L.A. COUNTY BAR ASSOCIATION

PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL OPINION NO. 473

January 25, 1993

SUMMARY

Where a client arranges for the employment of an attorney's firm where the attorney knows or reasonably should know that client's expectation is that no other attorney will be acting as attorney for client other than a particular attorney or specified attorneys, the attorney may be required to disclose to the client the use of other attorneys depending on the particular circumstances of the matter. Where the proposed additional attorney to be working on client's matter is not a partner, employee or shareholder of the attorney's firm and the client's fee is to be divided with such additional attorney, client consent in writing after full disclosure and the fee limitations of Rule 2-200 regarding division of fees between lawyers must be met.

AUTHORITIES CITED

California Business and Professions Code §§ 6068(m) and 6148
California Rules of Professional Conduct, 1-100(B)(4), 2-200(A) and 3-500
Los Angeles County Bar Association, Formal Opinion Nos. 457 (1989), 467 (1992), and 470 (1992)
Severson, Werson, Berke & Melchior v. Bolinger, 235 Cal.3d 1569, 1 Cal.Rptr.2d 531 (1991)

FACTS AND ISSUES

Attorney in question (the "Attorney") practices as a sole practitioner. As a result of an increased caseload, Attorney requires the assistance of additional attorneys and wishes to know his ethical responsibility to make disclosures to clients who engaged Attorney when he was a sole practitioner regarding the fact that other attorneys will be working on their matters. Attorney further asks whether his ethical responsibility to make disclosures varies depending on whether the additional attorneys engaged are full time professional staff, part time employees who

may have their own practice, independent contractors or an outside law firm billing at their normal hourly rates.

DISCUSSION

California Rules of Professional Conduct, Rule 3-500 requires an attorney to keep the "client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information." (Emphasis added.) This duty of attorneys is also imposed by California Business and Professions Code § 6068(m).

The determination of whether utilization of another attorney constitutes a significant development relating to the employment or representation turns on the circumstances of the particular case. Relevant factors, any one of which may be sufficient to require disclosure, include the following: (i) whether responsibility for overseeing the client's matter is being changed; (ii) whether the new attorney will be performing a significant portion or aspect of the work; (iii) whether staffing of the matter has been changed from what was specifically represented to the client or the client's direction to the attorney or firm; (iv) whether staffing of the matter is different from the client's reasonable expectation; or (v) whether the change in staffing increases the cost to the client for the work performed.[1] The listed factors are not intended to be exhaustive, but are identified to provide guidance. Other

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[1] In Severson, Werson, Berke & Melchior v. Bolinger, 1 Cal.Rptr.2d 531, 533 (Cal.App. 1 Dist. 1991), the court ruled that the professional responsibility of attorneys to make sure clients understand their billing procedures and rates encompasses the requirement that agreed upon rates cannot be changed without notification. See also Business and Professions Code § 6148.

factors, such as utilization of another attorney with less expertise or experience, may require disclosure depending on the significance of the work to the representation. Disclosure to the client should generally be made prior to any change unless there is no reasonable opportunity to do so.

A client's choice of counsel for representation in a legal matter is basic to the representation. Therefore, where an attorney knows or reasonably should know that a client expects only a specific attorney (or group of attorneys) will be working on the client's matter, the proposed use of other attorneys will often be a significant development relating to the employment or representation which requires disclosure under California Rule of Professional Conduct, Rule 3-500. It is appropriate that the attorney bears the responsibility to be reasonably aware of the client's expectations regarding counsel working on client's matter because the responsibility can be readily discharged by the attorney through a standard written retainer agreement or disclosure before or during the course of the representation. When a case involves a matter where it is reasonably foreseeable that total fees and expenses will exceed $1,000 and client is not a corporation, § 6148 of the Business and the Professions Code generally requires a written agreement setting forth, inter alia, the hourly rates of attorneys working on the matter .[2]

Here, the fact that Attorney was a sole practitioner at the time of engagement, does not in and of itself determine that Attorney knew or reasonably should have known that the clients

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[2] See also Los Angeles County Bar Association, Formal Opinion No. 467

expected Attorney to be the sole provider of legal services for the matter on which Attorney was retained. For example, clients may not have even known that Attorney was a sole practitioner at the time Attorney was engaged, or expected that Attorney would personally handle their matter. However, if the client communicated an understanding that Attorney would be the sole legal provider, or Attorney reasonably should know that was the client's expectation based on the circumstances, use of another attorney would be a significant development requiring disclosure. Additionally, if Attorney proposes to subcontract out an entire matter to other counsel this would constitute a significant development requiring disclosure.

Where an additional proposed attorney is not a partner, associate or shareholder of the firm or attorney engaged by client and the client's fee is being divided with such additional attorney, consent in writing after full disclosure must be obtained and the fee limitations of Rule 2-200(A) regarding division of fees between lawyers also would be applicable.[3] The determination of whether Rule 2-200(A) is applicable to the

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[3] California Rules of Professional Conduct 2-200(A) provides 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 unless:
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> > (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
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> > (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

different scenarios posited by Attorney turns on whether the client's fee is to be divided with attorneys who are not partners, associates or shareholders with Attorney.[4] The use of attorneys who are "employees", whether full or part time, does not trigger the requirements of Rule 2-200(A) since such employee attorneys are "associates" as defined in Rule 1-100(B)(4).[5]

In addition to the foregoing issues regarding disclosure and division of fees, where part time employees with their own practice, contract lawyers, or an outside law firm are utilized, there must be an adequate mechanism for clearing possible conflicts and adequate measures should be taken to protect the confidences of clients.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinions are based only on such facts as set forth in the questions submitted.

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[4] Payment of an outside firm or attorney by Attorney for work on a client's matter is not a division of fees triggering the fee splitting requirements and limitations of Rule 2-200(A) if each of the following criteria is satisfied: (1) the amount paid to the outside firm or attorney is not bargained for or based on the fee paid by the client to Attorney; (2) the outside firm or attorney has no expectation of receiving a percentage fee; and (3) the fee paid to the outside firm or attorney is compensation for work performed and is paid whether or not Attorney is paid by the client. Los Angeles County Bar Association Formal Opinion No. 470 (1992). See also Los Angeles County Bar Association Formal Opinion No. 457 (1989), discussing division of fees with non-lawyers.

[5] California Rules of Professional Conduct, 1-100(B)(4) defines "Associates" as follows: "'Associate' means an employee or fellow employee who is employed as a lawyer." The inquiry also includes the alternative of an independent contractor as the additional attorney to be utilized. This Opinion does not address the question of and we express no opinion as to whether an independent contractor is an employee for purposes of Rule 2-200(A) or an outside attorney.