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**March 26, 2016 Tuft Memo to Drafting Team:**

**[NOTE: This memo is included because it was referenced during the 8/26/2016 meeting as setting forth the arguments of Mr. Tuft in support of revising the proposed rule.]**

Paragraph (a) (2)

1. The argument in favor of eliminating the requirement to advise the client in writing to seek the advice of independent counsel where the client is already represented in the transaction does not apply in other rules requiring the same or similar advice. Rule 3-400(B); Business and Professions Code § 6175.3(f). The proposed change in the black letter appears to make the rule a less clear and enforceable disciplinary standard. A lawyer could argue that he or she had a good faith belief that the client was separately represented when that was not the case. This argument has been made in civil cases involving application of the rule.
2. If the Commission decides to include the exception, the rule should require the client's informed written consent to the lawyer's role in transaction, including whether the lawyer is representing the client in the transaction.

Proposed Comment [2]

1. I do not believe adding a comment that precludes the application of the rule to all modifications of retention agreements unless the modification confers on the lawyer a pecuniary interest adverse to the client is warranted under this Commission's charge. While I agree that the rule does not apply to all modifications of fee agreements, the opposite is also true: modifications to existing agreements relating to the hiring or compensation of lawyers may constitute business transactions under the rule. As professor Roy Simon states in his article on the subject, not all mid-stream changes trigger the rule and whether a mid-stream change constitutes a business transaction depends on the circumstances.
2. The extent to which modifications to existing retention agreements are subject to Rule 3-300 is controversial and an unsettled area of the law. There is no case authority in California holding that the rule does not apply to any mid-stream change in the agreement unless it amounts to an adverse pecuniary interest. On the other hand, there is authority that certain modifications to existing agreements can constitute business transactions requiring compliance with Rule 3-300. The Review Department in *Silverton*, 4 State Bar Ct. Rptr 252 (Rev. Dept 2001), for example, found that a post settlement modification of an original contingent fee agreement that gave the attorney the right to compromise the client's medical bills and keep the amount saved in exchange for paying the client an additional sum from his fee constituted a business transaction with the client in violation of the rule. The Review Department reached a similar conclusion in *Silverton II*, 2004 WL 60709 (Rev. Dept. 2004). The Supreme Court conducted an independent determination of the law and facts in the case and accepted the conclusions of the Review Department that *Silverton* had violated Rule 3-300 in at least one of the matters. State Bar Opinion 1994-135 concludes that the rule is intended to apply where important matters are left out of an initial fee agreement, such as whether the lawyer can receive his or her entire fee up front in the event of a structured settlement. While there isn't a great deal of authority, other courts have held that post engagement changes in compensation can constitute business transactions with clients under rule, depending on the circumstances. *In re Hefron*, 771 N.E. 2d 1157 (Ind. 2002), for example, involved a lawyer who agreed to represent a client in identifying and recovering assets in a probate matter on an hourly basis. The Indiana Supreme Court found that the lawyer violated rule 1.8(a) by negotiating for a 25% post engagement contingent fee after the lawyer learned that the estate had agreed to provide

an accounting that included the return of sizeable assets. The court concluded that the modification of the fee agreement constituted a business transaction to which rule 1.8(a) applied.

3. The application of the rule to changes in retention agreements depends on a variety of factors that cannot be easily captured in a comment to the rule. Whether the rule applies to particular modification does not necessarily turn on whether the modification confers on the lawyer an ownership, possessory, security or other pecuniary interest adverse to the client. There are obvious provisions that would not trigger the rule if agreed to in the initial agreement when the parties are acting at arms-length that could trigger the rule if negotiated mid-stream. There is often an overlap between the business transaction prong and the adverse pecuniary interest prong that is not easily distinguishable. A comment that says that only one of the two prongs applies to all mid-stream changes regardless of the circumstances would dilute the rule without adequate public protection.

