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March 19, 2016 Rothschild Email to Drafting Team, cc Difuntorum & Mohr:

I think you have done a fine job of addressing the issues in Rule 1.8.1. My only concern is the formatting. The initial paragraph sets forth the prohibition "unless each of the following requirements has been satisfied:". It then lists the 3 requirements in (a), (b), and (c). Finally, it lists a definition as (d). But the definition is not a requirement. I think that (d) should be a separate first level paragraph, so that the opening paragraph would be (a), the sub-paragraphs would be (1), (2), and (3), and the draft (d) would become (b). Thanks for considering this.

March 21, 2016 Bleich Email to Rothschild, cc Difuntorum & Mohr:

Thanks Toby. I'm fine with all of these changes.

March 21, 2016 Harris Email to Drafting Team, cc Rothschild, Difuntorum & Mohr:

Fine with me as well.

March 22, 2016 Difuntorum Email to Rothschild, cc Drafting Team & Mohr:

Does the attached revised draft of rule 1.8.1 [3-300] accurately implement your recommended reorganization of the rule?

With the definition of "independent lawyer" set off as its own first level paragraph, it does seem like it should include a typical lead-in phrase such as "As used in this Rule. . ." or "For purposes of this Rule. . ." but see footnote #1 in the report and recommendation that states:

¹ The term "independent lawyer" also is used in Rule 1.8.8, which suggests that the definition might be placed in Rule 1.0.1. However, the same phrase is used in Rule 4.2(c) but with a different meaning. The better solution therefore might be to place an agreed definition both here and in Rule 1.8.8.

The footnote should adequately tee-up this issue for discussion.

Attached:

RRC2 - [3-300][1.8.1] - Rule - DFT1.4 (03-19-16)-TR.docx

March 22, 2016 Rothschild Email to Difuntorum, cc Drafting Team & Mohr:

That works. I agree that it should have the "as used in this rule" intro, particularly as it means something different in another rule.

March 22, 2016 Bleich Email to Drafting Team, cc Rothschild, Difuntorum & Mohr:

I agree.

March 22, 2016 Kehr Email to Drafting Team, cc Rothschild, Difuntorum & Mohr:

And I also agree. Thanks to all.

March 22, 2016 Difuntorum Email to McCurdy & Lee, cc Mohr:

Based on the emails exchanged [above] among the 3-300 (1.8.1) drafting team, a revised proposed rule has been prepared. The attached memo presenting the revised rule should be added to the materials already posted for this agenda item. If possible, please add this before

the R&R that is already uploaded so that members who have not yet read these materials will read the memo and the current draft before reading the R&R that now has an outdated draft. Thanks.

Attached:

RRC2 - [3-300][1.8.1] - Rule - DFT1.4 (03-19-16)_w-Attach.pdf

March 26, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy:

Attached are my comments on the drafting team's report and recommendation on rule 3-300 [rule 1.8.1]

Attached:

RRC2 - [3-300][1.8.1] - 03-26-16 Tuft Memo to Drafting Team.docx

March 26, 2016 Tuft Memo to Drafting Team:

Paragraph (a) (2)

1. The argument in favor of eliminating the requirement to advise the client in writing to seek the advice of independent counsel where the client is already represented in the transaction does not apply in other rules requiring the same or similar advice. Rule 3-400(B); Business and Professions Code § 6175.3(f). The proposed change in the black letter appears to make the rule a less clear and enforceable disciplinary standard. A lawyer could argue that he or she had a good faith belief that the client was separately represented when that was not the case. This argument has been made in civil cases involving application of the rule.
2. If the Commission decides to include the exception, the rule should require the client's informed written consent to the lawyer's role in transaction, including whether the lawyer is representing the client in the transaction.

