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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:

<sup>1</sup> 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 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 4<sup>th</sup> 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.

**March 29, 2016 Bleich Email to Tuft, cc Kehr, Difuntorum & Mohr:**

Thanks for sharing these thoughts. I remain comfortable with the drafting team's initial proposal. In particular, I think it is fairly common for attorneys and clients to have a post-litigation "settling up" that should not require separate counsel. In many cases, for example, a lawyer will have a provision in the contract that says that if they perform exceptionally well, the client will consider paying a "success fee". The client has great bargaining power in this

situation -- they can say they do not consider the lawyer's work exceptional or they can offer only a small fee on a take-it-or-leave-it basis. I do not see any danger to the client in this sort of situation, even though it involves a form of post-litigation negotiation. Looking forward to discussing more on Thursday morning's flight!

**March 25, 2016 OCTC Email to RRC2:**

\* \* \*

**F. Rule 3-300 [Avoiding Interests Adverse to a Client]**

Rule 3-300 would provide greater public protection if it also applied to transactions involving an attorney's family members, where the attorney knew or reasonably should have known about the transaction. This would include an attorney's parents, spouse, and children. (See *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 776-777 [declining to apply former rule 5-101 to a transaction between the client and respondent's parents] and *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 123-124 [declining to apply rule 3-300 where respondent negotiated a transfer of real property between two of his clients, and, as a result of the transfer, the respondent's minor son received a 50 percent interest in the property].)1 In comparison, real estate brokers have been disciplined for failing to disclose that a purchaser was related to the broker. (See *Whitehead v. Gordon* (1969) 2 Cal.App.3d 659 [broker's brother-in-law].) While an attorney may not be able to stop a transaction between a client and a family member or obtain the client's informed written consent to the transaction, an attorney could be required to provide notice to the client of his or her indirect personal interest in the transaction.

It may also be advisable to revise the discussion section to expressly apply the rule to modifications of fee agreements. (See OCTC's written Comment to COPRAC's Proposed Formal Opinion Interim No. 05-0001, previously provided with OCTC's August 26, 2008 comment on the rules and *In the Matter of Mark Scott*, (Review Dept. 2007) Case No. 01-O-05066, Slip Op. p. 19, fn. 22 [contingency fee agreements renegotiated at the time of settlement may be governed by rule 3-300, unpublished].)

Finally, the discussion section could point out that the rule will apply to certain transactions occurring after a formal attorney-client relationship has ended. (Compare *Hunnicutt v. State Bar* (1988) 44 Cal.3d 362, 370-372 [applying former rule 5-101 to a transaction occurring after the termination of the attorney-client relationship, reasoning that "if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of rule 5-101 even if the representation has otherwise ended"] and *In the Matter of Allen* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 198, 203-205 [declining to apply rule 3-300 to a transaction occurring after the termination of the attorney-client relationship].)

**April 7, 2016 Difuntorum Email to Kehr, cc Mohr, McCurdy & Lee:**

Staff is working on the matters to be assigned for the Commission's June agenda. These items will include many Model Rules for which there are no direct California counterparts. Among those rules are [1.8\(d\)](#) (re literary/media rights) and [1.8\(i\)](#) (re proprietary interest in a client's cause of action). Would you be willing to hold a teleconference of your 3-300 (1.8(a)) team to discuss these rules and ascertain if there is any consensus for a recommendation to the full Commission. The prior Commission [considered but rejected](#) these rules and it might be that your team shares that opinion. Thanks for considering this potential addendum to your team's work.

**April 7, 2016 Kehr Email to Difuntorum, cc Mohr McCurdy & Lee:**

I'll be glad to do so.

