



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

OFFICE OF PROFESSIONAL COMPETENCE

PLANNING, AND DEVELOPMENT

TELEPHONE: (415) 538-2167

M E M O R A N D U M

DATE: March 22, 2016

TO: Members, Commission for the Revision of the Rules of Professional Conduct

FROM: Randall Difuntorum, Director, Professional Competence

SUBJECT: Proposed Rule 1.8.1 (3-300) Business Transactions with a Client and Pecuniary Interests Adverse to a Client

The attached draft of the subject rule is the current draft that should be considered in preparation for the discussion at the March 31st and April 1st meeting. The redline/strikeout markings show changes to the proposed rule contained in the drafting team's report and recommendation. The revisions are intended to be organizational changes rather than substantive.

ATTACHMENT
PROPOSED RULE 1.8.1 [3-300]
(DFT1.4 – 3/22/16)

Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client

| (a) A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

| (a~~1~~) The transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing to the client in a manner that should reasonably have been understood by the client; and

| (b~~2~~) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

| (c~~3~~) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

| (d~~b~~) As used in this Rule, An an independent lawyer is a lawyer who (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, (iii) is selected by the client; and (iv) represents the client with respect to the transaction or acquisition.

Comment

| [1] Fairness and reasonableness under paragraph (a)(~~1~~) are measured at the time of the transaction or acquisition based on the facts that then exist.

[2] This Rule is not intended to apply to the provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. This Rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[3] This Rule does not apply where a lawyer and client each make an investment on terms offered by a third person to the general public or a significant portion thereof. This Rule also does not apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. This Rule does apply where a lawyer wishes to obtain an interest in a client's property in order to secure payment of the lawyer's past, current, or future fees, or costs or other expenses.

[4] In addition to where a lawyer holds an ownership, possessory or security interest adverse to a client, a lawyer has a pecuniary interest adverse to a client when the lawyer has the unilateral ability to materially interfere with or prejudice the client's rights or interests. See *Fletcher v. Davis*, 33 Cal. 4th 61, 68 (2004). Also see Bus. & Prof. Code § 6175.3 ("Sale of financial products to elder or dependent adult clients; Disclosure").