

**Rule 1.8.8 [3-400] Limiting Liability to Client**  
**(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

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.

**Comment**

[1] Paragraph (b) does not absolve the lawyer of the 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(b).



**Proposed Rule 1.8.8 [3-400] Limiting Liability to a 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 <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-14	Greene Radovsky Maloney Share & Hennigh LLP	Yes	M	1.8.8	Modify the proposed rule to conform to ABA Model Rule 1.8(h)(1) that permits lawyers to limit their prospective liability to a client for malpractice when a client is independently represented in making the agreement.	The Commission believes that proposed rule 1.8.8 should not be changed to conform to Mode Rule 1.8(h)(1). In considering proposed California Rule 1.8.8 vs. ABA Model Rule 1.8(h)(1), the Commission deemed California's long standing absolute prohibition of prospective limitation of malpractice liability as better policy and more client protective. The ABA Model Rule would permit a lawyer to contract with a client to prospectively limit malpractice liability where the client is independently represented in making the agreement. 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. The Commission believes such situations are rare, but the risk that such a provision might be used with clients not

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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						experienced in the use of legal services is great. Additionally, Comment 2 provides appropriate guidance noting that "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(b)."
2016-43p	COPRAC (Baldwin) (8/12/16)	Y	A	1.8.1	Supports adoption of the proposed rule.	No response required.