

**COMMISSION PROVISIONAL REPORT AND RECOMMENDATION:  
RULE 1.8.5 [4-210]**

**Commission Drafting Team Information**

**Lead Drafter:** Toby Rothschild

**Co-Drafters:** Tobi Inlender, Judge Dean Stout, Dean Zipser

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**I. CURRENT CALIFORNIA RULE**

**Rule 4-210 Payment of Personal or Business Expenses Incurred by or for a Client**

- (A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:
- (1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or
  - (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or
  - (3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.
- (B) Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300.

**II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

**Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 1.8.5 [4-210]

Vote: 14 (yes) – 1 (no) – 0 (abstain)

**Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 1.8.5 [4-210]

Vote: X (yes) – X (no) – X (abstain)

### III. PROPOSED RULE 1.8.5 [4-210] (CLEAN)

#### **Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client**

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm\* will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), a lawyer may:
  - (1) pay or agree to pay such expenses to third persons,\* from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
  - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written\* promise to repay the loan, provided the lawyer complies with Rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so;
  - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and
  - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person\* in a matter in which the lawyer represents the client.
- (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable\* expenses of litigation, including court costs, and reasonable\* expenses in preparing for litigation or in providing other legal services to the client.
- (d) Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.

### IV. COMMISSION'S PROPOSED RULE 1.8.5 [4-210] (REDLINE TO CURRENT CALIFORNIA RULE 4-210)

#### **Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client**

- (Aa) A ~~member~~lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent, ~~or sanction a representation~~ that the ~~member or member's~~lawyer or lawyer's law firm\* will pay the personal or business expenses of a prospective or existing client, ~~except that this rule shall not prohibit a member.~~
- (b) Notwithstanding paragraph (a), a lawyer may:

- (1) ~~With the consent of the client, from paying or agreeing~~pay or agree to pay such expenses to third persons,\* from funds collected or to be collected for the client as a result of the representation, with the consent of the client; ~~or~~
  - (2) ~~After employment, from lending~~after the lawyer is retained by the client, agree to lend money to the client ~~upon the client's~~based on the client's written\* promise ~~in writing~~ to repay ~~such~~the loan; ~~or, provided the lawyer complies with Rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so;~~
  - (3) ~~From advancing~~advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; ~~Such costs; and~~
  - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person\* in a matter in which the lawyer represents the client.
- (c) "Costs" within the meaning of ~~this subparagraph (3) shall be limited to all paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable\*~~ expenses of litigation ~~or, including court costs, and~~ reasonable\* expenses in ~~preparation~~preparing for litigation or in providing ~~any other~~ legal services to the client.
- (Bd) Nothing in ~~rule 4-210~~this Rule shall be deemed to limit ~~rules 3-300, 3-310, and 4-300~~the application of Rule 1.8.9.

## V. RULE HISTORY

Current rule 4-210's concept became part of the rules in 1960 with former rule 3a, which prohibited a member from directly or indirectly paying or agreeing to pay medical, hospital or nursing bills, or other personal expenses of the client as a condition of, or for the purpose of, securing professional employment (*Report on Rules of Professional Conduct, effective January 5, 1960* (1959) 34 Cal. State Bar J. 857). Former rule 3a, however, permitted members to advance the costs of prosecuting or defending a claim or action, including related costs.

Former rule 3a was amended in 1970 to expand the ability of a member, with the client's consent, to pay or agree to pay to third parties expenses from funds collected or to be collected for the client. At the same time, rule 3a was amended to permit a member to lend money to the client *after* the attorney was retained by the client. In 1972, rule 3a was renumbered rule 5-104; however, rule 5-104's text was identical text to former rule 3a:

### **Rule 5-104 Payment of Personal Expenses Incurred by or for a Client**

A member of the State Bar shall not directly or indirectly pay or agree to pay, or represent or sanction the representation that he will pay, medical, hospital or nursing bills or other personal expenses incurred by or for a client, prospective or existing; provided this rule shall not prohibit a member;

- (1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or
- (2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or
- (3) from advancing the costs of prosecuting or defending a claim or action. Such costs within the meaning of this subparagraph (3) include all taxable costs or disbursements, costs of investigation and costs of obtaining and presenting evidence.

Former rule 5-104 was amended in 1975 to prohibit a member from entering into a discussion or other communication with a prospective client regarding payment of personal or business expenses incurred by the client. The 1975 rule revision expressly permitted a member to read or show the rule to a prospective client, in order to explain the nature and extent of conduct the rule prohibited. The 1975 version of rule 5-104 also retained the three exceptions which permitted a member to pay or agree to pay third persons, allowed the member to lend money to the client after the member became employed by the client, and allowed the member to advance the costs of prosecuting or defending a claim or action:

**Rule 5-104 Payment of Personal or Business Expenses Incurred by or for a Client**

(A) A member of the State Bar shall not directly or indirectly pay or agree to pay, guarantee, or represent or sanction the representation that he will pay personal or business expenses incurred by or for a client, prospective or existing and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided this rule shall not prohibit a member:

- (1) with the consent of the client, from paying or agreeing to pay to third persons such expenses from funds collected or to be collected for the client; or
- (2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan; or
- (3) from advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests. Such costs within the meaning of this subparagraph (3) shall be limited to all

reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in Rule 5-104 shall be deemed to abrogate any of the provisions set forth in Rules 5-101 through 5-103.