4. Evaluating mid-stream changes to existing agreements that do not come under the "acquisition" prong under Rule 1.5 would not be a sufficient substitute. There are obvious mid-stream changes, such as adding a mandatory arbitration clause or diluting a client's contract rights, that have little to do with whether the fee is unconscionable. We know, for example, that a lawyer seeking to apply an arbitration clause in a fee agreement to a business dispute with the client triggers Rule 3-300. *Mayhew v. Benninghoff*, 53 Cal. App 4<sup>th</sup> 1365. From a public protection perspective, why should the result be different if a lawyer seeks to modify an existing fee agreement to add a binding arbitration clause, particularly if the new clause deprives the client of the right to a jury trial and to appellate review? Comment (2) would eliminate the application of the rule to any modification of an existing retention agreement, no matter how significant it impairs the legal or contractual rights of the client, unless the revised agreement amounts to the lawyer acquiring an adverse pecuniary interest. A minor modification to clarify an existing provision or correct a technical error would not invoke the rule. On the other hand, a material modification that results in the client losing a substantive legal or contractual right could be found to be a business transaction requiring compliance with the rule. It is not uncommon for agreements relating to the hiring or compensation of any attorney to include business terms and law related services and procedures.

5. RRC-1 decided by the narrowest of margins (I recall the vote was 6-6-0), to venture into the unsettled area of mid-stream changes to attorney-client retention agreements. This ultimately resulted in unsatisfactory compromised by the Board that pleased no one. The comment does not appear to satisfy this Commission's charge. It does not appear to enhance public protection or maintain the rule as a clear and enforceable disciplinary standard. No other jurisdiction has such a provision. We should not venture into the complicated area of retention agreement modifications, nor should we try to preempt the development of the law in this area.

**March 29, 2016 Bleich Email to Tuft, cc Kehr, Difuntorum & Mohr:**

Thanks for sharing these thoughts. I remain comfortable with the drafting team's initial proposal. In particular, I think it is fairly common for attorneys and clients to have a post-litigation "settling up" that should not require separate counsel. In many cases, for example, a lawyer will have a provision in the contract that says that if they perform exceptionally well, the client will consider paying a "success fee". The client has great bargaining power in this situation -- they can say they do not consider the lawyer's work exceptional or they can offer only a small fee on a take-it-or-leave-it basis. I do not see any danger to the client in this sort of situation, even though it involves a form of post-litigation negotiation. Looking forward to discussing more on Thursday morning's flight!

\* \* \*

**August 27, 2016 Martinez Email to Difuntorum & Mohr:**

Are the Reports and Recommendations that went to the Board earlier this summer on the State Bar website or the Dropbox folders? If not, can you send me the one for Rule 1.8.1.

In general, is it correct that the RRC members only have the Reports that were considered at the May meeting, but not the final versions that went to the Board?

**August 28, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Jeff, Lee, and all: It was said at our last meeting that the Annotated Model Rules of Professional Conduct cite a series of cases holding that MR 1.8(a) applies to any modification of an existing fee agreement. The 8<sup>th</sup> Ed. cites two cases on this topic. The first is *In re Corcella*, 994 N.E.2d 1127 (Ind. 2013), in which the lawyer stipulated that his modification of a fee agreement violated Rules 1.5 and 1.8(a), and based on that stipulation, the Court issued a public reprimand. The opinion cites no authority, includes no analysis, and has nothing that could be considered to be a holding. It is best seen as only being the enforcement of a plea bargain and appears never to have been cited.

The second case is *In re Curry*, 16 So. 3d 1139 (La. 2009), and as the Court said, the facts are “very complex”. *Id.* at 1142. To greatly simplify the Court’s detailed presentation, the situation was that several individuals formed a real estate development company that had bank financing, and a series of difficulties led to some twenty separate lawsuits over the next twenty years. The firm represented the company and at least one affiliated individual. Litigation between the bank and the law firm’s clients resulted in a net judgment in favor of the bank, and the company asked the firm to guaranty a loan that it could use to pay this net judgment. The firm agreed, provided its guaranty of a \$950,000 loan to the company and, as part of the transaction by which the firm provided its guaranty, the firm and the company entered into a new fee agreement. The new agreement gave the firm two options. Under Option One, the firm was entitled to take, as what was labeled as a “contingency fee”, a percentage of the net profit of the company’s sale of lots, together with the payment of expenses incurred by the firm in connection with certain litigation. “Option Two” permitted the firm to take a contingency fee of one-third of the amount of any award in favor of the company in certain then-pending litigation. *Id.* at 1144. The problems with this arrangement is that Option One, which the firm had the authority to select, was not a contingent fee b/c not dependent on the outcome of the representation. This was both a business transaction without compliance with Rule 1.8(a) and also a violation of La. Rule 1.8(j) (based on MR 1.8(i)) (“(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except ....”)

