

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.8.8 [3-400]

Lead Drafter: Harris
Co-Drafters: Kornberg, Rothschild
Meeting Date: March 31 & April 1, 2016

I. CURRENT CALIFORNIA RULE

Rule 3-400 Limiting Liability to Client

A member shall not:

- (A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice; or
- (B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Discussion

Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 1.8.8 (CLEAN)

Rule 1.8.8 Limiting Liability to Client

A lawyer shall not:

- (a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:
 - (1) represented by an independent lawyer concerning the settlement; or
 - (2) advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable opportunity to seek that advice.

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Comment

[1] Paragraph (b) is not intended to absolve an attorney of his or her obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rules does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. See Rule 1.2.

IV. PROPOSED RULE 1.8.8 (REDLINE TO CURRENT CALIFORNIA RULE 3-400)

Rule ~~1.8.8~~³⁻⁴⁰⁰ Limiting Liability to Client

A ~~lawyer~~^{member} shall not:

~~(A)~~ (a) Contract with a client prospectively limiting the ~~lawyer's~~^{member's} liability to the ___ client for the ~~lawyer's~~^{member's} professional malpractice; or

~~(B)~~ (b) Settle a claim or potential claim for the ~~lawyer's~~^{member's} liability to ~~a~~^{the} client ~~or former client~~ for the ~~lawyer's~~^{member's} professional malpractice, unless the client is either:
~~informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.~~

(1) represented by an independent lawyer concerning the settlement; or

(2) advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable opportunity to seek that advice.

Comment~~Discussion~~

[1] Paragraph (b) is not intended to absolve an attorney of his or her obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably limiting the scope of the lawyer's representation. See Rule 1.2.

~~Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation.~~

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V. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, Date:**

[Insert OCTC Comments]

- **RUSSELL WEINER, OCTC, 6/15/2010:**

1. OCTC would recommend that this rule also require that the potential malpractice settlement be fair and reasonable. A leading treatise on legal ethics has criticized the ABA's model rules limiting liability because it does not require the terms of the agreement to be fair, although the treatise notes that this may be because that is already required by the ABA's version of rule 3-300 (ABA rule 1.8(a)). (See Hazard & Hodge, "The Law of Lawyering, 3rd Edition § 12.19.)
2. Comments 1 and 2 seem more appropriate for treatises, law review articles, and ethics opinions.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

OCTC recommends making an offer to settle a violation of the rule in the same way a settlement limiting liability to a client would violate the rule.

Revise the rule as follows:

A member shall not:

(A) contract with or offer to contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice; or

(B) Settle or offer to settle a claim or potential claim for such liability unless the client is informed in writing that the client ~~may~~ should seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

OCTC COMMENTS:

The proposed revisions would include attempts to contract with or settle for professional malpractice. There is no reason an unsuccessful attempt should not be prohibited. Also, as with rule 3-300, the member should be required to advise the client in stronger terms should instead of may to seek an independent lawyer. (See comments to proposed changes to rule 3-300.)

- **State Bar Court:** No comments received from State Bar Court.

VI. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Model Rule 1.8(h) Variations. All jurisdictions except California have adopted some version of ABA Model Rule 1.8(h). The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflict of Interest: Current Clients: Specific Rules,"

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revised May 13, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf [Last visited 2/10/16]
- Twenty-seven jurisdictions have adopted Model Rule 1.8(h) verbatim.¹ Sixteen jurisdictions have adopted a slightly modified version of Model Rule 1.8(h).² Eight jurisdictions have adopted a version of the rule that is substantially different than Model Rule 1.8(h).³

VII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Add subparagraph (b)(1): Drafting team reached consensus to include a provision stating that the lawyer is not required to advise the client to seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement.
 - Pros: Requiring the lawyer to advise the client to seek the advice of an independent lawyer when the client is independently represented would be redundant and unnecessary. If the client is already being represented by independent counsel, some of the policy reasons behind the rule have been achieved. Further, such action would likely be a separate violation of proposed Rule 4.2 [2-100].
 - Cons: The required advice should be given even if the client is already represented by an independent lawyer concerning the settlement. This would afford an opportunity for the lawyer to confirm that the client has in fact secured an independent lawyer concerning the settlement. Also, nothing in the rule dictates that the lawyer's advice be presented in a manner that would denigrate the lawyer-client relationship that is being confirmed. For example, the client's right to continue with the client's chosen independent counsel can be emphasized in advising the client.
2. Substitute "advised in writing" for "informed in writing," which is contained in the current rule.

