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# Avoiding the voidable

## *Ensuring contingency fees and fee-sharing agreements are enforceable*

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In order to be enforceable, contingency-fee agreements and attorney fee-sharing agreements must include certain provisions. Failure to adhere to these requirements can render these agreements voidable at the option of the client and relegate the attorney to proving up and collecting a reasonable fee. Since many plaintiffs' attorneys utilize one or both of these types of agreements in their practices, it is critical to keep abreast of the law in this area.

### Contingency fee agreements

***•Unconscionability***

Preliminarily, it is important to note that an attorney is not permitted to "enter into an agreement for, charge, or collect an illegal or unconscionable fee." (Rules Prof. Conduct, rule 4-200(A).) Whether a fee is unconscionable is determined by considering eleven factors:

(1) The amount of the fee in proportion to the value of the services performed.
(2) The relative sophistication of the member and the client.
(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
(5) The amount involved and the results obtained.
(6) The time limitations imposed by the client or by the circumstances.
(7) The nature and length of the professional relationship with the client.
(8) The experience, reputation, and ability of the member or members performing the services.
(9) Whether the fee is fixed or contingent.
(10) The time and labor required.
(11) The informed consent of the client to the fee.

(Rules Prof. Conduct, rule 4-200 (B).)

Unconscionability is assessed "at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events." (*Ibid*.) The party asserting unconscionability has the burden to establish that condition. (*Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 728.) The simple fact that a contingency fee payable by a client ultimately exceeds the amount the attorney would have billed on an hourly basis does not, in and of itself, render a fee agreement unconscionable. (*Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal.App.4th 1405, 1423.)

***•Requirements of contingency fee agreements***

The requirements for contingency fee agreements are provided in Business & Professions Code section 6147, which states, in pertinent part:

(a) An attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:
(1) A statement of the contingency fee rate that the client and attorney have agreed upon.
(2) 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.
(3) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.
(4) Unless the claim is subject to the provisions of Section 6146 (pertains to claims against health-care providers and provides that contingency fee percentages in such cases are fixed pursuant to the Medical Injury Compensation Reform Act ("MICRA"), a statement that the fee is not set by law but is negotiable between attorney and client.
(5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.
(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.
(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits….

Material changes to contingency fee agreements must also comply with Section 6147. (*Stroud v. Tunzi* (2008) 160 Cal.App.4th 377.)

Case law interpreting Section 6147 has reinforced its terms. For example, in


*Fergus v. Songer* (2007) 150 Cal.App.4th 552, an attorney and client executed a fee agreement that did not include a provision advising the client that the stated fee was negotiable, thus violating Section 6147(a)(4). When the attorney sought to recover under the agreement, the court held that the agreement was voidable and observed that, "even if [the client] had orally agreed to the terms of the letter agreement, that agreement would have been voidable at [the client's] option." (*Id*. at 570.)

The court held that the client had implicitly voided the agreement by his conduct and refused to consider the contingent nature of the fee arrangement when determining the attorney's reasonable fee. (*Id*. at 573.)

> The deterrent and protective purposes of Business and Professions Code section 6147 would be impaired if an attorney who was barred from enforcing a contingency fee agreement would nevertheless be entitled to a percentage of the recovery based on the contingent risk factor. The attorney would in effect be receiving a contingency fee even though the contingency fee agreement had been voided by the client. A contingency fee "is contingent not only on the ultimate success of the case but also on the amount recovered; that is, the fee is measured as a percentage of the total recovery."

(citations omitted) (*Fergus* at 573.)

Contingency fees are the lifeblood of the plaintiffs' bar, and contingency-fee attorneys generally do not keep contemporaneous time records. Plaintiffs' attorneys can thus find it difficult to prove – after their contracts are voided – that the contingency fees for which they contracted are, in fact, reasonable fees. Consequently, it is imperative that they adhere to the dictates of Section 6147 in their dealings with their clients.