My conclusion: Neither case supports the argument that the modification of a fee agreement to increase the amount of the fee, without more, comes within MR 1.8(a). Note that immediately after citing these two cases, the Annotated Model Rules cite ABA Formal Ethics Op. 11-458 (2011). Here is the summary of that opinion:

*Modification of an existing fee agreement is permissible under the Model Rules, but the lawyer must show that any modification was reasonable under the circumstances at the time of the modification as well as communicated to and accepted by the client. Periodic, incremental increases in a lawyer's regular hourly billing rates are generally permissible*

*if such practice is communicated clearly to and accepted by the client at the commencement of the client-lawyer relationship and any periodic increases are reasonable under the circumstances. Modifications sought by a lawyer that change the basic nature of a fee arrangement or significantly increase the lawyer's compensation absent an unanticipated change in circumstances ordinarily will be unreasonable. Changes in fee arrangements that involve a lawyer acquiring an interest in the client's business, real estate, or other nonmonetary property will ordinarily require compliance with Rule 1.8(a).*

This amounts to a version of what in California sometimes has been referred to as the special scrutiny standard. See *Priester v. Citizens Natl. Bank*, 131 Cal. App.2d 314, 321 (1955), stating that a court will look with special care at a lawyer's fee agreement with existing client to see whether the lawyer exercised any undue influence.

The Restatement is to the same effect. In its section on lawyer-client business transactions, it says: "The requirements of this Section do not apply to ordinary client-lawyer fee agreements providing, for example, for hourly, lump-sum, or contingent fees. They do apply when a lawyer takes an interest in the client's business as payment of all or part of a legal fee. Restatement (Third) of the Law Governing Lawyers, § 126, Comment a (3rd 2000) (note that these are almost exactly the same words used in MR 1.8, Comment [1]).

A slightly edited version of the proposed Rule is attached. I hope it is satisfactory to you. As you can see from this, my rereading these materials has not changed my view that ordinary fee negotiations should not be governed by the rigid and detailed requirements of the Rule. Prob. C. § 16004(c), on which rule 3-300 is based, states: "A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties." There should be no such suggestion in ordinary fee negotiations. Clients don't need that level of protection when a lawyer wants to raise fees due to the passage of time, when the scope of work is altered, or when (to borrow Jeff's example) a lawyer and client negotiate a success fee. It also shouldn't apply when in-house counsel or a governmental lawyer obtains a raise. Prob. C. § 16004(c) prevents this by its last sentence: "This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee." The proposed Rule uses this language to avoid any argument that there is a conflict between § 16004(c) (which quite possibly governs for civil purposes) and the Rule (which governs at least for disciplinary purposes).

The rare heinous situation, such as the story Richard related at our last meeting, is covered by Rule 1.5 and § 6106, and my suggested edit is intended to make that explicit.

**August 28, 2016 Mohr Email to Martinez, cc Difuntorum:**

The BOT did not necessarily review the Reports & Recommendations for each rule. The R&R's for many rules had been updated to be the Commission's R&R, i.e., it reflected the revisions to the rule that the Commission had made during the meeting(s) at which the rule was considered. Not all, however, were updated. All R&R's were available for BOT review but were not part of the agenda filing.

What each BOT member received for every rule was the proposed rule and the Executive Summary for that rule, as well as the cover memo that summarized the proposed handling of the rules submission at the 6/23/16 BOT meeting.

As near as I can tell (I defer to Randy on this), the 1.8.1 R&R has not yet been updated to reflect the changes made to the Rule at the May 6-7, 2016 meeting at which the revised rule was approved by the Commission. For your information, I've attached the original R&R (i.e., drafting team's version) that was submitted for the March 31-April 1 meeting, as well as the draft Commission R&R which was prepared by staff (i.e., certain sections are deleted) and sent to the drafting team for updating earlier this summer. Again, I do not believe It has yet been updated.

I've also attached the Executive Summary that was submitted to the BOT.

