

**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.

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Commission Drafting Team Information

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Co-Drafters: Jeffrey Bleich, Lee Harris

Meeting Date at which the Rule was discussed: May 6-7, 2016

Action Summary Approval Date: June 2, 2016

I. CURRENT CALIFORNIA RULE

Rule 3-300 Avoiding Interests Adverse to a Client

A member 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 are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and
- (B) The client is advised in writing that the client may 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 consents in writing to the terms of the transaction or the terms of the acquisition.

Discussion:

Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.

Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.

Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees.

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II. COMMISSION'S RECOMMENDATION AND VOTE

There was consensus among the Commission to recommend a proposed amended rule as set forth below in Section III.

At the Commission's May 6 –7, 2016 meeting, a majority of members present voted to adopt this recommendation, with Mr. Tuft voting no.

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to a Client

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.

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[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 the provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation, or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. However, the modification of a fee agreement that increases the lawyer's compensation or provides other added benefits to the lawyer is governed by Rule 1.5 and by Bus. & Prof. C. § 6106 and is subject to heightened scrutiny. See *In re Shalant*, 4 Cal. State Bar. Ct. Rptr. 829 (Rev. Dept. 2005) and *Priester v. Citizens Natl. Bank*, 131 Cal. App.2d 314, 321 (1955). This Rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[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.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-300)

Rule 1.8.1 [3-300-Avoiding] Business Transactions with a Client and Pecuniary Interests Adverse to a Client

A ~~member~~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:

- (Aa) 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 ~~which should~~that would reasonably~~;~~* have been understood by the client; ~~and~~
- (Bb) 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 ~~that the client may~~* to seek the advice of an independent lawyer of the ~~client's~~client's choice and is given a reasonable~~;~~* opportunity to seek that advice; and
- (Cc) The client thereafter ~~consents in writing~~provides informed written consent* to the terms of the transaction or the terms of the acquisition~~;~~; and the lawyer's role.

DiscussionComment

[1] 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

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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 ~~3-300 is~~ does not ~~intended to~~ apply to the ~~agreement by which the member is retained by the client~~ provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation, or to the modification of such an agreement, unless the agreement or modification confers on the ~~member~~ lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. ~~Such an agreement is governed~~ However, the modification of a fee agreement that increases the lawyer's compensation or provides other added benefits to the lawyer is governed by Rule 1.5 and by Bus. & Prof. C. § 6106 and is subject to heightened scrutiny. See *In re Shalant*, 4 Cal. State Bar. Ct. Rptr. 829 (Rev. Dept. 2005) and *Priester v. Citizens Natl. Bank*, 131 Cal. App.2d 314, 321 (1955). This Rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by ~~rule 4-200~~ 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.

~~Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.~~

~~Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees.~~

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V. OCTC / STATE BAR COURT COMMENTS

- **Jayne Kim, OCTC, 4/28/2016:**

Please see OCTC's March 25, 2016 comment.

- **Jayne Kim, OCTC, 3/25/2016:**

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].)

- **Jayne Kim, OCTC, 9/2/2015:**

Modification of fee agreements should require compliance with rule 3-300 regarding adverse interests. A lawyer holds a position of trust and has a fiduciary duty vis-a-vis his or her client. Compliance with rule 3-300 will help prevent lawyers from abusing their position and overreaching when renegotiating a fee agreement.

¹ The respondents' conduct in these cases was found to violate either rule 3-310 or Business and Professions Code, section 6106.

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

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

Massachusetts Rule 1.8(a) Conflict of Interest: Current Clients: Specific Rules

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

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
- Twenty-nine states have adopted the model rule 1.8(a) verbatim,² fourteen states have adopted variations of model rule 1.8(a),³ and eight jurisdictions have a different rule or a materially modified version of model rule 1.8(a).⁴

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

[This section to be edited or completed by the drafting team after the rule has been approved by a vote.]

² The twenty-nine states are: Arizona, Arkansas, Colorado, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine; Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, West Virginia, and Wyoming.

³ The fourteen states are: Alabama, Alaska, California, Georgia, Hawaii, Illinois, Michigan, Mississippi, New Jersey, New Mexico, Ohio, Texas, Virginia, and Washington.

⁴ The eight jurisdictions are: Connecticut, District of Columbia, Florida, Maryland, Minnesota, Montana, New York, and North Dakota.

