

COMMITTEE: Ethics Committee

DATE: May 7, 2009

3. CHAPTER 9, RULE 6: WHETHER COURT AWARD OF FEES TO REPRESENTATIVE PLAINTIFFS IN CLASS PROCEEDINGS CONSTITUTES FEE SHARING

A lawyer acts for plaintiffs in numerous class actions. Section 38 of the *Class Proceedings Act* gives the court wide authority to determine a lawyer's fees and disbursements in class proceedings and, in particular, an agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court. When approving settlements, courts have in some circumstances approved nominal compensation for the representative plaintiff or plaintiffs to come out of approved class counsel legal fees. The lawyer advised that he expects this issue to arise again in other class actions where he is plaintiff's counsel. He has asked whether there is any difficulty with such an allocation of fees given the provisions of Chapter 9, Rule 6.

The Committee noted that if such an allocation was a violation of Rule 6 it may be that the lawyer would have an obligation to draw the violation to the attention of the court, decline to make any submission favouring such an allocation, or perhaps even refuse the fees.

The Committee did not agree that the fees of the lawyer and the representative plaintiff are split, shared or divided in the manner contemplated by Rule 6. The fees for each are calculated separately and not divided by either the lawyer or the plaintiff, but by the court. Moreover, the allocation of fees between a lawyer and plaintiff in this way does not result in any attenuation of control of lawyers over their practices or promote the unauthorized practice of law, both of which the fee sharing rule is designed to curtail. Finally, since class proceedings are subject to supervision by the court and the allocation of fees is determined by court order, it was the Committee's opinion that Rule 6 does not affect counsel's ability to make submissions about allocation of fees between lawyer and plaintiff out of approved class counsel legal fees or counsel's ability to accept such fees when ordered by the court.

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