

**Rule 1.8.1 [3-300] Business Transactions with a Client and
Pecuniary Interests Adverse to a Client
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

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

- (a) The transaction or acquisition and its terms are fair and reasonable* to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing* to the client in a manner that would reasonably* have been understood by the client;
- (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing* to seek the advice of an independent lawyer of the client's choice and is given a reasonable* opportunity to seek that advice; and
- (c) The client thereafter provides informed written consent* to the terms of the transaction or the terms of the acquisition, and the lawyer's role.

Comment

[1] This Rule does not apply to the provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this Rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. See *Fletcher v. Davis* (2004) 33 Cal. 4th 61, 68 [14 Cal.Rptr.3d 58]. See also Business and Professions Code § 6175.3 (Sale of financial products to elder or dependent adult clients; Disclosure) and Family Code §§ 2033-2034 (Attorney lien on community real property). However, this Rule does not apply to a charging lien given to secure payment of a contingency fee. See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].

[2] For purposes of this Rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition, and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

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

[4] This Rule does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[5] This Rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person* to the general public or a significant portion thereof;

or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

**Proposed Rule 1.8.1 [3-300] Business Transactions with a Client
and Pecuniary Interests Adverse to the Client
Synopsis of Public Comments**

TOTAL = XX	A = X
	D = X
	M = X
	NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-32n	Law Professors, Richard Zitrin (7-25-16)	Y	D	1.8.1	<p>The rule is lawyer-protective and anti-client.</p> <p>The comment is unclear as to compliance with the rule relating to modifications of fee contracts. The only possible justification is lawyers' self-interest - - allowing lawyers to modify fee agreements mid representation.</p> <p>Compliance with the rule would not be required if the client has an independent lawyer. Having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction.</p>	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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July 21, 2016 McCurdy Email to Kehr, cc Drafting Team, Difuntorum, Mohr, Marlaud & Lee:

Proposed Rule 1.8.1 [3-300] Lead Drafter:

The time for submitting materials for consideration of the proposed Rules by the Board of Trustees is nearly upon us. Although many of the rules submitted by a drafting team were largely unchanged after the Commission's consideration, in some instances the Commission made substantial revisions to the drafting team's proposed rule. As a team leader for a rule that has been voted out by the full Commission, your work has been greatly appreciated. Your assistance, however, is again needed to timely complete the Commission's provisional final reports and recommendations ("R&R"). It is now necessary for you to conform your team's original R&R with the draft of the rule as voted out by the Commission.

The attachments provided for this assignment are the following:

1. A redline of the rule voted out by the Commission showing changes to the proposed rule originally submitted by your team in your original R&R.
2. A partially completed provisional final R&R that deletes the clean and redline proposed rule text in your team's original R&R and substitutes the clean and redline text of the draft of the rule voted out by the Commission.
3. A redline of the rule voted out by the Commission showing changes to the current California rule. (NOTE: The text of this redline draft has already been incorporated into the attached Commission's R&R, and is being provided as a standalone reference only).
4. The original R&R submitted by your team for this rule.
5. Excerpts from Kevin's meeting notes for each meeting at which your team's rule was discussed.

Please start this assignment by reviewing item #1 as this will reveal how much (or how little) the rule submitted by your team was changed by the Commission.

Next, review item #2 paying close attention to the sections that address concepts accepted/rejected, changes in duties, and alternatives, with special emphasis on the pros and cons within each category. If the Commission did not modify certain parts of the rule originally submitted by your team, then those related sections should not require changes. However, there may be minor changes required (for example, if the Commission deleted a paragraph, then paragraph numbering would have been affected and the references in the provisional final R&R would need to be conformed accordingly). If you don't remember the rationale or basis for a modification made in the rule voted out by the Commission, then please consult Kevin's meeting notes. If you are still unsure, send an email to Prof. Mohr and Randy with your question(s).

The following sections of the provisional final R&R have been completed for you and do not require any editing, but if you have time, your review to confirm the accuracy would be helpful:

- I. CURRENT CALIFORNIA RULE
- II. COMMISSION'S RECOMMENDATION AND VOTE
- III. COMMISSION'S PROPOSED RULE 5.3.1 [1-311] (CLEAN)
- IV. COMMISSION'S PROPOSED RULE 5.3.1 [1-311]
(REDLINE TO CURRENT CALIFORNIA RULE 1-311)

- V. OCTC / STATE BAR COURT COMMENTS (Note: OCTC comments previously submitted to RRC1 are no longer included in this section. If there are cross-references to those OCTC comments in the concepts accepted/rejected sections, the cross references and when appropriate, the concept discussed, need to be deleted.)
- VI. APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)
- VIII. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS
- IX. COMMISSION RESPONSE TO DISSENT/MINORITY
- X. COMMISSION RESOLUTION
- XI. FINAL COMMISSION VOTE/ACTION

Thank you for your continued efforts to move this project forward to the next step, which is to issue the proposed rules for public comment. A completed provisional final R&R will help assure that public commenters fully understand and appreciate the rule amendments proposed by the Commission.

Please calendar this assignment for submission by Monday, September 12, 2016 to Randy Difuntorum, Kevin Mohr, Lauren McCurdy and Mimi Lee. If you were the lead drafter on other rules, then an assignment to complete a provisional final R&R for those rule(s) is also being prepared.

Thanks again.

