

# **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.8.7 [3-310(D)]**

## **Commission Drafting Team Information**

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### **I. CURRENT CALIFORNIA RULE 3-310(D)**

#### **Rule 3-310(D) Avoiding the Representation of Adverse Interests (Aggregate Settlements)**

- (D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

#### **Discussion**

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Paragraph (D) is not intended to apply to class action settlements subject to court approval.

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

#### **Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 1.8.7 [3-310(D)]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

#### **Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 1.8.7 [3-310(D)]

Vote: X (yes) – X (no) – X (abstain)

### **III. COMMISSION'S PROPOSED RULE 1.8.7 (CLEAN)**

#### **Rule 1.8.7 [3-310] Aggregate Settlements**

- (a) A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.\* The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person\* in the settlement.

- (b) This Rule does not apply to class action settlements subject to court approval.

IV. **COMMISSION'S PROPOSED RULE 1.8.7**  
**(REDLINE TO CURRENT CALIFORNIA RULE 3-310(D))**

Rule **1.8.7 [3-310(D)]** ~~Avoiding the Representation of Adverse Interests~~ **Aggregate Settlements**

~~(D)~~(a) A ~~member~~lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients ~~without the, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives~~ informed written consent ~~of each client.\*~~ The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person\* in the settlement.

**Discussion**

~~Paragraph (D) is~~(b) This Rule does not ~~intended to~~ apply to class action settlements subject to court approval.

V. **COMMISSION'S PROPOSED RULE 1.8.7**  
**(REDLINE TO ABA MODEL RULE 1.8(G))**

Rule ~~1.8 Current Clients: Specific Rules~~**1.8.7 [3-310] Aggregate Settlements**

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~~(g)~~a) A lawyer who represents two or more clients shall not ~~participate in making~~enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an ~~aggregated~~aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent, ~~in a writing signed by the client.\*~~ The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person\* in the settlement.

~~(b)~~ This Rule does not apply to class action settlements subject to court approval.

**Comment**

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~~Aggregate Settlements~~

~~[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation,~~

~~as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.~~

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## **VI. RULE HISTORY**

The predecessor to current rule 3-310, former 5-102, originally approved and made operative on January 1, 1975, was entitled "Avoiding the Representation of Adverse Interests." Rule 5-102 was adopted following the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. Prior to the enactment of rule 5-102, Rule 7 was the rule that governed conflicts. The text of rule 5-102 was identical to the text of the previous rule 7.

### **A. Summary of 1989 Amendments**

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-310, which became operative on May 27, 1989.<sup>1</sup>

Paragraph (C) was new and adopted from ABA Model Rule 1.8(g). It was intended to make clear that an aggregate settlement of the claims of two or more clients is a special of conflict and could not be entered into absent the informed written consent of the client.

- (C) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, except with their informed written consent.

### **B. Summary of 1992 Proposed Amendments**

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<sup>1</sup> See page 34 of Bar Misc. No. 5626, —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, ll December 1987.

Proposed amendments to rule 3-310 were substantive and substantial. Structurally, former paragraph (F) became new paragraph (A), former paragraph (A) became new paragraph (B), former paragraph (B) became new paragraph (C), and so on throughout the rule.

New paragraph (D) was identical to current paragraph (C) except that “informed written consent” became “written consent...after disclosure.” No substantive change was intended.

(C) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, ~~except with their~~ without the informed written consent of each client.

## **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. Supports adoption of proposed Rule 1.8.7.
- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**  
(In response to 45-day public comment circulation):
  1. Supports adoption of proposed Rule 1.8.7.
- **State Bar Court:** No comments were received from State Bar Court.

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

Two comments, including the above comment from OCTC, were received. Both agreed 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.

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

**Model Rule 1.8(g).** 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 May 13, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_8.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf) [last visited 2/1/16]
- Thirty-one jurisdictions have adopted model rule 1.8(g)<sup>2</sup> and twenty (including California) have adopted variations of model rule 1.8(g).<sup>3</sup>

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<sup>2</sup> The thirty-one states are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, Nebraska,

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

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

1. The current rule does not refer to criminal matters. The proposed rule adds: “in a criminal case an aggregate agreement as to guilty or nolo contendere pleas.”
  - Pros: This change extends the public protection of the current rule in a manner consistent with purpose of the rule. An aggregate agreement in a criminal matter involving two or more clients implicates the public protection that the current rule is intended to provide. Joint clients in criminal, as well as civil matters, are entitled to receive full disclosure from their lawyer and they should be empowered to give or decline to give consent to an aggregate settlement. Moreover, the consequences in criminal matters suggest that the policy of the current rule is even more important than in a typical civil matter.
  - Cons: None identified.
2. The current rule does not specify particular matters that ought to be disclosed when a lawyer seeks consent from clients with respect to an aggregate settlement. The proposed rule follows the ABA Model Rule in specifying the following elements of a written disclosure: “the existence and nature of all the claims or pleas and of the participation of each person in the settlement.”
  - Pros: As the ABA Model Rule recognizes, in the context of an aggregate settlement, these disclosures are part of what a client should know before providing consent. While “informed written consent” might be interpreted as requiring these disclosures even without specifying them in this rule, the specification makes the requirement clear. Moreover, the specification of these disclosures in the rule governing aggregate settlements makes the requirement easier for lawyers to find.
  - Cons: Although a typical civil matter involves a plaintiff’s release/dismissal in exchange for monetary compensation, other civil matters can involve injunctive relief and other interests (i.e., child custody rights). This change is incomplete to the extent that it does not offer any guidance regarding disclosures on these points. The specification is unnecessary as the requirement of these disclosures is already implicit in the definition of “informed written consent.”

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Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Wisconsin, and Wyoming.

<sup>3</sup> The twenty jurisdictions are: Alabama, California, Connecticut, District of Columbia, Georgia, Hawaii, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Ohio, Tennessee, Texas, Virginia, Washington, and West Virginia.

3. ~~The current rule refers to a “member” and the proposed rule substitutes the term “lawyer.”~~

- ~~○ 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.~~

4.3. Move the proposed rule out of Rule 3-310 and make it a standalone rule. Assign the number 1.8.7 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.

## **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 lawyer addressing an aggregate settlement must approach it as 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 aggregate settlement rule with current Rule 3-310 is an unnecessary departure from the national standard.

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. The proposed rule adds a reference to aggregate agreements in the representation of two or more clients in a criminal matter.
2. The proposed rule adds a description of the required client disclosures for aggregate settlements.

### **D. Non-Substantive Changes to the Current Rule:**

1. Substitute the term "lawyer" for "member".
2. Assign comparable Model Rule number to the proposed rule (1.8.7) rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the corresponding Model Rule as rule 1.8(g).

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

None.

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

### **Recommendation:**

The Commission recommends adoption of proposed Rule 1.8.7 [3-310(D)] in the form attached to this Report and Recommendation.

### **Proposed Resolution:**

RESOLVED: The Board of Trustees adopt proposed amended Rule 1.8.7 [3-310(D)] in the form attached to this Report and Recommendation.

