

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.8.8 [3-400]**

### **Commission Drafting Team Information**

**Lead Drafter:** Lee Harris

**Co-Drafters:** Howard Kornberg, Toby Rothschild

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### **I. CURRENT CALIFORNIA RULE**

#### **Rule 3-400 Limiting Liability to Client**

A member shall not:

- (A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice; or
- (B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

#### **Discussion**

Rule 3-400 is not intended to apply to customary qualifications and limitations in legal opinions and memoranda, nor is it intended to prevent a member from reasonably limiting the scope of the member's employment or representation.

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

#### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.8.8 [3-400]

Vote: 11 (yes) – 0 (no) – 0 (abstain)

#### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.8.8 [3-400]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

### III. COMMISSION'S PROPOSED RULE 1.8.8 (CLEAN)

#### Rule 1.8.8 [3-400] Limiting Liability to Client

A lawyer shall not:

- (a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:
  - (1) represented by an independent lawyer concerning the settlement; or
  - (2) advised in writing\* by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable\* opportunity to seek that advice.

#### Comment

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably\* limiting the scope of the lawyer's representation. See Rule 1.2(b).

### IV. COMMISSION'S PROPOSED RULE 1.8.8 (REDLINE TO CURRENT CALIFORNIA RULE 3-400)

#### Rule 1.8.8 [3-400] Limiting Liability to Client

A ~~member~~lawyer shall not:

- ~~(A)~~(a) Contract with a client prospectively limiting the ~~member's~~lawyer's liability to the client for the ~~member's~~lawyer's professional malpractice; or
- (b) Settle a claim or potential claim for the ~~member's~~lawyer's liability to ~~the~~a client or former client for the ~~member's~~lawyer's professional malpractice, unless the client or former client is ~~informed~~either:
  - (1) represented by an independent lawyer concerning the settlement; or
  - ~~(B)~~(2) advised in writing ~~that\*~~by the ~~client may~~lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and ~~is~~ given a reasonable\* opportunity to seek that advice.

## Comment~~Discussion~~

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule ~~3-400-is~~does not ~~intended to~~apply to customary qualifications and limitations in legal opinions and memoranda, nor ~~is-it-intended-to~~does it prevent a ~~member~~lawyer from reasonably\* limiting the scope of the ~~member's employment~~ or lawyer's representation. See Rule 1.2(b).

## V. RULE HISTORY

Current Rule 3-400 was originally adopted operative on January 1, 1975 as former Rule 6-102, under the same title, "Limiting Liability to Client." Former Rule 6-102 incorporated the substance of Disciplinary Rule 6-102 of the ABA Model Code of Professional Responsibility. Former Rule 6-102 stated: "A member of the State Bar shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice. This rule shall not prevent a member of the State bar from settling or defending a malpractice claim."

Former Rule 6-102 was amended in 1989. The amendments included renumbering the rule 3-400, dividing the rule into two paragraphs, (A) and (B), and adding a Discussion paragraph. Paragraph (A) continued the prohibition contained in former Rule 6-102 on attorneys attempting to limit their liability to a client for their professional malpractice. Paragraph (B) was new and provided a lawyer must not settle a claim for the lawyer's malpractice unless the lawyer informed the client in writing that the client may seek the advice of independent counsel with respect to the settlement. In addition, the client must be given a reasonable opportunity to seek that advice. A Discussion paragraph was added to clarify the scope of the rule by stating that the rule was not intended to apply to limitations or qualifications pertaining to legal opinions and memoranda, nor was the rule intended to prevent a lawyer from limiting the scope of the lawyer's representation.

In 1992, paragraph (B) was amended to provide that a lawyer shall not:

(B) Settle a claim or potential claim for ~~such-the member's liability to the client for the member's professional malpractice~~, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice.

This change was not intended to be substantive. Rather, the amendment was made in order to allow the precatory language, and paragraph (B), to stand alone.

Rule 3-400 has not been amended since 1992.