Attached:

RRC2 - [3-300][1.8.1] - KEM Notes (05-06 & 07-16).docx
RRC2 - [3-300][1.8.1] - Report & Recommendation - DFT1.3 (03-14-16)2.docx
RRC2 - [1.8.1][3-300] - Rule - DFT3 (05-07-16) - Cf. to CalRule.docx
RRC2 - [3-300][1.8.1] - Comm Report & Recommendation - DFT3 (05-07-16).docx
RRC2 - [3-300][1.8.1] - Rule - DFT3 (05-07-16) cf. R&R DFT1.3 (03-14-16).docx

August 5, 2016 Lee Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud & Hollins:

Rule 1.8.1 Drafting Team:

We have received a public comment on proposed Rule 1.8.1. Please review the attached comment in preparation for the August 26th meeting. In addition, a public comment synopsis table is attached. Staff will insert the brief synopses of these comments shortly and upload an updated copy to the Dropbox folder.

Following review of the public comments, please do one of the following:

1. If the drafting team believes the comment(s) received warrant a revision to the proposed rule, please submit an annotated revised rule draft responsive to the public comment(s);

OR

2. If the drafting team believes the comment(s) received DO NOT warrant further revision to the proposed rule, please either present the drafting team's recommendation to reject the commenter's points in a memo format, and/or by filling in a recommended RRC Response in the attached public comment synopsis table, or providing that "blurb" in an email for staff to place in the synopsis table.

Please submit either of these items to all those copied on this message by **Monday, August 15th at 10:00 am** for circulation with the August 26th agenda materials. If you would like the assistance of staff to schedule/notice a conference call for your drafting team to discuss the comment(s), please include all those copied on this message with that request as some admin. staff will be out of the office (Angela is out until 8/12/16).

IMPORTANT: Going forward, all public comments submitted will be uploaded to Dropbox as they are received. We encourage you to regularly check the Dropbox folder for the rules you are assigned to monitor incoming comments. It will not be administratively practical for staff to send comments to each drafting team every time they are received as there are simply too many rule topics to manage in this manner. You can find the public comments on Dropbox:

<http://bit.ly/RRC2014>

Navigate as follows: Public Comments/Comprehensive 90-Day Public Comment Circulation (June 2016)

(At the top of this folder there is a "File List" document with a table listing all comments received by rule number.)

OR You can find the comments in the individual rule folders: RULES/X Rule/Public Comments

Thank you for your work on this next phase of rule revision work.

Attached:

RRC2 - [3-300][1.8.1] - Public Comment Synopsis Table - REV (08-05-16).doc

RRC2 - [3-300][1.8.1] - PubCom - X-2016-32n-Law Professors (Zitrin) [1.8.1]-PH.pdf

August 5, 2016 Bleich Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Lee & Hollins:

I'm comfortable with our current formulation. My view has been that a lawyer, having a special trust and bond with a client, has a duty not to exploit that relationship to his/her advantage in other business dealings in which legal ethics rules would not independently apply. But when establishing the terms of representation generally in a legal matter, the trust relationship has not been established, and it is a different negotiation, entirely. I think the ABA's approach of carving out this exceptions works, and that our refinements are an improvement. I also have not seen a situation in which a lawyer's exploitative agreement was not modified through a variety of means. I'd be interested in the thoughts of others.

August 5, 2016 Kehr Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Lee & Hollins:

I agree with Jeff's recommendation in favor of the currently proposed formulation.

Richard's first point is that our proposed handling of fee agreements is inconsistent with the MR. Richard seems to think that the MR distinguishes between fee agreements with new clients and with current clients. I believe he is wrong on this. MR 1.8, Comment [1], includes this sentence: "It [referring to this Rule] does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee." I see nothing in the MR language to distinguish between new and current clients. Our version means the same: "This Rule does not apply to the provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation unless

the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client.” Our proposal largely copies the first sentence of the *Discussion* to current rule 3-300, and I think is more complete and precise than the MR language.

His second point is at paragraph B, which is at p. 4 of the extract that Mimi attached to her email and at p. 7 of the original letter. He seems to think that we propose an exception if the client is represented, even if that representation is not on the transaction or acquisition. I don’t understand how one could read our proposal that way. Our proposed paragraph (b) begins: “The client either is *represented in the transaction or acquisition* by an independent lawyer of the client’s choice” (emphasis added) I don’t see how to make this any clearer.

I would like to know if anyone thinks I am misreading Richard’s letter, but for now I suggest no changes.

August 10, 2016 McCurdy Email to Drafting Team, cc Chair, Difuntorum, Mohr, Marlaud, Lee & Hollins:

Proposed Rule 1.8.1 Drafting Team:

We have not received a submission from this drafting team for the agenda materials for this rule (see 8/5/16 assignment message below). If the public comment received on this rule is non-substantive or simply supports the proposed rule as drafted then the assignment can be completed with an email from the team informing staff that the team does not recommend any revisions to the proposed rule at this time.

Please don’t hesitate to request the assistance of staff to schedule/notice a conference call for your drafting team if that is necessary to complete your assignment. Make sure to include all those copied on this message with any requests for a conference call, as some admin. staff will be out of the office (Angela is out until 8/12/16).

Attached:

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August 10, 2016 Bleich Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Lee & Hollins:

If I read the email traffic on this correctly, the group felt comfortable with the Commission’s proposed language and did not find that it favored lawyer interests at the expense of client protection.

August 10, 2016 Kehr Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy, Marlaud, Lee & Hollins:

Agreed.