¹ The twenty-seven jurisdictions are: Colorado, Connecticut, Delaware, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

² The sixteen jurisdictions are: Alabama, Alaska, Arkansas, California, District of Columbia, Florida, Michigan, Mississippi (Mississippi retains the former Model Rule language from 1983), New Jersey, New York, North Carolina, North Dakota, Tennessee, Texas (Texas retains the former Model Rule language from 1983, as Texas Rule 1.8(g)), Virginia, and Washington.

³ The eight jurisdictions are: Arizona, Georgia, Hawaii, Indiana, Iowa, Ohio, Oregon, and Wisconsin.

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- Pros: “Advised” is appropriate because it is read in conjunction with the lawyer’s duty to advise the client “to seek” rather than the client merely having been “informed” that the client “may seek” the advice of an independent lawyer. There is little risk that “advise” will be viewed as requiring a lawyer to give comprehensive legal advice; similar language limiting a lawyer’s advice to retain counsel is found in proposed Rule 4.3. The revised language is more client protective.
 - Cons: There are no known published State Bar Court cases indicating that the phrase “informed in writing” has been problematic as a disciplinary standard in the current rule. In addition, continuing to use “informed” rather than “advised” might guard against a lawyer misreading this requirement as a duty to give comprehensive legal advice to the client concerning the advantages and disadvantages of the settlement.
3. Recommend that the communication be in writing.
- Pros: This approach retains the current rule’s requirement which is more client protective than if the rule’s requirement could be achieved orally.
 - Cons: None identified.
4. Recommend that the rule expressly state it is the lawyer who must advise the client. The current rule does not expressly state who must inform the client in writing that the client may seek the advice of an independent lawyer.
- Pros: The suggested revision should result in greater compliance, understanding and client protection by clarifying that it is the lawyer’s duty to advise the client, thus ensuring the client is advised. In addition, the revision should alleviate potential ambiguity when prosecuting the rule in the discipline system because a lawyer will not be able to argue, after the fact, that someone else might have advised the client.
 - Cons: None identified.
5. Recommend replacing the phrase “may seek” with “to seek.”
- Pros: “To seek” is closer than “may seek” in how case law has interpreted a lawyer’s duty to advise a client about the importance of consulting with an independent lawyer.
 - Cons: None identified.
6. Recommend adoption of RRC1’s Comment [3] as Comment [1]. RRC1’s Comment has been modified by the drafting team by inserting the verb “absolve” in place of “override.”
- Pros: This Comment clarifies that paragraph (b) does not provide a means by which a lawyer might circumvent the application of 6090.5.⁴

⁴ Business and Professions Code section 6090.5:

(a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:

(1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.

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- Cons: The word “absolve” has several different meanings and the Comment may suffer from ambiguity as to which meaning is intended. Further, the Comment refers to a lawyer’s “obligation” under other law, yet a lawyer has no affirmative obligations under the statute cited (B&P Code § 6090.5).⁵
- 7. Recommend adoption of RRC1’s Comment [4] as Comment [2]. With the Commission’s approval at its February meeting of proposed Rule 1.2(b) [3-210], which provides a lawyer may reasonably limit the scope of the representation, the drafting team’s consensus is to include a cross-reference to Rule 1.2.
 - Pros: This Comment is very similar to the Discussion paragraph to current rule 3-400. Including a cross-reference to the new limited scope representation provision will enhance compliance and understanding of this important concept.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Include “attempts to contract” in paragraph (a) or “attempts to settle” in paragraph (b).
 - Pros: Such a provision would be difficult to prove, especially with oral offers. Such a provision would most likely devolve into a he/said, she/said.
 - Cons: An unsuccessful attempt to limit liability should be as equally prohibited as a successful attempt to do so. (See In the Matter of Lane (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747 – 738.
2. Include the concept contained in ABA Model Rule 1.8(h)(1) which permits a lawyer to contract with a client to prospectively limit malpractice liability where “the client is independently represented in making the agreement.”
 - Pros: The absolute prohibition is a better policy to promote and is more client protective. The ABA provision purportedly is intended to permit sophisticated clients to prospectively waive a lawyer or law firm’s liability in cases involving areas where the law is poorly developed and there is a significant risk that liability might be imposed in hindsight. Such situations would be extraordinarily rare, but the risk that such a provision might be used with clients not experienced in the use of legal services is great.