**April 8, 2016 Difuntorum Email to Drafting Team re MR 1.8(d) & (i), cc Mohr, McCurdy Marlaud & Lee:**

As you know, consideration of [rule 3-300 \[1.8.1\]](#) is being carried forward to the May 6 & 7 agenda. There are two ABA Model Rules for which rule 3-300 is the closest counterpart. They are: rule [1.8\(d\)](#) (re literary/media rights) and rule [1.8\(i\)](#) (re proprietary interest in a client's cause of action). Because the Commission is running low on meeting time to consider Model Rules that have no California counterpart, it would be very helpful if this team could seize the opportunity to hold one teleconference to discuss these two short model rules and ascertain if there is any consensus for a recommendation to the full Commission. The prior Commission [considered but rejected](#) these rules and it might be that this team shares that same opinion. Thank you in advance for taking on this addendum to your good work. Angela will be polling you for date/time next week for a teleconference. The deadline for receiving materials to post for the May meeting is April 18.

**RRC1's Concepts Considered But Rejected (2010) re MR 1.8(d) & (i):**

**2. Model Rule 1.8(d) re Literary or Media Rights**

Model Rule 1.8(d) provides:

**[Rule 1.8 Conflict of Interest: Current Clients: Specific Rules]**

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

**Comment**

*Literary Rights*

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Model Rule 1.8(d) is one of several unrelated provisions concerning conflicts of interest and potential conflicts that the ABA has collected in a single rule. The Commission is recommending that most of those provisions be adopted as separately-numbered and separately-titled rules, with numbers corresponding to the letters in the Model Rule (e.g., proposed Rule 1.8.1 is the counterpart of Model Rule 1.8(a)). The Commission has

determined that taking this approach will facilitate indexing of the Rules and the ability of lawyers to find the relevant provisions.

Although the Commission is recommending the adoption of most of the provisions in Model Rule 1.8, it is recommending that Model Rule 1.8(d) not be adopted. The Model Rule carries forward concepts expressed in the Model Code. DR 5-103(A) stated in relevant part: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client..." EC 5-4 stated: "If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended."

California has not adopted a similar prohibition. Instead, literary rights arrangements between lawyers and clients have been considered under the Rule 3-300 rubric. (See *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 616, n. 6.) The California Supreme Court addressed the conflict issues associated with literary rights agreements in *Maxwell* and rejected the conflict of interest considerations that have been used to justify the Model Rule. *Maxwell* involved an agreement by which a criminal defendant charged with a capital offense entered into an agreement to confer the ownership of his life story to his defense counsel. The agreement had extensive disclosures. It advised the client to seek the advice of independent counsel. The defendant was examined and was determined to have knowingly consented to the arrangement. Nevertheless, the trial court recused the defendant's lawyers on the grounds that the agreement created a conflict of interest.

The Supreme Court disagreed. It stated,

"A life-story agreement creates no such inherent or inevitable conflict. The contract here discloses that the value of petitioner's story might benefit from a long, sensational trial leading to conviction and death. It seems not unlikely, though, that counsel's self-interests might best be served by a careful, diligent defense that avoids conviction or minimizes the penalty. A quiet strategy that succeeds may well make a better story than a flamboyant failure. Counsel's reputation, a precious professional and commercial asset, is enhanced; and the risks of professional discipline and demeaning criticism are reduced. Also, it may be commercially prudent to keep lurid facts confidential until the legal battle has ended.

Justice Files' dissenting remarks in the Court of Appeal are particularly apt:

'Although the literary rights contract is not a common experience for attorneys, the kind of 'conflict' discussed here is not at all unusual. . . . [A]lmost any fee arrangement between attorney and client may give rise to a 'conflict.' An attorney who received a flat fee in advance would have a 'conflicting interest' to dispose of

the case as quickly as possible, to the client's disadvantage; and an attorney employed at a daily or hourly rate would have a 'conflicting interest' to drag the case on beyond the point of maximum benefit to the client.

The contingent fee contract so common in civil litigation creates a 'conflict' when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of 'conflict' are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying the client's interest." (Maxwell, supra, 30 Cal.3d at 619, n. 8.)

The Court concluded that a client could give an informed consent to the conflicts of interest that could arise from a literary rights agreement.

The Court's concluding comment in Maxwell states,

"We stress that our opinion connotes no moral or ethical approval of life-story fee contracts. We have addressed only this narrow question: May a criminal defendant (here charged with capital crimes) be denied his right to representation by retained counsel simply because of potential conflicts or ethical concerns even when he has asserted, after extensive disclosure of the risks, that he wishes to proceed with his chosen lawyers and no others? Our answer is No." (Maxwell, supra, 30 Cal.3d at 622.)