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A. Concepts Accepted (Pros and Cons):

1. Change the title of the Rule.
 - Pros: The current title is not descriptive of the rule's content. A more specific title should assist lawyers in locating this Rule.
 - Cons: None identified.
2. Specify in paragraph (a) that the required disclosure includes the lawyer's role in the transaction or acquisition
 - Pros: There is substantial authority that the lawyer's role cannot be hidden from the client. See, e.g., In the Matter of Crane and DePew, 1 Cal. State Bar Ct. Rptr. 139 (Rev. Dept. 1990). In addition, because the disclosure must be in writing, the information about the lawyer's role will be readily available to any independent lawyer who the client might choose to provide advice on the transaction or acquisition.
 - Cons: This addition is unnecessary and micro-manages the concept of a full disclosure to the client about the transaction or acquisition.
3. Clarify in paragraph (b) that there is no requirement to advise a client to seek an independent lawyer in circumstances where the client is already represented on the transaction or acquisition.
 - Pros: No public protection is realized by requiring an advisement in such circumstances because the objective of the requirement is already met. Moreover, this pointless advisement might be perceived by the client as denigrating the independent lawyer that the client has already chosen and therefore could interfere with the client's confidence in that lawyer's advice. Paragraph (b) is explicit that the lawyer is obligated to advise the client to seek independent counsel unless the client already is represented by independent counsel regarding the transaction or acquisition.
 - Cons: The required advisement should be given even if the client is already represented by an independent lawyer. In such circumstances, this would function as an opportunity for the client to communicate confirmation that the client has in fact secured an independent lawyer concerning on the transaction or acquisition. Also, nothing in the rule dictates that the advisement be presented in a manner that denigrates the lawyer-client relationship that is being confirmed by the advisement. For example, the client's right to continue with their chosen independent counsel can be emphasized in conveying the advisement.
4. Revise the paragraph (b) requirement to advise the client that it "may" seek independent counsel in order to make the first lawyer's disclosure more definitive.
 - Pros: Case law tends to read the rule in this stricter fashion, and a lawyer's more definite statement is more likely to convince the client to seek independent counsel.
 - Cons: None identified.
5. Add a new paragraph (d) that provides a definition of an independent lawyer for purposes of this rule.
 - Pros: The question of whether a lawyer is independent within the meaning of this rule does cause confusion. It is important to define the concept to help assure that the

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client actually receives independent advice. The receipt of truly independent advice can provide crucial protection for the client. This issue has been litigated under the prior rule (Rule 5-101). In *Conner v. State Bar* (1990) 50 Cal.3d 1047, 1058–59, the Supreme Court concluded that, as a general rule, a member, associate, or partner of a law firm cannot serve as the “independent counsel” required by the rule. In this case the purported independent counsel was the respondent’s law partner and girlfriend. While it might be correct, as suggested immediately below, that it might be more difficult in the smallest communities to locate an independent lawyer, we believe that all clients are entitled to the protection afforded by having a truly independent voice, and the Rule applies to all lawyers.

- Cons: The proposed definition would disqualify a person who is in a close legal, business, financial, professional, or personal relationship with the lawyer. In a small rural community with few lawyers, this might be burdensome.

B. Concepts Rejected (Pros and Cons):

1. Include in the Rule any new or modified fee agreement with current client.
 - Pros: It has been argued in a letter from OCTC and in a letter on behalf of various law professors that fee negotiations with current clients should be included in the Rule, in substance under the theory that a fiduciary relationship exists with current clients but not with a potential client.
 - Cons: The first sentence in the official Discussion to current rule 3-300 states: “Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.” It sometimes has been argued that this sentence applies only to the agreement by which a lawyer *first* is retained by a client although it does not by its terms refer only to initial retention. See *Priester v. Citizens Natl. Bank*, 131 Cal. App.2d 314, 321 (1955), which held that a lawyer has burden of proving that fee agreement with existing client was fair and reasonable and no advantage was taken. This states the correct concept that the negotiation of a standard fee agreement is an arms-length transaction but one that a court will review to see whether the lawyer exercised any undue influence. See also, Cal. State Bar Op. 1989-116: “Ethical considerations do exist, however, whenever an attorney attempts to negotiate an arbitration provision with a client during the course of an existing attorney-client relationship. Although rule 3-300 still does not apply because no ownership, possessory, security, or other pecuniary interest is involved, an attorney nevertheless has an on going ethical duty to preserve the trust and confidence existing clients place in the attorney.” Other courts have tacitly recognized this by ignoring rule 3-300 when addressing fee agreements between lawyers and current clients. See, e.g., *Stroud v. Tunzi*, 160 Cal. App.4th 377 (2008) (holding that any modification or amendment to a contingent fee agreement must comply with § 6147); *Severson & Werson v. Bolinger*, 235 Cal. App.3d 1569, 1573 (1991) (holding, among other things, that a lawyer may not change billing rates during a representation with notice to the client); *Ramirez v. Sturdevant*, 21 Cal. App.4th 904, 913 (1994); and *Walton v. Broglio*, 52 Cal. App.3d 400, 404 (1975) (discussing the possible application of Prob. C. § 16004 but ignoring rule 3-300). Courts and law firms properly do not generally treat the renegotiation of a fee