Proposed Comment [2]

1. I do not believe adding a comment that precludes the application of the rule to all modifications of retention agreements unless the modification confers on the lawyer a pecuniary interest adverse to the client is warranted under this Commission's charge. While I agree that the rule does not apply to all modifications of fee agreements, the opposite is also true: modifications to existing agreements relating to the hiring or compensation of lawyers may constitute business transactions under the rule. As professor Roy Simon states in his article on the subject, not all mid-stream changes trigger the rule and whether a mid-stream change constitutes a business transaction depends on the circumstances.
2. The extent to which modifications to existing retention agreements are subject to Rule 3-300 is controversial and an unsettled area of the law. There is no case authority in California holding that the rule does not apply to any mid-stream change in the agreement unless it amounts to an adverse pecuniary interest. On the other hand, there is authority that certain modifications to existing agreements can constitute business transactions requiring compliance with Rule 3-300. The Review Department in *Silverton*, 4 State Bar Ct. Rptr 252 (Rev. Dept 2001), for example, found that a post settlement modification of an original contingent fee agreement that gave the attorney the right to compromise the client's medical bills and keep the amount saved in exchange for paying the client an additional sum from his fee constituted a business transaction with the client in violation of the rule. The Review Department reached a similar conclusion in *Silverton 11*, 2004 WL 60709 (Rev. Dept. 2004). The Supreme Court conducted an independent determination of the law and facts in the case and accepted the

conclusions of the Review Department that Silverton had violated Rule 3-300 in at least one of the matters. State Bar Opinion 1994-135 concludes that the rule is intended to apply where important matters are left out of an initial fee agreement, such as whether the lawyer can receive his or her entire fee up front in the event of a structured settlement. While there isn't a great deal of authority, other courts have held that post engagement changes in compensation can constitute business transactions with clients under rule, depending on the circumstances. *In re Hefron*, 771 N.E. 2d 1157 (Ind. 2002), for example, involved a lawyer who agreed to represent a client in identifying and recovering assets in a probate matter on an hourly basis. The Indiana Supreme Court found that the lawyer violated rule 1.8(a) by negotiating for a 25% post engagement contingent fee after the lawyer learned that the estate had agreed to provide an accounting that included the return of sizeable assets. The court concluded that the modification of the fee agreement constituted a business transaction to which rule 1.8(a) applied.

3. The application of the rule to changes in retention agreements depends on a variety of factors that cannot be easily captured in a comment to the rule. Whether the rule applies to particular modification does not necessarily turn on whether the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client. There are obvious provisions that would not trigger the rule if agreed to in the initial agreement when the parties are acting at arms-length that could trigger the rule if negotiated mid-stream. There is often an overlap between the business transaction prong and the adverse pecuniary interest prong that is not easily distinguishable. A comment that says that only one of the two prongs applies to all mid-stream changes regardless of the circumstances would dilute the rule without adequate public protection.

4. Evaluating mid-stream changes to existing agreements that do not come under the "acquisition" prong under Rule 1.5 would not be a sufficient substitute. There are obvious mid-stream changes, such as adding a mandatory arbitration clause or diluting a client's contract rights, that have little to do with whether the fee is unconscionable. We know, for example, that a lawyer seeking to apply an arbitration clause in a fee agreement to a business dispute with the client triggers Rule 3-300. *Mayhew v. Benninghoff*, 53 Cal. App 4th 1365. From a public protection perspective, why should the result be different if a lawyer seeks to modify an existing fee agreement to add a binding arbitration clause, particularly if the new clause deprives the client of the right to a jury trial and to appellate review? Comment (2) would eliminate the application of the rule to any modification of an existing retention agreement, no matter how significant it impairs the legal or contractual rights of the client, unless the revised agreement amounts to the lawyer acquiring an adverse pecuniary interest. A minor modification to clarify an existing provision or correct a technical error would not invoke the rule. On the other hand, a material modification that results in the client losing a substantive legal or contractual right could be found to be a business transaction requiring compliance with the rule. It is not uncommon for agreements relating to the hiring or compensation of any attorney to include business terms and law related services and procedures.

5. RRC-1 decided by the narrowest of margins (I recall the vote was 6-6-0), to venture into the unsettled area of mid-stream changes to attorney-client retention agreements. This ultimately resulted in unsatisfactory compromised by the Board that pleased no one. The comment does not appear to satisfy this Commission's charge. It does not appear to enhance public protection or maintain the rule as a clear and enforceable disciplinary standard. No other jurisdiction has such a provision. We should not venture into the complicated area of retention agreement modifications, nor should we try to preempt the development of the law in this area.