## **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. OCTC would recommend, however, that this rule also require that the potential malpractice settlement be fair and reasonable. A leading treatise on legal ethics has criticized the ABA's Model Rule limiting liability because that rule does not require the terms of the agreement to be fair, although the treatise notes that this may be because that is already required by the ABA's version of rule 3-300 (ABA rule 1.8(a)). (See Hazard & Hodge, "The Law of Lawyering," 3rd Edition, § 12.19.)
2. OCTC supports Comment 1.
3. OCTC finds the first part of Comment 2 to be vague. It does not understand what the Comment means by "customary qualifications and limitations." This needs to be either explained or the Comment should be stricken. Without an explanation or definition of what the Comment is referring to, this rule will be difficult to understand or enforce, or will end up covering something not intended to be covered. It is not necessary to have a Comment that states the rule does not prevent a lawyer from reasonably limiting the scope of the representation. This rule on its face does not address that issue and limiting the scope of representation does not limit liability.

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

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

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

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE 1.8(H) ADOPTIONS**

### **A. Related California Law**

#### **Civil Code Section 1542**

When settling an attorney-client fee dispute, attorneys in California sometimes include a Civil Code section 1542 waiver of all known or unknown claims that the client has or may have against the attorney which necessarily extends to any malpractice claims. This type of waiver provision in a fee dispute settlement may violate California Rule of Professional Conduct 3-400(A) because it prospectively limits the attorney's liability to the client for malpractice. *The California Practice Guide on Professional Responsibility* includes a Comment regarding this issue which

states: “To avoid a possible violation of CRPC 3-400(A), the § 1542 waiver could include language to the effect that it does *not* apply to future malpractice claims.”

The ethical issue of including a section 1542 waiver as part of a fee dispute with a client was addressed by the State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) in [Formal Opinion No. 2008-179](#). That opinion states that when an agreement to settle a fee dispute is broad enough to include a release of malpractice claims, or where the lawyer intends to obtain a release of legal malpractice claims through a settlement agreement, a general release that includes a Civil Code section 1542 waiver from the client requires compliance with Rule 3-400(B) by (1) informing the client in writing that the client may seek the advice of an independent lawyer regarding the settlement, and (2) giving the client a reasonable opportunity to seek that advice.

### **Provision in Initial Fee Agreement Requiring Arbitration of Attorney-Client Disputes**

An initial fee agreement that contains a provision specifying mandatory and/or binding arbitration of client disputes, including potential malpractice claims, does not violate rule 3-400. California case law has stated such provision are not ethically improper in retainer agreements with new clients: “An attorney may ethically, and without conflict of interest, include in an initial retainer agreement with a client a provision requiring the arbitration of both fee disputes and legal malpractice claims.” [*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4<sup>th</sup> 1102, 1108-1109. See also, Cal. State Bar Form. Opn. 1989-116; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501]. The rationale is that standard arbitration provisions in a fee agreement neither limit an attorney’s professional duties owed to the client, nor limit the attorney’s liability for breaching those duties. Rather, the arbitration provision simply states in which forum any potential liability issues will be determined. [*Powers v. Dickson, Carlson & Campillo*, supra, 54 Cal.App.4<sup>th</sup> at 1115].

### **Limited Scope Representation**

The Discussion section to rule 3-400 states the rule is not intended to prevent a lawyer from reasonably limiting the scope of his or her employment or representation. In addition to Discussion paragraph [2] to current rule 1-650, this is the only reference to limited scope representation in the California Rules of Professional Conduct. This Commission has approved the rule 3-210 [1.2] drafting team’s proposal to recommend adoption of ABA Model Rule 1.2(c), which permits a lawyer to limit the scope of representation under circumstances. Under California case law, although a lawyer may limit the scope of representation, the lawyer still has an obligation to advise the client regarding reasonably apparent alternative remedies and legal liabilities even if those issues reside outside the scope of representation. [See, *Nichols v. Keller* (1993) 15 Cal.App.4<sup>th</sup> 1672, 1684 – malpractice claim against workers’ comp attorney for failure to advise client of potential third-party claim].