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agreement in a current representation to change the billing rate, the amendment of a fee agreement with a current client to alter the scope of services, or the negotiation with a current client of a fee agreement in a new matter as subject to rule 3-300. If this Rule were to apply to all fee agreements between a lawyer and a current client, it would require compliance each time a lawyer: (i) agrees to represent a current client in a new matter; (ii) agrees to a change in the billing rate; and (iii) agrees to alter the scope of a current representation. Discipline already is available when a lawyer utilizes the lawyer-client relationship to manipulate a client. See *Matter of Shalant*, 4 Cal. State Bar Ct. Rptr. 829 (2006). In addition, we believe that including fee agreements with current clients within this rule would denigrate the importance of the standards that apply to initial fee agreements; any impropriety in dealings with a new client will cause the lawyer to violate the unconscionable fee standard of *Herrscher v. State Bar of California*, 4 Cal. 2d 399 (1935). The first Commission dealt with this topic through the following Comment sentence: "This Rule does not apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees." The ABA Model Rules takes the approach we recommend and, as did the first Commission, does so through a Comment: "[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." In lieu of the wording selected by the first Commission or the ABA, the language used in this draft comes directly from Prob. C. § 16004(c) in order to make clear that the application in this respect is the same for disciplinary and for civil purposes. Finally, the theoretical premise for applying the Rule to fee agreements with current clients is that there is no fiduciary relationship with someone who is not yet a client. That is not certain as current rule 3-300 applies to fee agreements entered into before the formation of a lawyer-client relationship and a lawyer can have a duty of communication with someone who is not and never becomes a client. See Calif. Practice Guide: Professional Responsibility at ¶ 5:839 and *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 (1986):

2. OCTC recommends that this rule state that it applies to fiduciary relationships as well as lawyer-client relationships, arguing that this is already the law. (See e.g. In the *Matter of Hultman*, 3 Cal. State Bar Ct. Rptr. 297 (Review Dept. 1995).

We recommend against making this change. It is correct that the lawyer in *Hultman* was disciplined under rule 3-300 for utilizing his position as a trustee to make loans to himself, but the lawyer was the drafter of the trust instrument on behalf of his law client. It therefore is not certain from *Hultman* that the result would have been the same if there had been no lawyer-client relationship. *Hultman* has been cited as a lawyer-client business transaction case. See *Matter of Van Sickel*, 2005 Calif. Op. LEXIS 3.

3. OCTC recommends that the rule state that it can apply to transactions involving former clients in some circumstances and, presumably because of the difficulty of drafting a rule that accurately describes current case law in this area, recommends that a lawyer

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adoption of a bright-line standard that a person is a lawyer's client for three years after the relationship has terminated (presumably meaning, only for purposes of this rule), but that this three-year standard should not prevent a finding that even after three years the former expects the lawyer to exercise professional judgment for the protection of the client. We recommend against this because we do not believe that it correctly states current law as stated in *Hunnicutt v. State Bar*, 44 Cal.3d 362 (1988) and *Beery v. State Bar*, 43 Cal.3d 802 (1987) which describe a more nuanced approach to the question of whether the rule should be applied to a transaction involving a former client. This would be a place for a Comment alerting the reader, but we think that would amount to the kind of practice guidance that we are directed to avoid in our Comments.