(C) Nothing in this Rule 5-104 shall prohibit a member of the State Bar from reading or showing this Rule to a prospective client and describing the nature and extent of the conduct prohibited by this Rule.

In 1989, rule 5-104 was renumbered rule 4-210. It was also revised to remove language that prohibited a member from entering into a discussion or other communication with a prospective client regarding payment of personal or business expenses incurred by the client. With the removal of that provision, former rule 5-104(C), which permitted a member to read or show a client the rule was no longer necessary and was also removed. A substantive revision explicitly permitted a member to advance the costs of litigation, contingent upon the outcome of the matter:

**Rule 4-210, ~~5-104~~. Payment of Personal or Business Expenses Incurred by or for a Client**

(A) A member ~~of the State Bar~~ shall not directly or indirectly pay or agree to pay, guarantee, or represent, or sanction the a representation that he the member or member's law firm will pay the personal or business expenses incurred by or for of a client, prospective or existing client, and shall not prior to his employment enter into any discussion or other communication with a prospective client regarding any such payments or agreements to pay; provided except that this rule shall not prohibit a member:

(1) ~~w~~With the consent of the client, from paying or agreeing to pay such expenses to third persons such expenses from funds collected or to be collected for the client as a result of the representation; or

(2) ~~a~~After he has been employed employment, from lending money to his the client upon the client's promise in writing to repay such loan; or

(3) ~~f~~From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in rule ~~5-104~~ 4-210 shall be deemed to abrogate any of the provisions set forth in limit rules ~~5-101 through 5-103~~ 3-300, 3-310, and 4-300.

~~(C) Nothing in this rule 5-104 shall prohibit a member of the State Bar from reading or showing this Rule to a prospective client and describing the nature and extent of the conduct prohibited by this rule.~~

The rule was not amended in the comprehensive 1992 revisions and current rule 4-210 is identical to the text of the 1989 amendments.

## **VI. OCTC / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. OCTC supports this rule.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**  
**(In response to 45-day public comment circulation):**

1. OCTC generally supports this rule. However, OCTC is concerned that subsection (b)(4) does not define indigent person. The rule exempts an attorney from the requirements of this rule when the attorney pays expenses for an indigent client, but does not define when a person is considered indigent. This lack of precision will make this rule difficult to understand or enforce. This subsection could be used by attorneys to incite or promote unnecessary litigation.

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

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Two comments, including the above comment from OCTC, were received. Both agreed only if modified, with the proposed rule. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

- **Illinois Rule 1.8(e)** is identical to Model Rule 1.8(e):

### **Illinois Rule 1.8 Conflict of Interest: Current Clients: Specific Rules**

\* \* \* \* \*

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

\* \* \* \* \*

The ABA State Adoption Chart for the ABA Model Rule 1.8(e), which is the counterpart to current rule 4-210, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_8.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf)
- Thirty jurisdictions have adopted Model Rule 1.8(e) verbatim.<sup>1</sup> Sixteen jurisdictions have adopted a slightly modified version of Model Rule 1.8(e).<sup>2</sup> Five jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.8(e).<sup>3</sup>

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

**A. Concepts Accepted (Pros and Cons):**

1. Revise the rule to expressly state that a lawyer may *pay* certain costs and expenses of an indigent or pro bono client.
  - Pros: Current rule 4-210 does not permit a lawyer to *pay* court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client. Rule 4-210 only permits a lawyer to advance such costs, the repayment of which may be contingent on the outcome in the matter. Proposed paragraph (a)(4) does not require a similar contingency. Permitting a lawyer to make such payments should contribute to promoting access to justice.
  - Cons: None identified.
2. ~~Revise the rule to expressly state that it is not a violation for a lawyer to offer or give a gift to a current client.~~
  - ~~Pros: Permitting bona fide gifts would remove an apparent ambiguity in the current rule without contradicting the policy underlying the prohibition against entering into an agreement to pay costs or personal expenses.~~

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<sup>1</sup> The thirty jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming.

<sup>2</sup> The sixteen jurisdictions are: Alabama, Connecticut, District of Columbia, Georgia, Hawaii, Michigan, Minnesota, Montana, New Jersey, North Dakota, Ohio, Texas, Utah, Vermont, Virginia, and Washington.