(2) The plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.

(3) The record of any civil action for professional misconduct shall be sealed from review by the disciplinary agency.

(b) This section applies to all settlements, whether made before or after the commencement of a civil action.

⁵ A different approach that would avoid characterizing Business and Professions Code section 6090.5 as an affirmative obligation would be to substitute the following for the second sentence of Comment [1]: “Lawyers are also bound by Business and Professions Code § 6090.5.”

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- Cons: As long as the client is independently represented and advised of all the risks and concerns associated with such an agreement, individuals at arms-length should be free to contract.
- 3. Retain RRC1's Comment [1].
 - Pros: This Comment merely restates the policy underlying, and the purpose of, the rule but it does not contribute to explaining the rule's meaning or application.
 - Cons: None identified.
- 4. Retain the first sentence of RRC1's Comment [2] regarding the use of alternative dispute resolution procedures.
 - Pros: Although the sentence accurately states the law, there is a question whether the rules of professional conduct should promote the use of a dispute resolution mechanism that is perceived as anti-consumer and thus not protective of the public.
 - Cons: Such provisions are commonly included in attorney-client fee agreements. Including within a Comment the authority permitting the use of such provisions would help educate both lawyers and clients.
- 5. Retain the second sentence of RRC1's Comment [2] regarding lawyers practicing in the form of limited liability entities.
 - Pros: This sentence is unnecessary because it does not explain either the meaning of the rule or how it is applied, and the sentence is also potentially confusing. First, it might suggest that practicing in a limited liability entity will protect the actual actor from malpractice liability and, second, the reference to "limited liability entity" is vague and overbroad as California only permits lawyers to practice as an LLP or law corporation, not as an LLC.
 - Cons: None identified.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. A substantive change to the current rule is that the proposed rule expressly states the lawyer is not required to advise the client to seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement.
2. Under the proposed rule, the lawyer would expressly be required to advise the client "to seek" the advice of an independent lawyer regarding the settlement and not just be advised that the client "may seek the advice."

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
 - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

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- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
- 2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
- 3. In subparagraph (b)(2), the verb “is” has been deleted as not necessary.
 - Pros: The structure of paragraph (b) places the verb “is” in the opening clause: “is either . . . (2) advised in writing . . . and given . . .”
 - Cons: None identified.

E. Alternatives Considered:

None.

VIII. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues for the Commission’s consideration of this rule.

However, current rule 1-500(B) previously was considered by the Commission in connection with the drafting of a proposed new rule 5.6. In proposed new rule 5.6, the language of 1-500(B) is placed in brackets⁶ and if that language ultimately is retained, the Commission should consider adding in rule 1.8.8 a cross reference in a comment to rule 5.6(b).⁷

⁶ The Commission’s proposed new rule 5.6 provides that:

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that: (i) concerns benefits upon retirement, or (ii) is authorized by law; or

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IX. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS	
<p>Harris</p> <ul style="list-style-type: none"> ▪ [Date]: Email Comment <p>Kornberg</p> <ul style="list-style-type: none"> ▪ [Date]: Email Comment <p>Rothschild</p> <ul style="list-style-type: none"> ▪ [Date]: Email Comment 	
X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION	
<p>Recommendation:</p> <p>That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-400 [1.8.8] in the form attached to this Report and Recommendation.</p> <p>Proposed Resolution:</p> <p>RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-400 [1.8.8] in the form attached to this Report and Recommendation.</p>	
XI. DISSENTING POSITION(S)	
None.	