Please let me know if you have any questions. Thanks,

Attached:

RRC2 - [1.8.1][3-300] - Executive Summary & Rule - REV (06-16-16).pdf

RRC2 - [3-300][1.8.1] - Report & Recommendation - DFT1.3 (03-14-16)2.docx

RRC2 - [3-300][1.8.1] - Comm Report & Recommendation - DFT3 (05-07-16).docx

**August 28, 2016 Martinez Email to Mohr, cc Difuntorum:**

Thanks for your comprehensive response. I noticed that the file for the R&R's in Drop Box is empty. It would help members to have access to the R&R's with the understanding that some have not been revised or updated. (It's easier that way than tracking them down from the agenda materials.)

**August 28, 2016 Martinez Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

In reviewing the current version of the Report and Recommendation for Rule 1.8.1, I don't think the "pros and cons" discussion addressing fee modifications does justice to the Law Professor's position. There is a one-sentence discussion of the "pros" and a very lengthy discussion of the "cons." It also does not address the points made in Mark's 3-26-16 memo. The final report should address those arguments especially since I believe the issue will invite scrutiny by the Supreme Court. The first sentence in Comment [1]--that the Rule does not apply to an agreement relating to the lawyer's "hiring or compensation" (unless the lawyer acquires an adverse interest)--seems to go against the Supreme Court's views (e.g. Silverton). I believe it would be better to simply delete that sentence and leave the issue of fee modifications for future case law developments.

The Supreme Court will also question why the first Commission's approach is not preferable. Attached is Carol Buckner's article from 2010 discussing RRC-1's version of this rule and Rule 1.5 (4-200) which applied the written consent/independent counsel protocol to "material modifications" of fee agreements adverse to the client's interests. The article states that the "California Supreme Court has held that Rule 3-300 applies to the modification of a fee agreement in some circumstances." (See attached RRC-1's 2010 discussion draft for Rule 1.5. Our current draft of Rule 1.5 also doesn't contain this "material modification/adverse interest" language as was contained in RRC-1's version. See paragraph (f).)

Note the Buckner article says that RRC-1 was "directed" by the Board of Governors in 2010 "to incorporate some of the primary client protective provisions directing the client to obtain independent legal advice into Rule 1.5 (current Rule 4-200), the rule governing fees." Thus, our current rule may be at odds with the Board's and Supreme Court's views.

Attached:

RRC2 - [4-200][1.5] - RRC1 Rule - DFT11 (02-10-10).doc

RRC2 - [1.8.1][3-300][1.5][4-200] - Buckner - Modification of Fee Agreements - LACBA (05-2010).pdf

**August 28, 2016 Kehr Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

I've interlineated a few thoughts [in response to Martinez email].

In reviewing the current version of the Report and Recommendation for Rule 1.8.1, I don't think the "pros and cons" discussion addressing fee modifications does justice to the Law Professor's position. There is a one-sentence discussion of the "pros" and a very lengthy discussion of the "cons." It also does not address the points made in Mark's 3-26-16 memo. The final report should address those arguments especially since I believe the issue will invite scrutiny by the Supreme Court. The first sentence in Comment [1]--that the Rule does not apply to an agreement relating to the lawyer's "hiring or compensation" (unless the lawyer acquires an adverse interest)--seems to go against the Supreme Court's views (e.g. *Silverton*). I believe it would be better to simply delete that sentence and leave the issue of fee modifications for future case law developments. **This is an important topic, and lawyers are entitled to have specific directions on how to conduct themselves on this important issue. I will look back at Mark's memo to see whether there is something to be added. I do not believe the *Silverton* case supports an argument that current law obligates a lawyer to comply with rule 3-300 any time the lawyer agrees with a current client to receive increased compensation. *Silverton* entered into an agreement with his clients, Mr. and Mrs. Hou, that amounted to the clients' transfer to *Silverton* of medical lien claims. "The Review Department determined that the arrangement involving a compromise of the medical bills was a business transaction, in that 'the authorization to compromise constituted an immediate transfer from the Hous of both the ownership and possessory interest in all funds remaining after payment to the Hous of their distributive share of the settlement proceeds and the payment of attorney fees as called for in the original retainer agreement' in exchange for an upfront payment by the attorney. *In re Silverton*, 36 Cal. 4th 81, 85 (2005). The Supreme Court adopted this finding. *Id.* at 89. I see nothing in the proposed Rule that would lead to a different result in the same situation, and nothing in the Court's opinion that requires any editing in what we already have.**