In a concluding footnote, the Court stated,

"As Justice Files observed below: 'I do not disagree with EC 5-4 of the American Bar Association's Code of Professional Responsibility, which declares that the kind of contract which is here involved 'should be scrupulously avoided.' But we are here dealing with a fact and not a theory. The defendant and his attorneys have made the contract. The question now is whether this defendant, charged with four capital offenses, shall be deprived of his chosen attorneys and forced to accept the trial court's choice who, in the words of the Faretta court: "represents" the defendant only through a tenuous and unacceptable legal fiction.'" (Maxwell, supra, 30 Cal.3d at 622, n. 13.)

Model Rule 1.8(d) imposes an unconsentable prohibition on literary right agreements based on principles that the Supreme Court did not accept in Maxwell. Maxwell demonstrates that such agreements do not always involve a conflict of interest and that a client can consent to a literary rights agreement in the face of potential conflicts. The Commission is not aware of any particular development that would suggest that the Court would be prepared to abandon Maxwell. Indeed, in 2008, the Court cited Maxwell in its concluding footnote in *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706 without questioning its holding.

In deciding not to recommend adoption of a California version of Model Rule 1.8(d), the Commission reassessed California's existing law and policy and concluded that the absolute prohibition in Rule 1.8(d) is not warranted. Adequate client protection is afforded if literary rights agreements are permitted with appropriate disclosures and consents in compliance with the Commission's proposed Rule 1.8.1.



Although the Commission is not recommending adoption of Model Rule 1.8(d), the Commission is recommending adoption of the following provisions in the Rule: 1.8(a) (see proposed Rule 1.8.1); 1.8(b) (see proposed Rule 1.8.2); 1.8(c) (see proposed Rule 1.8.3); 1.8(e) (see proposed Rule 1.8.5); 1.8(f) (see proposed Rule 1.8.6); 1.8(g) (see proposed Rule 1.8.7); 1.8(h) (see Proposed Rule 1.8.8); 1.8(j) (see proposed Rule 1.8.10); and 1.8(k) (proposed Rule 1.8.11). Refer to the materials for each proposed rule for a full explanation of the differences, if any, with the Model Rule counterpart.

The Commission members unanimously approved the foregoing recommendation.

### **3. Model Rule 1.8(i) re Proprietary Interest in the Subject Matter of Representation**

Model Rule 1.8(i) provides:

#### **[Rule 1.8 Conflict of Interest: Current Clients: Specific Rules]**

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

#### **Comment**

##### *Acquiring Proprietary Interest in Litigation*

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Model Rule 1.8(i) is another of several unrelated provisions concerning conflicts of interest and potential conflicts that the ABA has collected in a single rule but which the

Commission is recommending be adopted as separately-numbered and separately-titled stand-alone rules. See discussion concerning rejection of Model Rule 1.8(d), above. Similar to Model Rule 1.8(d), the Commission is recommending that Model Rule 1.8(i) and the related Comment [16] not be adopted. As explained in the Model Rule comments, Model Rule 1.8(j) is based on (i) common law prohibitions on champerty and maintenance and (ii) the potential difficulty in discharging counsel. California has never included the concept of maintenance and champerty in a rule of professional conduct. The Commission believes that an acquisition of an ownership interest should be governed by proposed Rule 1.8.1, the general rule governing a business transaction with a client and a lawyer's acquisitions of an adverse interest. The comments to Model Rule 1.8(i) suggest that the ABA had a specific transaction in mind when it adopted the Model Rule, but neither the Model Rule nor the Comment provides any specific information on this point. The result is a Model Rule that is overbroad (in that it would apply to acquisitions that may be fair and reasonable and could pass muster under Rule 1.8.1) and that covers a subject that is already addressed in Rule 1.8.1. Rule 1.8.1 does a much better job of distinguishing between those acquisitions that should be prohibited and those that should not.