## B. ABA Model Rule 1.8(h) Adoptions

All jurisdictions have adopted some version of ABA Model Rule 1.8(h). The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.8: Conflict 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](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1.8.authcheckdam.pdf) [Last visited 1/8/2017]
- Twenty-seven jurisdictions have adopted Model Rule 1.8(h) verbatim.<sup>1</sup> Sixteen jurisdictions have adopted a slightly modified version of Model Rule 1.8(h).<sup>2</sup> Eight jurisdictions have adopted a version of the rule that is substantially different than Model Rule 1.8(h).<sup>3</sup>

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

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

1. Add subparagraph (b)(1) to current rule 3-400: to the Commission recommends including a provision that states a lawyer is not required to advise the client to seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement.
  - Pros: Requiring the lawyer to advise the client to seek the advice of an independent lawyer when the client is independently represented would be redundant and unnecessary. If the client is already being represented by independent counsel, some of the policy reasons behind the rule have been achieved. Further, such action would likely be a separate violation of proposed Rule 4.2 [2-100].
  - Cons: The required advice should be given even if the client is already represented by an independent lawyer concerning the settlement. This would afford an opportunity for the lawyer to confirm that the client has in fact secured an independent lawyer concerning the settlement. Also, nothing in

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<sup>1</sup> The twenty-seven jurisdictions are: Colorado, Connecticut, Delaware, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

<sup>2</sup> The sixteen jurisdictions are: Alabama, Alaska, Arkansas, California, District of Columbia, Florida, Michigan, Mississippi (Mississippi retains the former Model Rule language from 1983), New Jersey, New York, North Carolina, North Dakota, Tennessee, Texas (Texas retains the former Model Rule language from 1983, as Texas Rule 1.8(g)), Virginia, and Washington.

<sup>3</sup> The eight jurisdictions are: Arizona, Georgia, Hawaii, Indiana, Iowa, Ohio, Oregon, and Wisconsin.

the rule dictates that the lawyer's advice be presented in a manner that would denigrate the lawyer-client relationship that is being confirmed. For example, the client's right to continue with the client's chosen independent counsel can be emphasized in advising the client.

2. Substitute "advised in writing" for "informed in writing."

- Pros: "Advised" is appropriate because it is read in conjunction with the lawyer's duty to advise the client "to seek" rather than the client merely having been "informed" that the client "may seek" the advice of an independent lawyer. There is little risk that "advise" will be viewed as requiring a lawyer to give comprehensive legal advice; similar language limiting a lawyer's advice to retain counsel is found in proposed Rule 4.3. The revised language is more client protective.
- Cons: The Commission is unaware of any published State Bar Court cases indicating that the phrase "informed in writing" has been problematic as a disciplinary standard in the current rule. In addition, continuing to use "informed" rather than "advised" might guard against a lawyer misreading this requirement as a duty to give comprehensive legal advice to the client concerning the advantages and disadvantages of the settlement.

3. Carry forward the current rule's requirement that the communication be in writing.

- Pros: This approach retains the current rule's requirement which is more client protective than if the rule's requirement could be achieved orally.
- Cons: None identified.

4. Recommend that the rule expressly state it is the lawyer who must advise the client. The current rule does not expressly state who must inform the client in writing that the client may seek the advice of an independent lawyer.

- Pros: The suggested revision should result in greater compliance, understanding and client protection by clarifying that it is the lawyer's duty to advise the client, thus ensuring the client is advised. In addition, the revision should alleviate potential ambiguity when prosecuting the rule in the discipline system because a lawyer will not be able to argue, after the fact, that someone else might have advised the client.
- Cons: None identified.

5. Recommend replacing the phrase "may seek" with "to seek."

- Pros: "To seek" is closer than "may seek" in how case law has interpreted a lawyer's duty to inform a client about the importance of consulting with an independent lawyer.

