terminated their relationship. After judgment in favor of Kay's client, Chambers attempted to enforce the fee sharing agreement.

The Supreme Court held that their agreement violated Rule 2-200 and strictly enforced the requirement of a partnership or employment relationship as a prerequisite to a permissible division of fees, unless both the disclosure and the written consent requirements of Rule 2-200 were met.

The court held that a true partnership or employment relationship was required to allow fee sharing without meeting the disclosure and written consent requirements of Rule 2-200. Chambers argued that work on the case involved a joint venture in which Chambers paid some of

the expenses. As to the claim that Chambers and Kay were joint venturers in prosecution of the action, and that a joint venture was a form of partnership, the court noted that although a partnership and a joint venture share many characteristics, Rule 2-200 spoke of a partnership and not of a joint venture. The court noted that the arrangement between the lawyers was neither formal nor permanent, but that they merely worked together on a few cases. There was no co-ownership of partnership properties or sharing of profits and losses on a continuous basis which the court found to be necessary for a partnership, as distinct from a joint venture.

The *Chambers* court specifically overruled a Court of Appeal decision which allowed fee sharing without complying with the disclosure and the consent requirements of Rule 2-200, where both attorneys contributed substantial effort to the prosecution of the case that generated the fees that were to be shared.

As to the claim that Chambers was an "associate" as defined in Rule 2-200, the court observed that Rule 1-100 (D)(4) defines an associate as an employee or fellow employee and determined, in substance, that a common law employer-employee relationship was required under Rule 1-100 (D)(4).

The inquiry posits a fact situation which differs from the facts before the court in *Chambers.* The extent to which a court determines such differences in facts to be controlling may determine the propriety of the proposed arrangements.

In its Formal Opinion 1994-38 the Committee on Professional Responsibility of the State Bar ("COPRAC") considered the propriety of certain fee arrangements under Rule 2-200. COPRAC opined that an arrangement by which a lawyer billed a firm in which he was not a partner or employee for his regular hourly rate, which the firm then re-billed to the client and paid over to the lawyer when paid by the client, did not amount to a division of fees regulated by Rule 2-200. In that opinion COPRAC was of a view that, as the law firm was not retaining any portion of the fee, there was no division of fees, and the law firm acted merely as a collection agent. If the arrangement proposed in the inquiry contemplates that there will be no retention by Attorney or the ABC law firm of a portion of the fees charged, then the facts of COPRAC

opinion 1994-138 would be present and there would be no improper division of fees.

The inquiry, however, appears to contemplate that Client will contract with ABC to perform the requested services and Attorney or ABC will then arrange with DEF for DEF (or ABC and DEF acting together) to provide the representation of Client and that there will be a retention of fees by Attorney or ABC in excess of the fees charged client for Attorney's services when only ABC performs services.

The fact that both law firms will provide a substantial contribution of services in the representation, and that this contribution is known to Client, is not sufficient to avoid complying with the disclosure and consent requirements of Rule 2-200. In overruling prior case authority that allowed such fee sharing without complying with the requirements of Rule 2-200, the *Chambers* Court made it clear that the prohibition of Rule 2-200 is not directed only at referral fees and does not depend on the quantum of work performed by each of the lawyers.

Under *Chambers,* a joint venture between lawyers will not satisfy the requirements of Rule 2-200. According to case law, the principal difference between a joint venture and a partnership is that a partnership ordinarily involves a continuing business relationship, whereas a joint venture is usually formed for a specific transaction or a single series of transactions. *Weiner v. Fleischman* (1991) 54 Cal. 3d 476, 482 (noting that the distinction between partnerships and joint ventures is not sharply drawn); *Bank of California v. Connolly* (1973) 36 Cal. App. 3d 350, 364. Here, although the inquiry used the term "joint venture," the nomenclature may not be determinative. The first arrangement posited by the inquiry looks to a continuing business arrangement, not a specific transaction. On the other hand, a string of proceedings for the same client involving the same area of law may be of the nature of a series of transactions. The inquiry does not fully reveal whether there would be joint ownership of assets, a right of joint control and the sharing of profits and losses that are required for both a partnership and a joint venture.

Similarly, while the posited "employment" relationship may satisfy the language of Rule 2-200 and *Chambers v. Kay,* a common law employee - employer relationship in which the

employee earns minimal wages but receives substantial compensation by way of fee sharing may not be viewed as conforming with Rule 2-200. Similarly, an arrangement where the "employee" controls the employer may not be viewed as conforming with Rule 2-200.

The proposed arrangement must also take into account matters of disclosure to the client, client confidentiality and conflicts. Under the assumed facts that Attorney is serving as a member or associate of two law firms, Attorney must consider clients of both ABC and DEF as Attorney's clients for the purposes of avoiding the representation of adverse interests (Rule 3-310) and related conflict issues. State Bar Formal Opinion 1994 - 138; *People v. Speedee Oil Systems, Inc*. (1999) 20 Cal. 4th 1135.

The proposed arrangement must also consider the effect of Rule 1-400 (D) which prohibits untrue or false statements, including statements that omit any fact needed to make the statement not misleading. Under the authority of Rule 1-400 (E) the Board of Governors formulated standards of communications that are a presumption affecting the burden of proof. Standard (9) presumes as violative of Rule 1-400:

> A communication in the form of a firm name...or other professional designation used by a member of law firm ...which differs materially from any other such designation used by such member or law firm at the same time in the same community.

While under the posited facts the member will be practicing under two different firm names, the arrangement may involve two different law firms as defined in Rule 1-100 (B) (1) and the extent to which the arrangement conforms to Rule 2-200 may determine whether or not it is false or misleading. Thus, while concurrent use of Attorney's name in two different law firms may be factually correct, if a disciplinary proceeding is commenced on this ground, it is the Attorney that will bear the burden of showing that practicing under two firm names is not misleading.

The attorney must also consider whether the purpose or the effect of the arrangement is to avoid or evade the disclosure obligations of Rule 2-200(A). As a fiduciary, the attorney has the obligation to render a full and fair disclosure to the client. *Neel v. Magana, Olney, Levy,*

Cathcart & Gelfand (1971) 6 Cal. 3d 176, 188-189. Rule 3-500 provides: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information." Business & Professions Code § 6068 (m) similarly provides that an attorney has the duty to "[K]eep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

Attorney should consider whether the structure of the law firm, the fee and fee sharing arrangements and the identity of the attorneys performing and supervising the performance of services are of such importance that Attorney is obligated to disclose that information to the Client, and whether the statements made (and not made) to Client amount to deceit. Attorney may need to make that determination on a case by case basis.

This opinion is advisory only. The committee acts only on specific questions submitted *ex parte* and the opinions are based only on the facts set forth in the questions presented.