Although the Commission is not recommending adoption of Model Rule 1.8(d), the Commission is recommending adoption of the following provisions in the Rule: 1.8(a) (see proposed Rule 1.8.1); 1.8(b) (see proposed Rule 1.8.2); 1.8(c) (see proposed Rule 1.8.3); 1.8(e) (see proposed Rule 1.8.5); 1.8(f) (see proposed Rule 1.8.6); 1.8(g) (see proposed Rule 1.8.7); 1.8(h) (see Proposed Rule 1.8.8); 1.8(j) (see proposed Rule 1.8.10); and 1.8(k) (proposed Rule 1.8.11). Refer to the materials for each proposed rule for a full explanation of the differences, if any, with the Model Rule counterpart.

The Commission members unanimously approved the foregoing recommendation.

**April 9, 2016 Bleich Email to Drafting Team re MR 1.8(d) & (i), cc Difuntorum, Mohr, McCurdy Marlaud & Lee:**

I could do a call next week, but as a preliminary matter I agree with RRC 1 on this. Rule 1.8(d) seems like an unnecessary elaboration on the attorney-client confidentiality and conflict rules. Rule 1.8(i) seems like an unnecessary extension of the conflict of interest rules.

**April 9, 2016 Kehr Email to Drafting Team re MR 1.8(d) & (i), cc Difuntorum, Mohr, McCurdy Marlaud & Lee:**

I'm at the Oakland airport on my way back to L.A. after attending the Symposium, so I can't promise I will be up to this tomorrow, but that is when I plan to dig into this. I hope to get to all of you then.

**April 10, 2016 Kehr Email to Drafting Team re MR 1.8(d) & (i), cc Difuntorum, Mohr, McCurdy Marlaud & Lee:**

Here are my thoughts on these two MRs ---

MR 1.8(d) states an absolute prohibition on a lawyer obtaining literary or media rights related to the representation of a client. Stan Lampert reported to the first Commission on this and recommended against the adoption of the Rule. His explanation was that he was not prepared to say that every such contract necessarily would be improper, and that the question should be governed by the general principals stated in Rule 1.8.1. See *Maxwell v. Superior Court*, 30

Cal.3d 606 (1982), where the Court addressed the conflict issues associated with a literary rights agreement and rejected the conflict of interest considerations that have been used to justify the Model Rule. *Maxwell* involved an agreement by which a criminal defendant charged with a capital offense entered into an agreement to confer the ownership of his life story to his defense counsel. The agreement had extensive disclosures. It advised the client to seek the advice of independent counsel. The defendant was examined and was determined to have knowingly consented to the arrangement. Nevertheless, the trial court recused the defendant's lawyers on the grounds that the agreement created a conflict of interest. The Supreme Court reversed with an explanation that I read as meaning that each such agreement should be measured on its own. Although in *People v. Doolin*, 45 Cal. 4th 390, 391 (2009) the Court disapproved *Maxwell* to the extent that it can be read to hold that attorney conflict claims under the California Constitution are to be analyzed under a standard different from that articulated by the United States Supreme Court, I don't see any indication that the Court would alter what it said in *Maxwell* if presented with a literary or media rights issue. See *Haraguchi v. Superior Court*, 43 Cal. 4th 706, 719 n. 16 (2008), relying on *Maxwell*. I believe there is adequate client protection under our proposed Rule 1.8.1.

MR 1.8(i) states an absolute prohibition on a lawyer obtaining an ownership interest in a client's cause of action or the subject matter of litigation the lawyer is handling for the client except for a permitted charging lien or contingent fee. The first Commission's reason for rejecting this MR paragraph was the following: "The Commission is not recommending adoption of a California version of Model Rule 1.8(i). As explained in the Model Rule comments, Model Rule 1.8(j) is based on (i) common law prohibitions on champerty and maintenance and (ii) the potential difficulty in discharging counsel. California has never included the concept of maintenance and champerty in a rule of professional conduct. The Commission believes that an acquisition of an ownership interest should be governed by proposed Rule 1.8.1, the general rule governing a business transaction with a client and a lawyer's acquisitions of an adverse interest. The comments to Model Rule 1.8(j) suggest that the ABA had a specific transaction in mind when it adopted the Model Rule, but neither the Model Rule nor the Comment provides any specific information on this point. The result is a Model Rule that is overbroad (in that it would apply to acquisitions that may be fair and reasonable and could pass muster under Rule 1.8.1) and that covers a subject that is already addressed in Rule 1.8.1. Rule 1.8.1 does a much better job of distinguishing between those acquisitions that should be prohibited and those that should not." I again agree that proposed Rule 1.8.1 is adequate to the job and that no inflexible standard would be appropriate.