## Fee sharing agreements

When attorneys refer cases to other attorneys or associate additional attorneys into a matter, they are required to obtain written consent from the client. Fee sharing agreements between attorneys are governed by Rule 2-200 of the Rules of Professional Conduct, which 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.
>
> (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.

(Rules Prof.Conduct, rule 2-200.)

Rule 2-200 serves multiple purposes. The leading decision on Rule 2-200 is by the California Supreme Court in *Chambers v. Kay* (2002) 29 Cal.4th 142. In that case, the plaintiff attorney sought to enforce a fee-splitting arrangement with the defendant attorney. The arrangement was confirmed in a letter, a copy of which was sent to the client. The client, however, never signed a written consent to the fee division. The Court was emphatic that such an agreement was unenforceable.

> Rule 2-200 unambiguously directs that a member of the State Bar "*shall not divide a fee for legal services*" unless the rule's written disclosure and consent requirements and its restrictions on the total fee are met. Yet Chambers, in effect, seeks the aid of this court in dividing the fees of a client without satisfaction of the rule's written consent requirement. We decline such aid.

(emphasis in original) (*Chambers* at 156.)

Although the contract was between the lawyers, the Supreme Court was explicit that client consent was essential:

> Were we to hold that the fee . . . may be divided as Chambers and Kay agreed, with no indication that the required client consent was either sought or given, we would, in effect, be both countenancing and contributing to a violation of a rule we formally approved in order "to protect the public and to promote respect and confidence in the legal profession." (Rule 1-100(A), 1st par.; Bus. & Prof. Code, § 6076.) Such a result would be untenable as well as inconsistent with the policy considerations that motivated the adoption of rule 2-200.

(*Id*. at 158.)

Rule 2-200 was designed to protect the interests of clients:

> Just as a client has a right to know how his or her attorney's fees will be determined, he or she also has a right to know the extent of, and the basis for, the sharing of such fees by attorneys.

(*Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 903.)

Moreover,

> …[r]equiring the client's written consent to fee sharing impresses on the client the importance of his or her consent, and of the right to reject the fee sharing.

(*Ibid*.)


> Written disclosure to the client of the percentage of the fees payable to her attorneys may affect the client's level of confidence in the attorneys and is indispensable to the client's ability to make an informed decision regarding whether to accept the fee division and whether to retain or discharge a particular attorney.

(*Chambers, supra,* at 157.)

Rule 2-200 was also designed to increase the likelihood that the fee-sharing attorneys would be on the same page with one another as to the division of fees and the division of responsibility:

> The written disclosure has the additional benefit of ensuring that the attorneys themselves truly agree to the exact terms of the fee sharing agreement, thus making it less likely that they will have a disagreement between themselves that will lead to litigation or potentially impact the client in a negative manner. Moreover, providing a written disclosure of the fee sharing agreement makes it less likely that the attorneys will wittingly or unwittingly change the terms of such agreement during the pendency of the case.

(*Margolin, supra,* at 903.)

In *Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal.4th 453, there was no writing complying with Rule 2-200; the client was apparently never consulted and provided no input about the division of fees. There was, however, an oral agreement between two law firms to share fees. The firm that tried the case refused to adhere to the oral agreement when the judgment was obtained, contending that, in the absence of a written agreement signed by the client, the referring firm was not entitled to any fees. This prompted the referring firm to bring suit for various causes of action, including quantum meruit, which the Court allowed.

## Conclusion

Courts do not enforce fee sharing agreements that fail to comply with Rule 2-200. Though fee-sharing attorneys may believe at the outset of their joint venture that they and the client are in full agreement as to their respective responsibilities, in the absence of a signed writing complying with Rule 2-200 the attorneys risk losing a good portion of their fees should the relationship break down. Compliance with the Rule is paramount.

The last thing a lawyer wants to do after obtaining a hard-fought victory for a client is to have to go to court to prove up a reasonable fee. The best way to avoid that eventuality is to comply with the requirements of Section 6147 and Rule 2-200 at the outset of the representation.


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