

**COMMISSION PROVISIONAL REPORT AND RECOMMENDATION:
RULE 1.8.6 [3-310(F)]**

Commission Drafting Team Information

Lead Drafter: Raul Martinez

Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Dean Stout

I. CURRENT CALIFORNIA RULE 3-310(F)

Rule 3-310(F) Avoiding the Representation of Adverse Interests (Payments Not From Client)

* * * * *

- (F) A member shall not accept compensation for representing a client from one other than the client unless:
- (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
 - (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
 - (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law; or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion

* * * * *

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.8.6 [3-310(F)]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2017

Action: Board Adoption of Proposed Rule 1.8.6 [3-310(F)]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION' S PROPOSED RULE 1.8.6 (CLEAN)

Rule 1.8.6 [3-310(F)] Compensation From One Other Than Client

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;
- (b) information is protected as required by Business and Professions Code § 6068(e)(1) and Rule 1.6; and
- (c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:
 - (1) nondisclosure or the compensation is otherwise authorized by law or a court order; or
 - (2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

Comment

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably* practicable.

IV. COMMISSION'S PROPOSED RULE 1.8.6 (REDLINE TO CURRENT CALIFORNIA RULE 3-310(F))

Rule 1.8.6 ~~[3-310(F)]~~ ~~Avoiding the Representation of Adverse Interests Compensation From One Other Than Client~~

~~(F)~~ A ~~member~~lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

~~(1)(a)~~ ~~There~~ there is no interference with the ~~member's independence of~~lawyer's independent professional judgment or with the ~~client-lawyer~~lawyer-client relationship; ~~and~~

~~(2)(b)~~ ~~Information relating to representation of the client~~ information is protected as required by Business and Professions Code ~~section~~§ 6068, ~~subdivision (e)(1)~~ and Rule 1.6; and

~~(3)(c)~~ ~~The member~~ the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:

~~(a)(1)~~ ~~such~~ nondisclosure or the compensation is otherwise authorized by law or a court order; or

~~(b)(2)~~ the ~~member~~lawyer is rendering legal services on behalf of any public agency ~~which~~or nonprofit organization that provides legal services to other public agencies or the public.

~~Discussion~~Comment

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's

additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] ~~Paragraph (F)~~ This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably* practicable.

V. COMMISSION'S PROPOSED RULE 1.8.6 (REDLINE TO MODEL RULE 1.8(f))

Rule ~~1.8—Current Clients: Specific Rules~~ 1.8.6 [3-310(F)] Compensation From One Other Than Client

~~(f)~~ A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- ~~(1) the client gives informed consent;~~
- ~~(2a)~~ there is no interference with the lawyer's ~~independence of~~ independent professional judgment or with the ~~client-lawyer~~ lawyer-client relationship; ~~and~~
- ~~(3b)~~ information ~~relating to representation of a client~~ is protected as required by Business and Professions Code § 6068(e)(1) and Rule 1.6-; and
- (c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:
 - (1) nondisclosure or the compensation is otherwise authorized by law or a court order; or

- (2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

Comment

* * *

Person Paying for a Lawyer's Services

~~[11]—Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).~~

~~[12]—Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.~~

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably* practicable.

VI. RULE HISTORY

Current rule 3-310(F) originated with the comprehensive revision of all of the rules approved by this Court operative on May 26, 1989. It originally was denominated paragraph (E) and provided:

- (E) A member shall not accept compensation for representing a client from one other than the client unless:
 - (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
 - (2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and
 - (3) The client consents after disclosure, provided that no disclosure is required if:
 - (a) Such nondisclosure is otherwise authorized by law, or
 - (b) The member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or members of the public.

The State Bar's memorandum to this Court seeking approval observed that: "Paragraph (E) is new and is adopted from ABA model rule 1.8(f). It is intended to regulate those situations in which an attorney is paid by someone other than the client." (See page 34 of the "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987, Bar Misc. No. 5626.)

A Discussion paragraph to the 1989 rule excepted from its application situations where an insurer pays for legal representation:

Paragraph (E) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego*

Navy Federal Credit Union v. Cumis Insurance Society (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

In 1992, subparagraph (E)(3) was amended to conform it to a new definition section that was added as section (A) and which defined the terms “disclosure” and “informed written consent.” The addition of paragraph (A) resulted in former paragraph (E) being re-lettered as paragraph (F). Subparagraph (F)(3) was also revised as follows:

- (3) The member obtains the client's informed written consents ~~after disclosure~~, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law;¹ or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

As noted in the 1992 comprehensive rule filing, the foregoing revision created a stricter standard. (See page 16 of the “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1991, Supreme Court File No. 24408.) In the 1989 version, the rule required the client to “consent after disclosure.” Since the 1992 amendments, however, “informed written consent” has been defined as “the client’s or former client’s written agreement to the representation following written disclosure.”¹ Both disclosure and consent must be in writing. There was also a non-substantive revision to the discussion paragraph to conform it to the relettering of the rule text.

