

**LOS ANGELES COUNTY BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

OPINION NO. 523

June 15, 2009

CAN A LAWYER ETHICALLY AGREE WITH A CLIENT TO A CONTINGENCY  
FEE WHICH IS BASED ON A PERCENTAGE OF THE COMBINED AMOUNT OF  
DAMAGES AND ANY STATUTORY FEES AWARDED?

**Summary**

This Opinion addresses whether it is permissible, in a contingency representation, for the attorney and client to include within the gross recovery the statutory award of attorney's fees which, absent an agreement to the contrary, would otherwise belong to the attorney. The issue is whether such an agreement that allocates the gross recovery between the attorney and the client constitutes "fee splitting" with a non-lawyer. The Committee believes that it does not.

**Table of Authorities**

**Statutes:**

Cal. Gov't Code § 12965(b)

Cal. Bus. & Prof. Code § 6147(a)(2)

42 U.S.C. § 1988

**Rules of Professional Conduct:**

Rule 1-320(A)

Rule 4-200

**Cases:**

*Denton v. Smith* (1951) 101 Cal.App.2d 841

*Evans v. Jeff D.* (1986) 475 U.S. 717

*Flannery v. Prentice* (2001) 26 Cal.4th 572

*In re Yagman* (Rev.Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788

*McIntosh v. Mills* (2004) 121 Cal.App.4th 333

*Pony v. County of Los Angeles* (9th Cir. 2006) 433 F.3d 1138

*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904

*Severson & Werson v. Bollinger* (1991) 235 Cal.App.3d 1569

**Ethics Opinions:**

L.A. County Bar Opinion No. 447

L.A. County Bar Opinion No. 515

Cal. State Bar Form. Opn. 1994-136

Okl. Bar. Assn. Legal Ethics Committee (2009) Opn. No. 329

## Facts

Attorney represents Client, a non-attorney, as the plaintiff in an employment discrimination case brought in state court under the California Fair Employment & Housing Act (Cal. Gov't Code § 12900, et seq.) ("FEHA"). If Client prevails on her FEHA claim, the court may, in its discretion, award reasonable attorney's fees to the plaintiff's attorney. (Cal. Gov't Code § 12965(b).)

Attorney is representing Client pursuant to an otherwise valid written retainer agreement entered into at the beginning of the retention. The retainer agreement provides, *inter alia*, that Attorney shall be entitled to 1/3 of any gross recovery from the litigation. Gross recovery is defined in the agreement as all recovery for the client, including any court awarded attorney's fees and costs. The remaining 2/3 of the gross recovery belongs to Client.

## Issue

Can an attorney and a client ethically agree to divide the gross recovery in a contingency case that includes the amount of a statutory award of attorney's fees? Does such an agreement violate Rule of Professional Conduct 1-320, subdivision (a)?<sup>1</sup>

## Analysis

Contingency fee agreements must be in writing and must include a "statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery." (Cal. Bus. & Prof. Code § 6147(a)(2).)

Rule 1-320(A) of the California Rules of Professional Conduct provides, subject to enumerated exceptions, that "neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer . . . ."

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<sup>1</sup> This Opinion does not address whether the terms of the retainer agreement would have to be disclosed to the Court in any application for attorney's fees. Nor does this Opinion address whether the retainer agreement at issue complies with Rule 4-210, which prohibits an attorney from directly or indirectly paying expenses of a client, subject to exceptions.

In *Flannery v. Prentice* (2001) 26 Cal.4th 572, 575, 590 (*Flannery*), the California Supreme Court held that, absent an agreement to the contrary, a statutory award of attorney's fees under FEHA (Cal. Gov't Code § 12965), belongs to the attorney, not the client.<sup>2</sup> In doing so, the Court held:

For the foregoing reasons, we conclude that attorney fees awarded pursuant to section 12965 (exceeding fees already paid) belong, *absent an enforceable agreement to the contrary*, to the attorneys who labored to earn them. *The preceding analysis, of course, may not be dispositive – indeed, will not even come into play – where the parties have made an enforceable agreement disposing of an award's proceeds.* Whether an enforceable agreement exists, or what its terms may be in any given case, are of course questions of fact.

(*Id.* at p. 590, italics added.)

*Flannery* discussed, but did not explicitly decide, the issue of whether sharing a statutory award of attorney's fees with a client would run afoul of Rule 1-320(A)'s prohibition upon "fee splitting." (*Flannery, supra*, 26 Cal.4th at pp. 586-587 & fn. 15.) Nonetheless, the italicized language from *Flannery* can be read as suggesting that it is appropriate for the attorney and client to agree, in an otherwise enforceable retainer agreement, to divide the statutory award of attorney's fees that could otherwise belong to the attorney. Indeed, *Flannery* assumed that the parties would contract for a disposition of the statutory attorneys' fees. (*Id.* at 588, fn.16.) Under the facts of this Opinion, attorney and client have agreed to divide percentages of the recovery inclusive of both the client's award and the fee award, and would properly be viewed not as fee splitting but rather as a division of the gross recovery obtained.