4. OCTC recommends that the rule apply to an attempt to enter into a business transaction or acquire an adverse pecuniary interest, but we disagree. Including attempts within this rule would create a new and undefined body of law dealing with the scope of "attempt". This would leave open many questions. For example: How far along the process would a lawyer have to go to be subject to discipline under the rule? What if the client rejected the attempt so quickly that the transaction was not yet in writing as required by the rule? What if the lawyer withdrew the attempt on the lawyer's own volition?
5. OCTC recommends that the rule be expanded to include much of Bus & Prof Code § 6175.3 (titled: "Sale of financial products to elder or dependent adult clients; Disclosure"). We disagree. This already is part of a statutory scheme that creates specific remedies in § 6175.3 and authorizes professional discipline in § 6175.5. We see no benefit to including portions of this scheme in the rule. This would make the rule considerably more complex and cumbersome, and therefore less easily accessible to readers, and would risk creating conflicts between the rule and the statutory scheme (however, we have added a Comment reference to these statutes for the information of readers).
6. OCTC recommends that the consent requirement be changed to one of "informed consent", arguing that this merely codifies existing case law. We recommend against this change because it would conflict with the current standard that applies when the client is independently represented with regard to the transaction or acquisition by suggesting that a low quality of independent representation could lead to disciplinary consequences for the lawyer who participates in the transaction or acquisition. See *Ferguson v. Yaspan*, 233 Cal. App. 4th 676, 689 (2014) (concluding that the quality of advice by independent counsel should be tested only in a malpractice action against that lawyer).
7. OCTC recommends that the rule obligate the lawyer to state whether the lawyer represents the client in the transaction. We recommend against this change because it is a matter of law that the lawyer represents the client unless the client is represented by independent counsel. Compare *Ferguson v. Yaspan*, 233 Cal. App. 4th 676 (2014) and *Felton v. Le Breton*, 92 Cal. 457 (1891). The suggested addition at best would be surplus and at worse might suggest to some readers that *Felton* is being implicitly overruled.
8. OCTC recommends that the rule be extended to state that it applies to transactions between a lawyer and a client's agent. We recommend against this. A transaction will

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be with the client if entered into in the client's name, even if the negotiations are with the client's agent. The result would be the same if entered into in the name of the agent for the benefit of the client if the client's position is disclosed to the lawyer (see Restatement Third of Agency § 6.01 (3rd Ed. 2006)). In these two situations the OCTC recommendation would serve no purpose. There is a third situation, which is where the agent's principal is not disclosed. In that situation, the lawyer's conduct should not be governed by this rule, but it would be under the OCTC recommendation because an undisclosed principal is a party to a contract made by an agent on the principal's behalf. (see Restatement Third of Agency § 6.02 (3rd Ed. 2006). A lawyer should not be subject to scrutiny under this rule for entering into a transaction with a client's agent if the lawyer does not know of that agency relationship.

9. OCTC recommends that the rule be extended to state that it applies to transactions with a client's close relative. We recommend against this. A lawyer under current law does not owe the fiduciary duties of a lawyer-client relationship to a non-client even if that person has a close or even a family relationship with a client. We see no basis for altering this well-understood concept.

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

1. Requiring that the disclosure must include the lawyer's role in the transaction or acquisition is a substantive change to the rule. (See VII.0.2, above.)
2. Providing there is no requirement to advise a client to seek an independent lawyer in circumstances where the client is already represented on the transaction or acquisition is a substantive change to the rule. (See VII.0.3, above.)

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.)
 - 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

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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. Revising the paragraph (b) requirement to advise the client that it “may” seek independent counsel in order to make the first lawyer’s disclosure more definitive is a non-substantive change to the rule; it merely reflects how the rule has been interpreted. (See VII.0.4, above.)
 4. New paragraph (d), defining “independent lawyer,” is a non-substantive change to the rule; it merely clarifies what the law is. (See VII.0.5, above.)

E. Alternatives Considered:

None.

VIII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended Rule 1.8.1 [3-300] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended Rule 1.8.1 [3-300] in the form attached to this Report and Recommendation.

IX. FINAL COMMISSION VOTE/ACTION

Date of Vote: May 6 – 7, 2016

Action: Approve Rule 1.8.1 [3-300] Comments as revised during the meeting

Vote: 12 (yes) – 1 (no) – 0 (abstain)