There have been no revisions subsequent to the 1992 amendments.

VII. 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 and its Comments. OCTC believes, however, that a Comment should be added requiring lawyers to advise both the client and the paying non-client in writing that the lawyer’s duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client, and, even with such designation, the lawyer must preserve the client’s confidences and secrets. OCTC finds that often the paying non-client complains to OCTC because they do not understand that the lawyer cannot communicate with them.

¹ See current rule 3-310(A)(2).

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

VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Four comments were received including the above-referenced comment from OCTC. Two agreed with the proposed rule, and two agreed only if the proposed rule were modified. A public comment synopsis table, which includes the Commission's responses to the comments received, is provided at the end of this report.

IX. ABA MODEL RULE 1.8(F) ADOPTIONS

Model Rule 1.8(f). The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflicts of Interest: Current Clients: Specific Rules," revised December 1, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf [last visited 1/8/2017]
- Thirty-three jurisdictions have adopted Model Rule 1.8(f) verbatim,² and eighteen jurisdictions (including California) have adopted slight variations of the model rule.³

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

A. Concepts Accepted (Pros and Cons):

1. Expand the scope of rule's coverage. The current rule provides that a lawyer shall not "accept compensation" from one other than a client. The proposed rule expands the existing language to state that a lawyer shall not "enter into an agreement for, charge, or accept compensation" from a third-party payor.
 - Pros: This change extends the public protection of the current rule in a manner consistent with purpose of the rule. Acceptance of compensation is not the crux of the harm to a client. For example, a client would be harmed where the lawyer's independent professional judgment was compromised due to a third-party payor agreement regardless of whether that lawyer actually accepted or received compensation from the third-party payor). This change

² The thirty-three jurisdictions are: Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

³ The eighteen jurisdictions are: Alabama, Alaska, California, Connecticut, District of Columbia, Georgia, Hawaii, Louisiana, Minnesota, Mississippi, Montana, New York, North Dakota, Ohio, Tennessee, Texas, Virginia, and Wisconsin.

also is consistent with the language used in current rule 4-200, the prohibition against illegal or unconscionable fees.

- Cons: None identified.
2. Revise cross-reference in the rule to be more specific. The current rule incorporates by reference the duty of confidentiality, citing Bus. & Prof. Code § 6068(e). Paragraph (b) of the proposed rule updates this by referring to subdivision (e)(1) of Business and Professions Code §6068 and by adding a reference to Rule 1.6.
- Pros: This revision is a conforming change to track amendments to the State Bar Act and the Rules since the current rule was first adopted.
 - Cons: None identified.
3. Substitute language term from proposed Rule 1.6 to describe protected confidential information. The current rule uses the phrase “information relating to the representation of the client” to describe the information protected by the duty of confidentiality. Paragraph (b) of the proposed replaces that phrase with “information protected by Business and Professions Code § 6068(e)(1) and Rule 1.6.”
- Pros: The proposed phrase is a more accurate and precise description of the information protected by the duty of confidentiality. The Commission has made similar changes in other rules and the change here maintains consistency.
 - Cons: This phrase is found in the current rule and there is no evidence or authority that suggests it is been problematic in applying the rule.
4. Add new timing element for obtaining client consent. The current requires a lawyer to obtain consent prior to accepting compensation from a third-party payor. Paragraph (c) would add a new timing element requiring that consent be obtained “at or before the time the lawyer has entered into an agreement for, charged, or accepted compensation, or as soon thereafter as reasonably practicable.”
- Pros: This change enhances the ability of a client to render informed consent after duly considering the concerns that arise from a third-party payor arrangement. Under the current rule, seeking consent might be delayed until just prior to the lawyer’s acceptance of compensation; however, the harm to be prevented by the rule might have already occurred by this time. In addition, the proposed change is not rigid because it permits the lawyer to obtain consent as soon as reasonably practicable. (See *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838 [17 Cal.Rptr.3d 486] for an analogous discussion of the timing of client consent when there is a division of fees among lawyers who are not in the same law firm.)