The Supreme Court will also question why the first Commission's approach is not preferable. **The first Commission's approach was consistent with what the current Commission has voted to approve. It was the Board of Governors that directed the first Commission to modify Rule 1.5, not Rule 1.8.1, and I recall that the first Commission objected to the Board's directions.** Attached is Carol Buckner's article from 2010 discussing RRC-1's version of this rule and Rule 1.5 (4-200) which applied the written consent/independent counsel protocol to "material modifications" of fee agreements adverse to the client's interests. The article states that the "California Supreme Court has held that Rule 3-300 applies to the modification of a fee agreement in some circumstances." (See attached RRC-1's 2010 discussion draft for Rule 1.5. Our current draft of Rule 1.5 also doesn't contain this "material modification/adverse interest" language as was contained in RRC-1's version. See paragraph (f).)

Note the Buckner article says that RRC-1 was "directed" by the Board of Governors in 2010 "to incorporate some of the primary client protective provisions directing the client to obtain independent legal advice into Rule 1.5 (current Rule 4-200), the rule governing fees." Thus, our current rule may be at odds with the Board's and Supreme Court's views. **I have no opinion on the Supreme Court's future views, but I am not aware of any Supreme Court authority (and not intermediate court authority) that conflicts with the Commission's current draft. *Silverton* is not an exception to that. I imagine there will be a revised R&R the next time this comes before the**

Commission. If the vote goes against your views, please be sure to submit a dissent if you think the R&R does do justice to your views (as I expect to do on more than one Rule).

**August 28, 2016 Martinez Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

I think it's a close question and the Report should give an objective evaluation of both the pros and cons.

What is troubling to me is the possible over breadth of carving out all agreements "relating to" the "compensation" of lawyers (and to do so via a comment to the Rule). There are potential abuses relating the compensation of lawyers where the lawyer does not acquire an adverse pecuniary interest that this rule should reach.

I appreciate the source of the exception as articulated in cases like *Ramirez v. Sturdevant* and the Probate Code. However, there are also cases that the Supreme Court could seize on like *Felton v. Le Breton* (1891) 92 Cal. 457, 469 ["While an attorney is not prohibited from having business transactions with his client, yet, inasmuch as the relation of attorney and client is one wherein the attorney is apt to have very great influence over the client, especially in transactions which are a part of or intimately connected with the very business in reference to which the relation exists, such transactions are always scrutinized by courts with jealous care, and are set aside at the mere instance of the client, unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect; and in any attempt by the attorney to enforce an agreement on the part of the client growing out of such transaction, the burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was fully advised."] and *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146 ["The relationship between an attorney and client is a fiduciary relationship of the very highest character. All dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness."]. So I think the safest course for the Commission and the State Bar would be to leave the issue alone and delete the comment.

**August 28, 2016 Martinez Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

I don't think we need to come up with a realistic example of a clever scheme that would not otherwise be prohibited. If we could imagine or anticipate every potential overreaching and abuse by lawyers we would not need any rules at all beyond section 6106. Rule 1.5 and section 6106 don't serve the same prophylactic function as Rule 1.8.1 in that they don't have the "fair and reasonable", consent etc. requirements.

But I can imagine an example where a lawyer in lieu of payment of fees that are in arrears induces the client to invest in property that the lawyer had some kind of ownership interest in order to pay off the owed fees. The investment would not be an adverse pecuniary interest, would not be covered by any rule and would not be covered by Rule 1.5 or section 6106 if the investment was simply a bad deal.