The Committee believes that permitting such contractual agreements does not implicate the policies against "fee splitting." In Opinion No. 510, this Committee opined that the "rationale behind [Rule 1-320(A)] and its intended application are, primarily, to protect the integrity of the attorney-client relationship, to prevent control over the services rendered by attorneys from being shifted to lay persons, and to ensure that the best interests of the client remain paramount." (*See also McIntosh v. Mills* (2004) 121 Cal.App.4th 333, 345 [discussing policy reasons for prohibiting "fee splitting" with non-lawyers. *McIntosh* did not address the division of a court-awarded fee with the client.]) In Opinion No. 447, the Committee opined that it was permissible for a statutory award of attorney's fees to be used to reduce the amount of the contingency fee. In doing so, the Committee opined that the policies against "fee splitting" are not implicated "if the lay person is a client who has employed the Attorney under a prior

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<sup>2</sup> This Opinion also does not address the situation where an attorney receives a contingent fee percentage of the client's recovery plus all or a substantial portion of a court awarded statutory fee. The combination of the contingency percentage and the court awarded fee in such situations may be unconscionable depending upon the circumstances and the factors enunciated in Rule 4-200(A). (*See In re Yagman* (Rev.Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788).

specified contingency fee agreement. . . .” In Opinion No. 515, the Committee opined that it would not constitute “fee splitting” for a retainer agreement to provide for a cap on hourly fees and for any statutory award of attorney’s fees to be reimbursed to the client, once the law firm had been paid its full hourly rate. Lastly, the negotiation of the initial retainer agreement between an attorney and client is generally considered an arms-length transaction. (See *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913). As this Committee stated in Opinion No. 515: “As long as the agreed fee is ‘fair, reasonable and fully explained to the client’ and as long as the attorneys abide by the terms of the agreement (see *Severson & Werson v. Bollinger* (1991) 235 Cal.App.3d 1569), no ethical violation arises.”

As in Opinion 447, such policies are not implicated by the facts at hand. The statutory award of attorney’s fees is part of the gross recovery being divided between Attorney and Client, not with a third-party “capper” or “runner” non-attorney, or a non-lawyer employee of the attorney’s, who may not have Client’s best interests in mind. Nor does the Committee believe that such a fee agreement would interfere with the attorney-client relationship or otherwise adversely effect Client’s interests. Nor is there anything in the facts to suggest that the retainer agreement is not “fair, reasonable and fully explained to the client.”

As noted, the negotiation of initial retainer agreements is generally an arms-length transaction by which the attorney and client come to an agreement regarding the payment of fees. Except for certain situations where fees are statutorily set that are not applicable here, an attorney and client are free to negotiate their fee agreement on any terms they agree to that are fair and reasonable. Attorneys paid on an hourly basis are free to negotiate discounts of hourly rates or fees with clients. In terms of contingency fee agreements, under certain statutes (most notably 42 U.S.C. § 1988), the statutory award of attorney’s fees belongs to the client, not the attorney. (See *Evans v. Jeff D.* (1986) 475 U.S. 717, 730, fn. 19.) In such cases, the client can contractually agree to assign the right to collect attorney’s fees to the attorney (see *Pony v. County of Los Angeles* (9th Cir. 2006) 433 F.3d 1138, 1142-1145), provided the agreement is otherwise valid and complies with the Rules of Professional Conduct. (See *In re Yagman, supra*, 3 Cal. State Bar Ct. Rptr. 788, 796, fn. 7; Cal. State Bar Form. Opn. 1994-136.) Similarly, an attorney and client may contractually agree that the percentage of the contingent fee will be reduced by the amount of any court awarded attorney fee. (See *Denton v. Smith* (1951) 101 Cal.App.2d 841, 844.) All of these contractual arrangements reflect the arms-length negotiations that are permitted in initial retainer agreements. The Committee believes that the retainer agreement at issue here is simply another example of the type of agreement an attorney and a client can reach regarding fees.

Therefore, without clear guidance from case law, it is the Committee’s opinion that an otherwise valid retainer agreement may call for the division of a statutory award of attorney’s fees between an attorney and a client without running afoul of Rule 1-320(A)’s prohibition upon “fee splitting” with a non-lawyer. This is the same conclusion reached by another ethics committee, albeit under the laws of another state. (Okl. Bar. Assn. Legal Ethics Committee (2009) Opn. No. 329.)

This Opinion is advisory only. The committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.