- Cons: The combination of this change and the proposed expansion to cover entering into agreements and charging compensation (in addition to actual acceptance of compensation) might lead to delays in a lawyer's ability to begin rendering services to client in a time sensitive matter. (But see Comment [5]).
5. Add consent exception for nonprofit organization. The current rule excepts a lawyer from the requirement to obtain client consent where the lawyer is rendering legal services on behalf of any "public agency" that provides legal services to the public or other public agencies. Paragraph (c)(2) of the proposed rule add a reference to a similarly situated a nonprofit organization.
- Pros: This change clarifies the exception in the existing rule and reflects the fact that public agencies are not the only type of entity that provides legal services to the public. (See current Rule 1-600 and proposed Rule 5.4 that address the participation of a lawyer in a legal services organization.)
 - Cons: None identified.
6. Recommend adoption of numbering similar to the ABA Model Rules numbering scheme. Move the proposed rule out of Rule 3-310 and make it a standalone rule. Assign the number 1.8.6 rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as rule 1.8(f).
- 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.
7. Comment [1]. Add a comment, proposed Comment [1], recognizing that there

may be situations where a lawyer represents a client and also represents the third-party payor.

- Pros: This change provides a cross-reference to the conflict of interests rule and avoids a potential misunderstanding that the third-party payor rule applies to the exclusion of the conflicts rules.
 - Cons: This comment is unnecessary as lawyers should be expected to know that separate rules may have overlapping application to a particular situation.
8. Comment [2]. Add a comment, proposed Comment [2], clarifying that a lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).
- Pros: This addition helps assure that the obligations to avoid interference and breaches of confidentiality that might arise due to a third-party payor relationship are understood as duties independent of the requirement to obtain client consent.
 - Cons: The black letter is clear that the exceptions only apply to paragraph (c), rendering the comment unnecessary if you assume that a lawyer will carefully read the entire rule.
9. Comment [3]. Add a comment, proposed Comment [3], which carries forward current rule 3-310, Discussion ¶. 12, which recognizes the unilateral contractual right of an insurer to select counsel for the insured when there is no conflict of interest.
- Pros: This is an important concept that explains the provision requiring that a lawyer's independent professional judgment not be compromised does not affect the well-settled ability of insurers to select counsel for the insured. There is no evidence that this provision has impaired lawyer's ability to represent an insured.
 - Cons: None identified.
10. Comment [4]. Add a comment, proposed Comment [4], which recognizes that in certain circumstances, strict compliance with timing requirement for informed consent might not be possible.
- Pros: The comment provides important guidance on the application of the timing requirement and an explanation of what is meant by "as soon thereafter as practicable" by providing two concrete examples of when a lawyer cannot obtain the client's consent contemporaneously with entering into an agreement for, charging or accepting compensation from a third person. RRC1 recommended adoption of a similar comment in response to public comment.

- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Retain the rule as a part of current Rule 3-310 rather than as a separate rule following the Model Rule 1.8 approach.
 - Pros: Retaining the rule as a part of Rule 3-310 recognizes that a third-party payor arrangement is a current client conflicts issue. It also continues the familiarity that lawyers presently have with the current rule's approach to the topic of conflicts of interest.
 - Cons: A majority of states have adopted Model Rule 1.8 and leaving the third-party payor rule with current Rule 3-310 is an unnecessary departure from the national standard.
11. Add a comment explaining that the rule does not apply to a payment pursuant to a settlement agreement, a court order, or other payment otherwise provided for by law.
 - Pros: This change would clarify the scope of the rule, recognizing that payments pursuant to a settlement or a court order ordinarily would not implicate the harm that the rule is intended to prevent.
 - Cons: This change would either be unnecessary given the precise terms of the proposed rule, or would constitute an exception to the rule that does not belong in a comment.

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. In addition to accepting compensation, the proposed rule expands the prohibition to cover entering into agreements with, or charging, a third-party payor.
2. The proposed rule adds a new timing element requiring that a lawyer obtain a client's consent "at or before the time the lawyer has entered into an agreement for, charged, or accepted compensation, or as soon thereafter as reasonably practicable."
3. The proposed rule excepts a lawyer from the requirement to obtain client consent where the lawyer is rendering legal services on behalf of a nonprofit organization.

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term “lawyer” for “member” and numbering the rule similar to the Model Rules numbering scheme are both non-substantive changes.

E. Alternatives Considered:

None.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed Rule 1.8.6 [3-310(F)] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.6 [3-310(F)] in the form attached to this Report and Recommendation.