<sup>3</sup> The five jurisdictions are: California, Louisiana, Mississippi, New York, and Oregon.

- ~~Cons: Gift giving between a lawyer and a client could confuse the line between a personal and a professional relationship and precipitate unintended expectations.~~

~~[It appears that this concept was excluded from the current rule draft].~~

3. Delete the phrase “sanction a representation” as vague and unnecessary.
  - Pros: This phrase does not add anything given that the existing language prohibits direct or indirect representations concerning a lawyer’s payment of personal expenses of a current or prospective client
  - Cons: This phrase is found in the current rule and there is no evidence or authority that suggests it is confusing or problematic.
4. Change the rule structure by substituting the phrase “Notwithstanding paragraph (a), a lawyer may” for the current rule clause: “except that this rule shall not prohibit a member.”
  - Pros: With the proposed change, conduct permitted under the rule is not mischaracterized as “exceptions” to the conduct prohibited. There is a disconnect in current rule 4-210 because not all of the items identified as “exceptions” actually involve conduct that would violate the rule. The concept underlying a loan or an advance generally is a debtor – creditor relationship that leaves the debtor financially liable rather than absolving them of a financial obligation. It may even be more costly to the debtor if interest is involved. In that sense, a loan from a lawyer to client does not constitute a *payment* by the lawyer of a client’s personal expense or cost that frees the client from accountability.
  - Cons: The proposed change in rule structure is only necessary if the proposed “exception” for a “gift” to a current client is added.
5. Revise the description of a permitted client loan to substitute the phrase “after the lawyer is retained” for the current phrase, “after employment.”
  - Pros: This change removes an ambiguity in the existing rule. There is a potential for the phrase “after employment” to be misinterpreted as after a client’s representation has concluded and the attorney-client relationship terminated when the intent is to permit such conduct during the representation, i.e., *after the lawyer is retained*.
  - Cons: None identified.
6. Add to the description of a permitted client loan, a proviso that references other applicable rules (e.g., ~~Rules 3-300 (business transactions with clients) and 3-310(B) (mandatory disclosure of personal/financial interests a client’s matter)~~ proposed rule 1.7 regarding current client conflicts of interests).



- Pros: This change promotes compliance with the Rules and advances client protection in settings (business transactions between lawyer and client) that potentially pose great risks for a client. Moreover, retaining these rule references is consistent with paragraph (B) of the current rule.
- Cons: A loan to a client is a business transaction between fiduciary and a beneficiary. A lawyer should be expected to know that other rules apply.

7. Add a comment clarifying the scope of the term “costs” as used in the rule.

- Pros: This change removes a possible misperception that the term “costs” is intended to encompass only that term’s meaning in litigation.
- Cons: None identified.

## **B. Concepts Rejected (Pros and Cons):**

1. Deleting the current rule in its entirety.

- Pros: The current rule is a remnant of outdated concepts of maintenance and champerty. Deleting the current rule would obviate the need for proposing additional permitted conduct. In fact, the new proposed paragraphs (b)(4) and (b)(5) tend to show that the general prohibition is no longer needed.
- Cons: Permitting a lawyer to induce a prospective client to hire the lawyer based upon promises of financial assistance is permitting a form of overreaching and commercializes the practice of law.

**8.2. Revise the rule to expressly state that it is not a violation for a lawyer to offer or give a gift to a current client.**

- Pros: Permitting bona fide gifts would remove an apparent ambiguity in the current rule without contradicting the policy underlying the prohibition against entering into an agreement to pay costs or personal expenses.
- Cons: Gift giving between a lawyer and a client could confuse the line between a personal and a professional relationship and precipitate unintended expectations.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. A lawyer’s payment of certain costs and expenses of an indigent or pro bono client would be expressly permitted.

2. A lawyer's giving of a bona fide gift to a client would be expressly permitted.

#### **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 correspond 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 to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) 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 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. Assign the number 1.8.5 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as rule 1.8(e).
  - Pros: The drafting team agrees with the approach taken by RRC1. RRC1 proposed, and the Board agreed, that California not follow the Model Rules approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing

and make these various provisions easier for lawyers to locate and use by reference to a table of contents, RRC1 recommended that each rule in the 1.8 series be given a separate number. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the Model Rule counterpart should nevertheless achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide.

- Cons: Not adopting the Model Rule numbering for the 1.8 series of rules could hinder the ability of lawyers in other states to research California case law that might interpret and apply the rule.

#### **E. Alternatives Considered:**

None.

#### **X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

##### **Recommendation:**

The Commission recommends adoption of proposed Rule 1.8.5 [4-210] in the form attached to this Report and Recommendation.

##### **Proposed Resolution:**

RESOLVED: That the Board of Trustees adopt proposed Rule 1.8.5 [4-210] in the form attached to this Report and Recommendation.