**April 10, 2016 Bleich Email to Drafting Team re MR 1.8(d) & (i), cc Difuntorum, Mohr, McCurdy Marlaud & Lee:**

Thanks Bob. This reinforces my pre-disposition not to suggest adoption of either of these Model Rules.

**April 10, 2016 Harris Email to Drafting Team re MR 1.8(d) & (i), cc Difuntorum, Mohr, McCurdy Marlaud & Lee:**

Bob, thank you for your review and analysis. I am also happy to participate in a conference call if you wish. However, I agree with both you and Jeff that the two additional MRs are not necessary and in fact conflict with existing California precedent. The flexibility of case law precedent is a better way to deal with the what ifs than the two proposed MRs. I think 1.8.1 is adequate as drafted.

**April 10, 2016 Difuntorum Email to Drafting Team re MR 1.8(d) & (i), cc Mohr, McCurdy Marlaud & Lee:**

I think the emails exchanged are more than sufficient for adding these two Model Rules to the rule 3-300 (1.8(a)) presentation at the May meeting. No teleconference is needed. I will prepare a short cover memo for the emails and will post them for the May agenda. I will also adjust the title of this agenda item on the agenda itself so that a vote, if any, to dispose of these Model Rules is noticed for the May meeting. Thanks for your quick work on this.

**April 27, 2016 McCurdy Email to Drafting Team, cc Difuntorum, Mohr & Marlaud:**

We have received the attached letter from Richard Zitrin with comments concerning Rule 1.7. Please review it in preparation for the upcoming meeting. We will include it as a separate attachment in the additional agenda materials posted prior to the meeting.

Attached:

RRC2 - [3-310][1.7][3-300][1.8.1] - 04-26-16 Zitrin Letter - 2016-059(l).pdf

**April 26, 2016 Zitrin Letter to Chair & RRC2, cc McCurdy:**

I am writing this letter for two reasons. First, thank you, Madam Chair especially, and all the Commission members, for your kind consideration of my presentation of the position of the ethics professors who cosigned the recent letter about rule 1.7. You granted me patience, ears focused on listening, and healthy discussion.

Second, I want to make some brief observations about the (generally excellent) modifications to Rule 1.7 and also to remind this commission of the ethics professors' position on rule 1.8.1. I have not polled the ethics professors in this regard because such polling is difficult and intrusive, and because I have their stated positions already. Thus, I write on my own behalf, though I believe these thoughts accurately reflect the professors' stated positions.

As to Rule 1.7, by and large the changes you have made are excellent and conform to our suggestions. There are two matters at variance and of concern. First, the "menu" of items in section (b), drawn essentially from former Rule 3-310(b), should make it clear that these items are not exclusive. This could be done by saying, in section (b), "including but not limited to ...." Second, the phrase in (c), "informs the client in writing," does not conform to the usual language of disclosure and consent. I believe that the Commission should reconsider this language before sending it out for public comment.

As to Rule 1.8.1, there are more serious concerns that the ethics professors have previously expressed. It is simply bad for clients to allow lawyers to change their fee agreements without requiring the client to have the opportunity and time to seek independent counsel. And the fact that a client may already have counsel — for instance, a business lawyer whose understanding of fee agreements is non-existent — is of no moment. As currently drafted, this is a rule that is designed to protect lawyers, not clients.

