

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 should 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 acquisition, and to the lawyer's role in it.

Comment

[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 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 can apply to a transaction involving a former client. See, e.g., *Hunnicutt v. State Bar* (1988) 44 Cal.3d 362, 371-72.

[5] 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 amounts to a business transaction or 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 Business & Professions Code § 6106 and is subject to heightened scrutiny. See *In re Silverton*, 36 Cal.4th 81, 85-86 (2005); *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.

[6] 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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- (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~~^{should}¹ 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 to the lawyer's role in it.²

Comment

[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 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 can apply to a transaction involving a former client. See, e.g., *Hunnicutt v. State Bar* (1988) 44 Cal.3d 362, 371-72.³

~~[4]~~⁵ 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,

¹ This change was suggested by COPRAC and corrects what probably was an inadvertent alteration in the current rule.

² These edits were suggested by the COPRAC comment letter but are not identical to its suggestion.

³ Comment [4] added in response to public comment submitted by Polish, X-2016-120c. See Public Comment Synopsis Table.

unless the agreement or modification [amounts to a business transaction or](#)⁴ 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 Business & Professions Code § 6106 and is subject to heightened scrutiny. See [In re Silverton, 36 Cal.4th 81, 85-86 \(2005\)](#); *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.

[56] 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.

⁴ [This change is to address Mark's observation at the 9/30/16 meeting that the prior draft omitted the business transaction element of the Rule.](#)

**Proposed Rule 1.8.1 [3-300] Business Transactions with a Client
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Synopsis of Public Comments**

TOTAL = 7	A = 1
	D = 5
	M = 1
	NI = 0

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 (Zitrin) (07-25-16)	Y	D	1.8.1	<p>1. The rule is lawyer-protective and anti-client.</p> <p>2. 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>3. 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>	See response to Law Professors, Public Hearing, below.
X-2016-43m	COPRAC (Baldwin) (8-12-16)	Y	M	(a), (c)	<p>1. Change "should" to "would" in paragraph (a) with regard to what the client understands b/d "would" is subjective and "could" is objective.</p> <p>2. Suggests language which would make paragraph (c) clearer.</p> <p>3. Whether modification of an existing fee agreement implicates the rule should be addressed.</p>	<p>1. The current rule uses "should" and the Commission agrees there is no reason to change it.</p> <p>2. The Commission agrees and has edited paragraph (c) for clarity.</p> <p>3. The possible application of the Rule to fee modifications already</p>

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

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						is directly addressed in Comment [4]. The Commission believes there is nothing more is needed on this topic.
X-2016-52n	Law Professors (Zitrin) (08-24-16)	Y	D	1.8.1	See X-2016-32n Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See response to Law Professors, Public Hearing, below.
Public Hearing	Law Professors (Zitrin, Richard) (Provided oral public hearing testimony on July 26, 2016. See pages 18-20 of the public hearing transcript.)	Y	D	1.8.1, Cmt. [1]	1. The Rule is most anti-client, lawyer-protective rule. Lawyer shouldn't be able to modify an existing fee contract without satisfying rule.	1. The Commission respectfully disagrees that the Rule is either anti-client or lawyer protective. It is designed to govern the possible disciplinary consequences of transactions between lawyer and client. A lawyer's right to agree with a client to modify a fee agreement is consistent with current California disciplinary and civil authority. Any fee modification that amounts to a business transaction or the acquisition of an adverse pecuniary interest is covered by the Rule. Any fee modification obtained through fraud,

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					<p>overreaching, or acts of moral turpitude will be covered by other Rules and by Bus. & Prof. Code § 6106. A rule placing all fee modifications within the Rule would be grossly overbroad and would govern countless harmless events. It would be unneeded because bad conduct is governed elsewhere.</p> <p>2. Gives an example of how the “independent lawyer” provision doesn’t provide the client protection.</p>	<p>2. This comment is premised on the possibility that the other lawyer will have been hired by the client for a different purpose, but paragraph (b) is specific that it applies only when the client is “represented in the transaction or acquisition [by an independent lawyer].” The Rule is not satisfied merely because the client is represented by a lawyer on other matters.</p>
X-2016-68n	Law Professors (Zitrin) (09-21-16)	Y	D	1.8.1	See X-2016-32n Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference	See response to Law Professors, Public Hearing, above.

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X-2016-104n	Office of Chief Trial Counsel (OCTC) (09-27-16)	Y	D	1.8.1, Cmt.	<p>1. OCTC believes there should be a Comment that fee modifications would and should normally apply to this rule.</p> <p>2. The rule should be amended to include transactions involving relatives of the attorney when the attorney knows or should know of these transactions or potential transactions.</p> <p>3. The rule should also be amended to cover attorney-client transactions for three years after the attorney-client relationship terminated.</p>	<p>1. See response to Law Professors, Public Hearing, above.</p> <p>2. The Commission disagrees. 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.</p> <p>3. The Commission disagrees because this would not correctly reflect current law as stated in <i>Hunnicutt v. State Bar</i>, 44 Cal.3d 362 (1988) and <i>Beery v. State Bar</i>, 43 Cal.3d 802 (1987). They describe a nuanced approach to the question of whether the rule should be applied to a transaction involving a former client based on factors such as closing in</p>

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					<p>4. OCTC supports Comments 1, 2, 4, and 5.</p> <p>5. OCTC supports Comment 3. However, the Comment should also make clear that it is the attorney's burden to establish that the transaction is fair and reasonable. (<i>Rodgers v. State Bar</i> (1989) 48 Cal.3d 300, 314.)</p>	<p>time and whether the transaction or acquisition is related to the former representation. (See also response to Polish, X-2016-120c, below.</p> <p>4. No response required.</p> <p>5. It is correct that the burden is on the lawyer both in the disciplinary setting under rule 3-300 and in the civil setting under Prob. C. § 16004, but including this in the Comment would amount to additional practice guidance , which is contrary to the Commission's Charter..</p>
X-2016-82f	LGBT Bar Assoc. of L.A. (King) (09-27-16)	Yes	A	1.8.1	Supports adoption of proposed Rule 1.8.1.	No response required
X-2016-120c	Polish, James (09-27-16)	No	M	1.8.1	On its face, this rule applies only to transactions with a client. Nevertheless, at least one California case stated, arguably in dictum, that a predecessor to the current rule can also apply to transactions with a former client. <i>Hunnicutt v. State Bar</i> , 44 Cal.3d 362 (1988). This is a trap for the unwary. If the rule can apply to transactions with former clients, it	The Commission agrees that a lawyer can be subject to professional discipline for failing to meet the standards of this Rule when engaging in a business transaction with or obtaining a pecuniary interest adverse to a former

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					should so state. If not, there is ample protection for former clients, including seeking relief based on fraud or undue influence.	client. See, <i>Hunnecutt v. State Bar</i> , 44 Cal.3d 362, 371-72 (1988) (“Since the duty of fidelity and good faith arising out of the confidential relation of attorney and client is founded, not on the professional relation <i>per se</i> , but on the influence which the relation creates, such duty does not always cease immediately upon the termination of the relation but continues as long as the influence therefrom exists.”). The opinion in <i>Hunnecutt</i> relies in part on <i>Beery v. State Bar</i> , 43 Cal.3d 802, 812 (1987). Accordingly, the Commission has added a comment to clarify this point.