- Cons: None identified.
6. Recommend adoption of RRC1's Comment [3] as Comment [1]. RRC1's Comment has been modified by the drafting team by inserting the verb "absolve" in place of "override."
- Pros: This Comment clarifies that paragraph (b) does not provide a means by which a lawyer might circumvent the application of Bus. & Prof. Code § 6090.5.<sup>4</sup>
  - Cons: The word "absolve" has several different meanings and the Comment may suffer from ambiguity as to which meaning is intended. Further, the Comment refers to a lawyer's "obligation" under other law, yet a lawyer has no affirmative obligations under the statute cited (B&P Code § 6090.5).
7. Recommend adoption of RRC1's Comment [4] as Comment [2].
- Pros: This Comment is similar to the Discussion paragraph to current rule 3-400. Including a cross-reference to the limited scope representation provision in proposed rule 1.2(b) should enhance compliance and understanding of this important concept.
  - Cons: None identified.

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

1. Include "attempts to contract" in paragraph (a) or "attempts to settle" in paragraph (b).
- Pros: An unsuccessful attempt to limit liability should be as equally prohibited as a successful attempt to do so. (See *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747 – 738.
  - Cons: Such a provision would be difficult to prove, especially with oral offers.

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<sup>4</sup> Business and Professions Code § 6090.5 provides:

- (a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:
  - (1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.
  - (2) The plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.
  - (3) The record of any civil action for professional misconduct shall be sealed from review by the disciplinary agency.
- (b) This section applies to all settlements, whether made before or after the commencement of a civil action.



Such a provision would most likely devolve into a he/said, she/said contest.

2. Include the concept contained in ABA Model Rule 1.8(h)(1) which permits a lawyer to contract with a client to prospectively limit malpractice liability where “the client is independently represented in making the agreement.”

- Pros: As long as the client is independently represented and advised of all the risks and concerns associated with such an agreement, individuals at arms-length should be free to contract.
- Cons: The absolute prohibition is a better policy to promote and is more client protective. The ABA provision purportedly is intended to permit sophisticated clients to prospectively waive a lawyer or law firm’s liability in cases involving areas where the law is poorly developed and there is a significant risk that liability might be imposed. Such situations would be extraordinarily rare, but the risk that such a provision might be used with clients not experienced in the use of legal services is great.

3. Retain RRC1’s Comment [1].

- Pros: Explaining the rule’s purpose and the policy underlying the rule can provide interpretative guidance regarding the rule’s application.
- Cons: This Comment merely restates the policy underlying, and the purpose of, the rule but it does not contribute to explaining the rule’s meaning or application.

4. Retain the first sentence of RRC1’s Comment [2] regarding the use of alternative dispute resolution procedures.

- Pros: Such provisions are commonly included in attorney-client fee agreements. Including within a Comment the authority permitting the use of such provisions would help educate both lawyers and clients.
- Cons: Although the sentence accurately states the law, there is a question whether the rules of professional conduct should promote the use of a dispute resolution mechanism that is perceived as anti-consumer and thus not protective of the public.

5. Retain the second sentence of RRC1’s Comment [2] regarding lawyers practicing in the form of limited liability entities.

- Pros: The sentence would usefully clarify that the rule does not prohibit lawyers from practicing in a limit liability entity so long as a lawyer’s individual liability is not limited.
- Cons: This sentence is unnecessary because it does not explain either the meaning of the rule or how it is applied, and the sentence is also potentially

confusing. First, it might suggest that practicing in a limited liability entity will protect the actual actor from malpractice liability and, second, the reference to “limited liability entity” is vague and overbroad as California only permits lawyers to practice as an LLP or law corporation, not as an LLC.

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 substantive change to the current rule is that the proposed rule expressly states the lawyer is not required to advise the client to seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement.
2. Under the proposed rule, the lawyer would expressly be required to advise the client “to seek” the advice of an independent lawyer regarding the settlement and not just be advised that the client “may seek the advice.”

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

1. The remaining changes to the rule are non-substantive, including the substitution of the term “lawyer” for “member,” and the numbering of the rule similar to the ABA Model Rule numbering scheme.

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

None.

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

### **Recommendation:**

That the Board of Trustees of the State Bar of California adopt proposed Rule 1.8.8 [3-400] in the form attached to this Report and Recommendation.

### **Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.8 [3-400] in the form attached to this Report and Recommendation.