**August 28, 2016 Bleich Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

I'll be interested in Mark's, Lee's and Kevin's input as well. I'm not inclined to remove the sentence entirely precisely because I think some guidance is necessary here. It is very common (and to me appropriate) that lawyers may agree up-front to reserve the right to increase their hourly rates over time. Bob points out that this is currently governed by a different regime. Specifically, case law allows it to be accomplished by: (1) giving notice of the potential

for increased rates at the outset of forming the attorney-client relationship, (2) providing adequate notice of any actual proposed increase in fees, (3) giving the client the right to decline the fee increase, (4) requiring that consent to the increased fees be informed, consensual, and in writing, and (5) allowing a system by which any change in fees can be reviewed with higher scrutiny to ensure they are reasonable and were not secured in an unfair manner. To not differentiate this situation seems to me to suggest that we are changing the current state of the law here and imposing a new duty on lawyers. I do not think that there is a good basis for this, or that the 1.8.1 regime is appropriate. In particular, I think there are real problems with requiring lawyers to advise a client that they should consult other firms to review the confidential fee agreement that the lawyer has entered into with the client for their legal services. For that reason, I'd like to keep some clarification in place and I hope that as a group we can develop some acceptable language for the comment.

**August 28, 2016 Martinez Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

I don't view a fee increase or modification as a "business transaction" with a client. I don't know of any case that has. The problem with Comment [1] is that it exempts all agreements "relating to" "compensation" of the lawyer. It goes too far. Deleting the first sentence of Comment [1] simply retains the common sense notion that normal fee modifications are not business transactions and leaves the status quo as it is.

**August 28, 2016 Bleich Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

Frankly, this is why I think a clarification is helpful. Unless we make clear that an initial engagement agreement, and normal fee increases are not "business transactions" then there could be confusion on this point. Richard Zitrin's view seemed to be that without this clarification all fee modifications (including, but not limited to, the egregious one he described) would be regulated under 1.8.1. I think we can find language that gets across the point we wish to make. Before we try to draft it though, I'd like to get a sense from the other members of the committee.

**August 28, 2016 Martinez Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

We could say something like: "Renegotiation or modification of an agreement by which the lawyer is retained by the client is not a business transaction with a client under this Rule."

**August 28, 2016 Bleich Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

I'd be okay with this as long as we included language referencing that fees or modifications would be subject to the provisions of rule 1.5 to address Richard Zitrin's concern.

**August 29, 2016 Harris Email to Drafting Team, cc Tuft, Difuntorum & Mohr:**

I am OK with Raul's suggestion plus Jeffrey's comment re: Rule 1.5. Initial fee agreements may often contemplate or need modifications. Those modifications shouldn't be considered a business transaction with a client under this Rule. No fee agreement, initial or modification should violate Rule 1.5. It would make sense to provide some guidance on that.

**August 29, 2016 Tuft Email to Drafting Team, cc Martinez, Difuntorum & Mohr:**

I respond briefly to the points raised in your email exchange over the weekend:

1. My concern deals with the intended and unintended consequences of including an unqualified statement in a comment that under no circumstances could a mid-stream change in an existing legal services or compensation agreement constitute a business transaction under the Rule. There no authority for this statement, and as an absolute proposition, it is contrary to existing law. While Bob is correct that the Review Dept. and Supreme Court's decisions in *Silverton 1* and *Silverton 2* do not support the argument that lawyers must comply with Rule 3-300 *any time* a modification to an existing agreement leads to an increase in compensation, the fact remains that the circumstances in that case were found to constitute a "business transaction" under the rule. COPRAC also concluded that a change in an existing agreement that allowed a lawyer to be paid first before the client received anything under a structured settlement could trigger the rule. According to the Annot. Model Rules, "[a]lthough Rule 1.8(a) does not apply to ordinary client-lawyer fee agreements, it has been applied to efforts to modify fee agreements during the course of a representation."
2. Rule 1.5 and Bus. & Prof. Code 6106 would not be adequate substitutes. There are provisions in engagement agreements that have nothing to do with whether a fee is unconscionable. I mentioned as an example adding a binding arbitration clause during the representation. I can envision other provisions that if added or deleted mid-stream would deprive a client of important legal and contractual rights. None of these would be covered under Rule 1.5 and would not necessarily constitute moral turpitude, dishonesty or corruption. The Buckner article and the article by Roy Simon referred to in my earlier memo acknowledge that there are a myriad of reasons and circumstances for negotiating a revisions to an engagement agreement with an existing client.
3. The problem is that the first sentence in comment [1] exempts all provisions in any agreement relating to the hiring or compensation of a lawyer, whether in-house, government or in private practice, from the business transaction prong of the rule regardless of the terms of the agreement and the consequences to the legal and contractual rights of the client. The complicated area of mid-stream changes in retention agreements cannot be resolved a single sentence in a comment to the rule. This is a substantive change that is not consistent with this Commission's charge. A comment that tells lawyers they are exempt from the business transaction prong of Rule 1.8(a) in negotiating any change to an existing compensation agreement regardless of the terms and consequences to the client does not enhance public protection.
4. I agree with the concerns Raul raises but do not agree that revising the comment to read "Renegotiation or modification of an agreement by which the lawyer is retained by client is not a business transaction with the client under this Rule" solves the problem.

