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## OPINION NO. 515

August 15, 2005

### ETHICAL ISSUES ARISING FROM AGREEMENTS BETWEEN ATTORNEY AND CLIENT TO SPLIT AN AWARD OF STATUTORY ATTORNEY'S FEES

#### **I. FACTS**

Client, a non-profit organization, approaches Law Firm to represent Client in a public interest case involving enforcement of important public rights under state law. Because of the limited financial resources of Client and the possibility of recovering fees for the enforcement of the important public rights, Law Firm proposes a retainer agreement offering Client the following fee terms:

Client will pay for Law Firm's legal services on the case based on Law Firm's regular hourly rate, up to a certain sum, at which point Law Firm will continue to accrue its charges but without client having any obligation to pay them. If the case is successful, Law Firm will move for an award of private attorney general fees pursuant to Code of Civil Procedure § 1021.5 and attempt to recover from the defendants in the case the full amount of the fees earned. For example, Law Firm agrees to cap Client's fee obligation at \$50,000, Law Firm accrues a total of \$80,000 of attorney time working on the case. If the case is successful, Law Firm would move the court for the award of private attorney general fees in the amount of \$80,000. If the court awards \$80,000 in fees, Law Firm will receive \$30,000 for its noncompensated time and reimburse the balance to client. If the judge awards less than \$80,000, the fees awarded will be paid first to the Law Firm to the extent of its unpaid compensation with any amount of the award over and above the unpaid compensation to be reimbursed to the client.<sup>1</sup>

#### QUESTION PRESENTED

Does the fee agreement proposed above constitute and improper fee split that would be prohibited by Rule of Professional Conduct 1-320?

#### **II. SUMMARY OF OPINION**

Rule of Professional Conduct 1-320 prohibits a member of the bar from sharing a legal fee with any person who is not a lawyer. The agreement described above **does not** violate RPC 1-320 because the reimbursement to the client, if any, is a refund of an overpayment, **not** a sharing of an earned fee. The agreement anticipates the possibility of receiving an award of private attorney general fees pursuant to Code of Civil Procedure § 1021.5. An award of "private attorney general" fees pursuant to Code of Civil Procedure § 1021.5 is properly made to the attorneys rather than to plaintiffs themselves.<sup>2</sup> If such fees are awarded in an amount that would result in an excess recovery of fees (i.e. fees greater than the value of the legal services agreed to by the parties) the attorneys can, and indeed must, under the terms of the retainer agreement, refund the amount of overpayment to their clients without violating RPC 1-320.<sup>3</sup>

#### **DISCUSSION**

The agreement contemplates the possibility that Law Firm will pay over to client some portion of the statutory attorney fee award that Law Firm recovers from the defendants. California Rule of Professional Conduct 1-320 states, subject to several exceptions, which are not applicable here:

Neither a member nor a law firm shall directly or indirectly share legal fees with a person

who is not a lawyer.

The proposed agreement does not violate RPC 1-320 for the simple reason that no fee sharing is contemplated. The only possible shifting of any portion of the eventual attorney fee award from the attorney to the client would be in the nature of a refund, rather than a fee split. The hypothetical assumes that the law firm and the client had agreed that the firm's fees would be charged at not more than its usual hourly rates and that the total value of the legal services (hours worked x \$ per hour) was \$80,000, of which \$50,000 was paid up front by the client. Any court ordered award of fees greater than \$30,000 would result in a payment to the attorneys greater than that contemplated by the agreement.

The fiduciary duties that an attorney owes a client encompass the fairness of fee agreements and billings.<sup>4</sup> Rule of Professional Conduct 4-200(A) expresses this requirement stating: "A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." This, and all other Rules of Professional Conduct, "are not only ethical standards to guide the conduct of members of the bar; but they also serve as an expression of the public policy to protect the public."<sup>5</sup> Attorney fee agreements are evaluated at the time of their making and must be fair, reasonable and fully explained to the client. Such contracts are strictly construed against the attorney.<sup>6</sup> *Alderman v. Hamilton* (1988) 205 Cal. App. 3d 1033, 1037. 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*, 235 Cal. App. 3d 1569 (1991)) no ethical violation arises.

The fee agreement contemplates that the attorney's maximum fee would be their normal hourly rate multiplied by the hours they worked. The agreement further contemplates that if the combined total of the fees advanced by the client and the court awarded fees exceeds amount of fees agreed to by the parties the excess would be refunded to the client.

Applying the above analysis to the hypothetical facts, it is clear that the attorneys cannot retain an award of attorney fees that would result in a total fee greater than that contemplated in the retainer agreement. Refunding the excess is the obvious solution to avoid this problem. The mere fact that this may involve a payment of part of the court awarded fees from the attorneys to the client does not violate RPC 1-320. The excess amount to be refunded is not a fee earned pursuant to the terms of the retainer agreement and therefore cannot be the subject of an improper fee split.

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

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<sup>1</sup> In many cases brought under CCP § 1021.5, courts calculate the attorney fee award to include a multiplier based on a variety of factors relating to the case. & *Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 322 (1983). The facts of this inquiry do not include any discussion of a multiplier being applied, so we have not addressed the effect of such that issue in this opinion.

<sup>2</sup> *Folsom v. Butte County Assn. of Governments*, 32 Cal. 3<sup>rd</sup> 668, 682 (1982). Compare: *Evans v. Jeff D.*, 475 U.S. 717, 759, 106 S. Ct. 1531, 1539 (1986).

<sup>3</sup> A different result might arise if the statutory fees sought were awarded to the party and not the attorneys or if there was an agreement to split any overpayment between the party and the attorneys.

<sup>4</sup> *Severson & Werson v. Bollinger*, 235 Cal. App. 3d 1569, 1572 (1991).

<sup>5</sup> *Atschul v. Sayble*, 83 Cal. App. 3d 153, 162 (1978).

<sup>6</sup> *Alderman v. Hamilton*, 205 Cal.