(2) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

[(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.]

(c) This Rule does not prohibit an agreement that is authorized by Business and Professions Code §§ 6092.5(i) or 6093.

⁷ For example, Comment [1] could be revised as follows:

[1] Paragraph (b) is not intended to absolve an attorney of his or her obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5 and Rule 5.6(b).

Alternatively, the comment suggested in note 5, above, could be revised as follows:

[1] Lawyers are also bound by Business and Professions Code § 6090.5 and Rule 5.6(b).

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XII. FINAL COMMISSION VOTE/ACTION
Date of Vote: Action: Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 3-400
“Limiting Liability to Client”

I. Text of Current Rule:

A member shall not:

- (A) Contract with a client prospectively limiting the member’s liability to the client for the member’s professional malpractice; or
- (B) Settle a claim or potential claim for the member’s liability to the client for the member’s professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client’s choice regarding the settlement and is given a reasonable opportunity to seek that advice.

Discussion:

Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member’s employment or representation. (Amended by order of the Supreme Court, operative September 14, 1992.)

II. Background/Purpose:

Current Rule 3-400 was originally adopted operative on January 1, 1975 as former Rule 6-102, under the same title, “Limiting Liability to Client.” Former Rule 6-102 incorporated the substance of Disciplinary Rule 6-102 of the ABA Model Code of Professional Responsibility. Former Rule 6-102 stated: “A member of the State Bar shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice. This rule shall not prevent a member of the State bar from settling or defending a malpractice claim.”

Former Rule 6-102 was amended in 1989. The amendments included renumbering the rule 3-400, dividing the rule into two paragraphs, (A) and (B), and adding a Discussion paragraph. Paragraph (A) continued the prohibition contained in former Rule 6-102 on attorneys attempting to limit their liability to a client for their professional malpractice. Paragraph (B) was new and provided a lawyer must not settle a claim for the lawyer’s malpractice unless the lawyer informed the client in writing that the client may seek the advice of independent counsel with respect to the settlement. In addition, the client must be given a reasonable opportunity to seek that advice. A Discussion paragraph was added to clarify the scope of the rule by stating that the rule was not intended to apply to limitations or qualifications pertaining to legal opinions and memoranda, nor was the rule intended to prevent a lawyer from limiting the scope of the lawyer’s representation.

In 1992, paragraph (B) was amended to provide that a lawyer shall not:

(B) Settle a claim or potential claim for ~~such the member's liability to the client for the member's professional malpractice~~, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

This change was not intended to be substantive. Rather, the amendment was made in order to allow the precatory language, and paragraph (B), to stand alone.

Rule 3-400 has not been amended since 1992.

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. 2015 Comments. In a ____, 2015 memorandum from OCTC, OCTC provided the following comment on rule 3-400:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comments. In a June 15, 2010 memorandum from OCTC, OCTC provided the following comment on proposed rule 1.8.8 (which is how Rule 3-400 was renumbered in RRC1's rules):

1. OCTC would recommend that this rule also require that the potential malpractice settlement be fair and reasonable. A leading treatise on legal ethics has criticized the ABA's model rules limiting liability because it does not require the terms of the agreement to be fair, although the treatise notes that this may be because that is already required by the ABA's version of rule 3-300 (ABA rule 1.8(a)). (See Hazard & Hodge, "The Law of Lawyering, 3rd Edition § 12.19.)
2. Comments 1 and 2 seem more appropriate for treatises, law review articles, and ethics opinions.

C. 2001 Comment. In a September 27, 2001 Memo to the first Commission, OCTC provided the following comment on rule 3-400:

OCTC recommends making an offer to settle a violation of the rule in the same way a settlement limiting liability to a client would violate the rule.