Here in its entirety is the comment of the 55 ethics professors in their letter to the Supreme Court of March 3, 2014 — the same comment previously sent the State Bar board. It was the longest and most detailed of all the comments in that letter:

1. Rule 1.8.1— Doing business with a client

This analysis tracks the comment in the *June 2008 Ethics Profs. Letter* joined by 13 California ethics professors. The current Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients, and also be at odds with California case law on fiduciary duty. Despite widespread criticism, the Commission has improvidently insisted on a clearly anti-client rule that serves only the interests of lawyers wishing to change their fee structure in the middle of a representation.

A. The current and proposed rules

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only after inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any subsequent modification of a fee agreement with a client, however, is done under circumstances where the lawyer has already taken on ongoing fiduciary duties to the client. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

B. Modification of fee contracts excluded

The current draft of Rule 1.8.1 simply eliminates these requirements, and excludes modifications of fee contracts from the rule, under proposed Comment 5. This proposed language adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement.

The only possible justification for this language is lawyers' own self-interest — to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 5 acknowledges that lawyers do have "fiduciary principles [that] might apply" to fee agreements. Formerly, prior to the *June 2008 Ethics Profs. Letter*, the proposed comments also stated that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." While this language has been eliminated, the truth of this statement remains. In essence, then, the Commission's draft sets up a conflict between common law principles of fiduciary duty and the ethics rules themselves. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.

The phrase relating to modifications of fee contracts in Comment ¶ 5 must be stricken.

C. Inappropriate use of independent counsel

The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must advise the client of the opportunity to seek the advice of independent counsel. The modified rule — with limiting language that is absent from the ABA rule, MR 1.8(a)(2) — states that if the client is already represented by independent counsel, there need be no

notice. This, read together with Comments 13 and 14 of the proposed rule, substantially diminishes client protection.

Comments 13 and 14 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction. Moreover, under the ABA's Comment, ¶ 4, written disclosure is still required from one of the involved lawyers. This is not true of the current California comments.

In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction. The ABA rule language in MR 1.8(a)(2) and Comment ¶ 4 should replace the ill-advised Commission language.

Again, thank you for your kind attention

**April 28, 2016 OCTC Memo to RRC2:**

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**A. Rule 3-300 [Avoiding Interests Adverse to a Client]**

Please see OCTC's March 25, 2016 comment.

**March 25, 2016 OCTC Email to RRC2:**

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**F. Rule 3-300 [Avoiding Interests Adverse to a Client]**

Rule 3-300 would provide greater public protection if it also applied to transactions involving an attorney's family members, where the attorney knew or reasonably should have known about the transaction. This would include an attorney's parents, spouse, and children. (See *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 776-777 [declining to apply former rule 5-101 to a transaction between the client and respondent's parents] and *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 123-124 [declining to apply rule 3-300 where respondent negotiated a transfer of real property between two of his clients, and, as a result of the transfer, the respondent's minor son received a 50 percent interest in the property].) In comparison, real estate brokers have been disciplined for failing to disclose that a purchaser was related to the broker. (See *Whitehead v. Gordon* (1969) 2 Cal.App.3d 659 [broker's brother-in-law].) While an attorney may not be able to stop a transaction between a client and a family member or obtain the client's informed written consent to the transaction, an attorney could be required to provide notice to the client of his or her indirect personal interest in the transaction.

It may also be advisable to revise the discussion section to expressly apply the rule to modifications of fee agreements. (See OCTC's written Comment to COPRAC's Proposed Formal Opinion Interim No. 05-0001, previously provided with OCTC's August 26, 2008 comment on the rules and *In the Matter of Mark Scott*, (Review Dept. 2007)

Case No. 01-O-05066, Slip Op. p. 19, fn. 22 [contingency fee agreements renegotiated at the time of settlement may be governed by rule 3-300, unpublished].)

Finally, the discussion section could point out that the rule will apply to certain transactions occurring after a formal attorney-client relationship has ended. (Compare *Hunnicutt v. State Bar* (1988) 44 Cal.3d 362, 370-372 [applying former rule 5-101 to a transaction occurring after the termination of the attorney-client relationship, reasoning that “if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of rule 5-101 even if the representation has otherwise ended”] and *In the Matter of Allen* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 198, 203-205 [declining to apply rule 3-300 to a transaction occurring after the termination of the attorney-client relationship].)