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OF CALIFORNIA**

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III.A. Rule 3-300 [1.8(d) & (i)]
June 2 - 3, 2016
Open Session

M E M O R A N D U M

DATE: April 18, 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 Acquisition of Pecuniary Interests Adverse to a Client – Additional Consideration of ABA Model Rule 1.8(d) and 1.8(i)

At the request of staff, the drafting team assigned to [rule 3-300](#) (proposed rule 1.8.1) has considered two ABA Model Rules, [rule 1.8\(d\)](#) (literary rights) and [rule 1.8\(i\)](#) (proprietary interest in cause of action), for which there are no direct California counterparts. The closest California rule is rule 3-300. Prior to the conclusion of a client's representation, rule 1.8(d) prohibits a lawyer from seeking an agreement giving the lawyer literary or media rights to a portrayal or account substantially based on information relating to the lawyer's representation of the client. Subject to limited exceptions for a lawyer's lien to secure fees/costs and contingent fee arrangements, rule 1.8(i) prohibits a lawyer from acquiring a proprietary interest in the cause of action or subject matter of the client's representation.

Following its review, the drafting team believes that adequate client protection would be provided by adoption of proposed rule 1.8.1 and that the absolute prohibitions imposed by rules 1.8(d) and 1.8(i) should not be recommended for adoption. Attached please find an email message compilation providing the messages exchanged by the drafting team concerning rules 1.8(d) and 1.8(i).

For the Commission's May 6 – 7, 2016 meeting, please be prepared to discuss whether the Commission should recommend adoption of one or both of these rules. It is anticipated that this discussion would occur following Commission action on proposed rule 1.8.1. Thanks.

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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 Lamport 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 1.81 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.