Revise the rule as follows:

A member shall not:

(A) contract with or offer to contract with a client prospectively limiting the

member's liability to the client for the member's professional malpractice; or

(B) Settle or offer to settle a claim or potential claim for such liability unless the client is informed in writing that the client ~~may~~ should seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

OCTC COMMENTS:

The proposed revisions would include attempts to contract with or settle for professional malpractice. There is no reason an unsuccessful attempt should not be prohibited. Also, as with rule 3-300, the member should be required to advise the client in stronger terms should instead of may to seek an independent lawyer. (See comments to proposed changes to rule 3-300.)

IV. *Potential Deficiencies in the Current Rule:*

A. See above input from OCTC.

B. Other potential deficiencies:

1. In advising an unrepresented client to seek the advice of independent counsel, the rule provides only that the lawyer must inform the client in writing that the client "may seek the advice of an independent lawyer." The Model Rule requires that the lawyer advise the client in writing "of the desirability of seeking ... the advice of independent legal counsel." Model Rule 1.8(h)(2). Should the rule simply state that the lawyer must advise the client "to seek" the advice of an independent lawyer?

2. Should a reference be made that complying with paragraph (b) is not intended to override a lawyer's obligations under other law? (See, B&P Code § 6090.5 which prohibits an agreement precluding the reporting of complaints to the State Bar.)

V. *California Context:*

A. Civil Code Section 1542

When settling an attorney-client fee dispute, attorneys in California sometimes include a Civil Code section 1542 waiver of all known or unknown claims that the client has or may have against the attorney which necessarily extends to any malpractice claims. This type of waiver provision in a fee dispute settlement may violate California Rule of Professional Conduct 3-400(A) because it prospectively limits the attorney's liability to the client for malpractice. *The California Practice Guide on Professional Responsibility* includes a Comment regarding this issue which states: "To avoid a possible violation of CRPC 3-400(A), the § 1542 waiver could include language to the effect that it does *not* apply to future malpractice claims."

The ethical issue of including a section 1542 waiver as part of a fee dispute with a client was addressed by the State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) in [Formal Opinion No. 2008-179](#). That opinion states that when an agreement to settle a fee dispute is broad enough to include a release of malpractice claims, or where the lawyer intends to obtain a release of legal malpractice claims through a settlement agreement, a general release that includes a Civil Code section 1542 waiver from the client requires compliance with Rule 3-400(B) by (1) informing the client in writing that the client may seek the advice of an independent lawyer regarding the settlement, and (2) giving the client a reasonable opportunity to seek that advice.

B. Provision in Initial Fee Agreement Requiring Arbitration of Attorney-Client Disputes

An initial fee agreement that contains a provision specifying mandatory and/or binding arbitration of client disputes, including potential malpractice claims, does not violate rule 3-400. California case law has stated such provision are not ethically improper in retainer agreements with new clients: “ An attorney may ethically, and without conflict of interest, include in an initial retainer agreement with a client a provision requiring the arbitration of both fee disputes and legal malpractice claims.” [*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1108-1109. See also, Cal. State Bar Form. Opn. 1989-116; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501]. The rationale is that standard arbitration provisions in a fee agreement neither limit an attorney’s professional duties owed to the client, nor limit the attorney’s liability for breaching those duties. Rather, the arbitration provision simply states in which forum any potential liability issues will be determined. [*Powers v. Dickson, Carlson & Campillo*, supra, 54 Cal.App.4th at 1115].

C. Limited Scope Representation

The Discussion section to rule 3-400 states the rule is not intended to prevent a lawyer from reasonably limiting the scope of his or her employment or representation. In addition to Discussion paragraph [2] to current rule 1-650, this is the only reference to limited scope representation in the California Rules of Professional Conduct. This Commission has approved the rule 3-210 [1.2] drafting team’s proposal to recommend adoption of ABA Model Rule 1.2(c), which permits a lawyer to limit the scope of representation under circumstances. Under California case law, although a lawyer may limit the scope of representation, the lawyer still has an obligation to advise the client regarding reasonably apparent alternative remedies and legal liabilities even if those issues reside outside the scope of representation. [See, *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684 – malpractice claim against workers’ comp attorney for failure to advise client of potential third-party claim].