**August 29, 2016 Kehr Email to Drafting Team, cc Difuntorum & Mohr:**

Since I signed off yesterday, there have been eight additional emails on this draft Rule. This causes me to think that the drafting team never will be able to complete its R&R if we continue including Raul and Mark in our communications. I intend no disrespect to either of them or to their views in sending this message only to the two of you, but I think we need to reach our own agreement. All of our emails will be in the record and, as I said yesterday in a message to Raul, they can voice their opinions if they think we have not done justice to their views. I think I am on three other drafting teams for Rules that will be on the September agenda, for which we have a 9/12 deadline, so I think we need to come to an agreement on our R&R for this Rule.

I therefore have attached the R&R that Lauren sent with her July email about the September meeting, with all my suggested changes computer marked and relabeled as DFT 4. Here are some thoughts on the changes that I made and did not make, all of which of course are subject to your review (note that I've redlined the changes in Section III to simplify our discussion, but those markings will need to be removed for the R&R. I think it would be helpful for the R&R to add a comparison of our recommendation to the May version approved by the Commission, but I intend to leave that to staff ---

- 1) I have not made any change as a result of paragraph 1 in Mark's message of this morning. Mark's description of the proposed Comment language in the first sentence of that paragraph obviously misstates the proposal, and I think no explanation is needed. As to *Silverton*, I believe that Mark is wrong b/c the Supreme Court explicitly recognized that Silverton had engaged in a business transaction with his clients, the Hous. The pertinent language is quoted in my email to Raul yesterday at 3:59 p.m. As to the Annotated Model Rules, I think that Mark is wrong for the reasons given in my email to you at 9:54 a.m. yesterday.
- 2) On Mark's paragraph 2, I agree that a lawyer and client might agree to any number of mid-stream changes other than just the amount of the fee. Examples might include the interest rate on past-due amounts, an additional retainer amount b/c of the lawyer's new perception of the amount of work to be done or the client's financial weakness, a limitation on the scope of the lawyer's engagement, and the addition of the arbitration provision Mark suggested. Let us assume that every one of these changes is for the lawyer's benefit. That does not in my view require the full panoply of protections required when a lawyer enters into a business transaction with a client or acquires a pecuniary interest adverse to the client. There is great difference between, say, a lawyer agreeing with a client to increase the hourly fee and the lawyer acquiring a deed of trust with power of sale on the client's home. This lawyer in any event will be subject to Rule 1.5 and § 6106, and they are more than sufficient to cover the heinous situations.
- 3) I have tinkered with draft Comment [4] as a result of Mark's paragraph 3.
- 4) I agree with Mark's concerns about Raul's suggested language. Raul's language would amount to the blanket exemption that Mark described in his paragraph 1, and draft Comment [4] does not go nearly that far. You will see that I have edited that language, perhaps in a way that violates the requirement that we avoid practice guidance, but I think the changes might be helpful in the Commission's deliberations.
- 5) Raul's email at 6:15 yesterday evening was without benefit of seeing the draft that I sent only to the two of you. I think the new proposed Comment [4] covers his concerns.
- 6) I have added a sentence to R&R Section VII.A.3 b/c of an earlier letter from Richard. Although I think he no longer is concerned on that point, I see no downside to underscoring what I see as the clear meaning of paragraph (b). I've also suggested a change to VII.B.1 that should be self-explanatory.

I look forward to your responses.

Attached:

RRC2 - [3-300][1.8.1] - Comm Report & Recommendation - DFT4 (08-29-16).docx

**September 2, 2016 McCurdy Email to Drafting Team, cc Difuntorum, Mohr, Marlaud & Lee:**

Rule 1.8.1 Drafting Team:

This message provides information and instructions for Rule 1.8.1 assignment for the September 30th meeting.

