

**Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure
or a Sale Subject to Judicial Review**

(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)

- (a) A lawyer shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that lawyer or with that lawyer's law firm* is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (b) A lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the lawyer or of another lawyer in the lawyer's law firm* or is an employee of the lawyer or the lawyer's law firm.*

**Proposed Rule 1.8.9 [4-300] Purchasing Property at a
Foreclosure or a Sale Subject to Judicial Review
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
2016-43ba	COPRAC (Baldwin) (9-8-2016)	N	M	1.8.9	Proposed Rule 1.8.9 directly conflicts with certain Probate Code sections 9881 and 9882, which expressly permit the purchases by a lawyer that the proposed rule prohibits. Such a direct conflict between statutory law and ethical rules is confusing and a trap for the unwary, and implies that the laws passed by our legislature expressly authorized conduct that is unethical. COPRAC supports the approach proposed by the first Rules Revision Commission ("RRC1") in its proposed Rule 1.8.9, which exempted any transaction permitted by the Probate Code, as long as the transaction did not violate any other ethical rule. ²	The Commission disagrees that a rule excepting sales pursuant to Probate Code §§ 9881 and 9882 should be substituted for the Commission's proposed rule. There are several reasons for the Commission's recommended rule: <i>First</i> , when the Supreme Court approved rule 4-300, effective September 14, 1992, the Supreme Court was fully aware of the conflict that existed between the Probate Code sections and the rule. The Supreme Court rule filing seeking Supreme Court approval of the current rule explained the conflict between the rule and the Probate Code.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

² RRC1's proposed Rule 1.8.9 provided:

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- (b) A lawyer shall not represent the seller at a foreclosure, receiver's, trustee's, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer's law firm.
- (c) This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

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					The public is not protected by an inflexible rule that prohibits transactions that a court has determined to be to the advantage of the estate and which are fair, reasonable and subject to independent advice (as required by Rule 1.8.1).	Notwithstanding the described conflict, the Supreme Court approved rule 4-300 with the more stringent protections. <i>Second</i> , Rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. Lawyers have been disciplined for this misconduct. Accordingly, the fact that the Probate Code allows such purchases should not vitiate a lawyer's obligation to comply with a higher ethical standard imposed by a rule approved by the Supreme Court. <i>Third</i> , the Commission is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. The Commission believes that

Comment

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

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						<p>under appropriate circumstances the Rules can and should hold lawyers to a higher standard than corresponding statutory law. <i>Lastly</i>, the Office of the Chief Trial Counsel on three separate occasions submitted a comment urging the first Commission or this Commission to recommend adoption of current rule 4-300's absolute prohibition despite the existence of the conflicting Probate Code sections.</p> <p>The commenter's last point is that the court will confirm the lawyer's compliance with proposed Rule 1.8.1 [current rule 3-300] and its requirement to provide to the client [estate] an opportunity to seek independent advice and will result in public protection. However, Probate Code § 9881, the statute under which a lawyer would seek to have a court approve the sale, requires only "written consent" and does not require that the court determine that the transaction or acquisition is fair and reasonable to the estate</p>

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						or beneficiaries and that the terms are fully disclosed in writing with an opportunity to seek the advice of independent counsel. RRC1's approach would not enhance public protection.