VI. Approach In Other Jurisdictions (National Backdrop):

A. Model Rule 1.8(h) Variations. All jurisdictions except California have adopted some version of ABA Model Rule 1.8(h). The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflict of Interest: Current Clients: Specific Rules,” revised May 13, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf [Last visited 2/10/16]

Twenty-seven jurisdictions have adopted Model Rule 1.8(h) verbatim.¹ Sixteen jurisdictions have adopted a slightly modified version of Model Rule 1.8(h).² Eight jurisdictions have adopted a version of the rule that is substantially different than Model Rule 1.8(h).³

VII. Public Comment Received by the First Commission:

A. The clean text of proposed new rule 1.8.8 drafted by the first Commission and adopted by the Board to replace rule 3-400 is enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rule differs from current rule 3-400, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 3-400 is also enclosed with the public comments received. However, given the Board’s charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as “a clear and enforceable articulation of disciplinary standards,” a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

¹ The twenty-seven jurisdictions are: Colorado, Connecticut, Delaware, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

² The sixteen jurisdictions are: Alabama, Alaska, Arkansas, California, District of Columbia, Florida, Michigan, Mississippi (Mississippi retains the former Model Rule language from 1983), New Jersey, New York, North Carolina, North Dakota, Tennessee, Texas (Texas retains the former Model Rule language from 1983, as Texas Rule 1.8(g)), Virginia, and Washington.

³ The eight jurisdictions are: Arizona, Georgia, Hawaii, Indiana, Iowa, Ohio, Oregon, and Wisconsin.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether the rule should be amended to include both (i) attempts to contract with the client prospectively to limit the lawyer's liability, and (ii) attempts settle a claim for professional malpractice.

(2) Whether to add a Comment stating that compliance with this rule does not absolve an attorney of his or her obligation to comply with other law (e.g. B&P Code § 6090.5).

(3) An alternative to (2), above, would be to follow either Arizona⁴ or Oregon's⁵ approach which have added an additional subpart to their Rule 1.8(h) addressing agreements limiting a client's right to report the lawyer to a disciplinary authority.

(4) Whether the rule should state that the lawyer must advise the client "to seek" the advice of an independent lawyer rather than state the lawyer must advise the client that the client "may seek" such advice.

(5) Whether the rule should expressly state what is impliedly recognized in current rule 3-400(B), i.e., that a lawyer need not advise a client or former client to seek the advice of independent counsel if the client or former client is already represented by an independent lawyer.

⁴ Arizona Rule 1.8(h)(2) states: "(h) A lawyer shall not: (2) make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities."

⁵ Oregon Rule 1.8(h)(4) states: "(h) A lawyer shall not: (4) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar."

(6) As an alternative to (5), whether the rule should affirmatively state compliance with the rule's provisions is not necessary where the lawyer no longer represents the client.

(7) If the Commission agrees to adopt proposed Rule 1.2(c),⁶ should the reference in the Discussion paragraph regarding limiting the scope of the lawyer's employment or representation be removed from this rule? If this reference is removed, should a cross-reference to proposed Rule 1.2(c) be added as a Comment?

(8) Whether a rule provision or comment should be added to state an attorney may include in an initial retainer agreement with a client a provision requiring the arbitration of either, or both, fee disputes and legal malpractice claims. (See *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1108-1109.)

(9) Whether the Commission should consider Model Rule 1.8(h), which does not place an absolute prohibition on prospective limitations of lawyer liability to a client but instead permits such agreements if "the client is independently represented in making the agreement."

IX. Research Resources:

- [CAL 2009-178](#) (Settlement Agreement Limiting Attorney's Liability)
- [CAL 2012-185](#) (Seeking an Agreement Not to File State Bar Complaint)
- [CAL 1989-116](#) (Retainer Agreement Requiring Arbitration of Potential Malpractice Claims)
- *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]
- *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]

⁶ Proposed Rule 1.2(c) permits a lawyer to limit the scope of representation if the limitation is reasonable under the circumstances, not otherwise prohibited by law, and the client gives informed consent.