## **I. Follow-up on the Discussion at the 8/26/16 Commission Meeting**

Kevin Mohr's August 26<sup>th</sup> Commission meeting notes flagged the following change to the rule for the drafting team's consideration:

- In Comment [1], consider whether the discussion of fee agreements, initial and modifications, are properly addressed with regard to existing law. (See email compilation circulated for meeting and subsequent email from Bob Kehr dated 8/28/16.)

## **II. Consideration of Public Comments and Public Hearing Testimony**

In accordance with the protocol established at the August meeting, the drafting team is assigned to review the public comments received for this rule. Your prior assignment for the last meeting covered comments received through August 14, 2016. The following public comments for Rule 1.0 have been received since August 14<sup>th</sup> and are assigned for your review in preparation for the September meeting.

1. X-2016-43m COPRAC (Baldwin)
2. X-2016-52n-Law Professors (Zitrin)  
*(The comments for Rule 1.8.1 in this August 25, 2016 Law Professors' comment letter are identical to the comments for this rule in the July 25, 2016 Law Professors' comment letter, with the exception of additional law professor signatories, however, they are being considered and logged as separate comments, as they were submitted on separate dates with additional signatories.)*
3. Richard Zitrin 7-26-16 Public Hearing Testimony  
*(Refer to testimony in bookmarked transcript attached.)*

Use the Dropbox link below to access the above listed public comments – this is a direct link to the public comments folder for this specific rule:

<https://www.dropbox.com/sh/vknof3ytbo73qq2/AACmROouvJfbxNqYrYtGfOzea?dl=0>

Please note that this folder includes comments that were previously assigned for the August meeting. This folder will also include future comments that we anticipate will be assigned for the October meeting. You are responsible for reviewing and considering the comments listed above for the September meeting. We have set September 1<sup>st</sup> as the cut-off point for comments assigned for the September meeting. However, we encourage you to periodically check the folder for subsequently received comments as these will be assigned for the October meeting.

An updated public comment synopsis table is attached.

As was the case with the assignments for the August meeting, 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, then please draft the recommended RRC Response for the public comment synopsis table. In some cases, a comment may be supportive of the proposed rule or otherwise not require a substantive response. For those comments, please indicate expressly the drafting teams decision that no response is required.

**Assignment Due Date:** Please submit either of these items to all those copied on this message by **Friday, September 16th at 10:00 am** for circulation with the September 30th agenda materials.

**Assistance with Conference Calls:** 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 and one of the admin. staff will send out a notice.

Attached:

RRC2 - [1.8.1][3-300] - Public Comment Synopsis Table - REV (09-02-16)  
RRC2 - Process - PubCom - Transcript of 07-26-16 Public Hearing (LA-SF-TeleConf) - FINAL (09-02-16).pdf

**September 3, 2016 Bleich Email to Drafting Team, cc Difuntorum, Mohr, McCurdy, Marlaud & Lee:**

I believe we agreed to address these concerns before the next meeting based on the discussion at our last meeting.

**September 4, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy, Marlaud & Lee:**

Do either of you have any thoughts about my lengthy 8/29/16 email on this?

**September 4 2016 Bleich Email to Drafting Team, cc Difuntorum, Mohr, McCurdy, Marlaud & Lee:**

I do. I've been waiting for a quiet moment to address them. Hope to do so before the end of the weekend.

**September 4, 2016 Harris Email to Drafting Team, cc Difuntorum, Mohr, McCurdy, Marlaud & Lee:**

I will review and respond Monday or Tuesday.

**September 6, 2016 Harris Email to Drafting Team, cc Difuntorum, Mohr, McCurdy, Marlaud & Lee:**

Bob, I have reviewed your revised draft and believe it adequately deals with the relevant comments and issues. The disciplinary problem of an over reaching attorney taking advantage of an unsophisticated client in a fee agreement modification should be reviewed through the lens of breach of fiduciary duty and acts of moral turpitude as discussed in In re Shalant, 4 Cal. State Bar. Ct. Rptr. 829 (Rev. Dept. 2005). Your draft specifically references this and, I think, takes care of the issue.