**Commission Member Dissent to the Recommended Adoption  
of Proposed Rule 1.8.5, Submitted by Robert L. Kehr**

Proposed Rule 1.8.5 states the general prohibition on a lawyer bidding for clients by promising benefits to a potential client other than the benefit of the quality of the lawyer's services and the price at which they will be provided. I don't disagree with that policy, which is part of our current Rules as rule 4-210. I dissent for the single reason that the proposed Rule, in proposed paragraph (b)(2), makes compliance with rule 3-310(B) a condition to a lawyer making a loan to the lawyer's client.

Proposed paragraph (b) (2) continues the current exception to the general prohibition on a lawyer providing benefits to a client, the exception permits a lawyer's post-retention agreement to lend money to the client based on the client's written promise to repay the loan. Current rule 4-210 treats a lawyer's loan to a client as a business transaction within the meaning of current rule 3-300 (which will be Rule 1.8.1 under the new numbering system). However, proposed Rule 1.8.5(b)(2) would add to the Rule 1.8.1 reference a reference to what currently is rule 3-310(B).

Current rule 3-310(B) contains four subparagraphs. The only one that has any conceivable connection to a lawyer's loan to a client is subparagraph (4). It includes within a lawyer's "disclosure" requirement the situation in which the lawyer "has or had a legal, business, financial, or professional interest in the subject matter of the representation." (emphasis added).<sup>1</sup>

The Commission's discussion on the rule 3-310(B)(4) reference was to the effect that the existence of a creditor – debtor relationship between lawyer and client could have an effect on the representation as might occur if there were any unwanted change in the lawyer's position as a debtor, such as might occur if the client were to default on the loan or the lawyer were to sense that possibility. This of course is correct, but the logic of this view would require lawyers to make rule 3-310(B) disclosures to their clients whenever any relationship between a lawyer and client might change and, in changing, affect the lawyer-client relationship. This would mean that rule 3-310(B)(4) would require a "disclosure" whenever a lawyer has a "legal, business, financial, or professional" relationship with the client. This would include the representation of family members, neighbors, acquaintances from clubs and other social situations, social relationships based on common connections (the client was referred to the lawyer by their common accountant or dentist), and so on. To take one of many possible examples, imagine a lawyer who represents her brother-in-law in a matter. In that situation, the Commission's logic is that the lawyer's "disclosure" would have to warn the brother-in-law about the possible hazard to the lawyer-client relationship if the new client were to divorce the lawyer's sister.

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<sup>1</sup> Rule 3-310(A)(1) states in full: "'Disclosure' means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;"

That “disclosure” would be plain silly. It would trivialize the important role that a “disclosure” has under the conflict rules by requiring the lawyer to say things that are perfectly obvious. It would be a waste of effort by the lawyer, would make the lawyer appear foolish to the client and thereby potentially interfere with the client’s willingness to rely on the lawyer’s advice, and would be a trap for unwary clients without any client protection benefit. Given the frequency with which many lawyers represent their social acquaintances, this is not a small matter.

Most important, the use of rule 3-310(B)(4) in these situations would be possible only by reading out of the current rule that the lawyer’s interest be “in the subject matter of the representation.” One example of what is included within this Rule is a lawyer who is asked to sue a company in which the lawyer has invested. There, the disclosure would include “the relevant circumstances” (lawyer has an investment in the target defendant) and the “reasonably foreseeable adverse consequences” (that investment amounts to roughly \$X, which the client might consider to be large enough to compromise the lawyer’s zeal in the representation).

It should be perfectly obvious to the hypothetical brother-in-law/client that his relationship with his lawyer would be affected if he were to divorce his lawyer’s sister, so no explanation should be needed. But disclosures currently required under rule 3-310(B)(4) are of facts that might not be known to the client (the lawyer’s interest in or relationship with others), and the consequences of that interest or relationship (the client’s confidence that the lawyer performance of her duties of loyalty, confidentiality, and competence would not be affected).

There is three-fold mischief of the Rule 1.8.5 reference to rule 3-310(B). First, to the extent the reference is recognized as altering the meaning of rule 3-310(B), it will lead to “disclosures” that have no client benefit and make the lawyer and the legal system appear foolish. Second, it is unlikely that practitioners looking at the conflict rules would be sophisticated enough to see that Rule 1.8.5 might have inferentially amended rule 3-310(B)(4), and this would create a trap for unwary lawyers that would leave them vulnerable to later attack. Third, there would be a conflict between the words of rule 3-310(B)(4) and the inferential meaning of Rule 1.8.5 that would lead to uncertain results.

I would remove from Rule 1.8.5 the reference to what currently is rule 3-310(B) but otherwise would adopt Rule 1.8.5 as drafted by the Commission.