

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.8.9 [4-300]

Commission Drafting Team Information

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I. CURRENT CALIFORNIA RULE

Rule 4-300 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.8.9 [4-300]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.8.9 [4-300]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. PROPOSED RULE 1.8.9 [4-300] (CLEAN)

Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (a) A lawyer shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that lawyer or with that lawyer's law firm* is acting

as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.

- (b) A lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the lawyer or of another lawyer in the lawyer's law firm* or is an employee of the lawyer or the lawyer's law firm.*

IV. COMMISSION'S PROPOSED RULE 1.8.9 [4-300] (REDLINE TO CURRENT CALIFORNIA RULE 4-300)

Rule 1.8.9 [4-300] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (Aa) A ~~member~~lawyer shall not directly or indirectly purchase property at a probate, foreclosure, ~~receiver's, trustee's~~receiver's, trustee's, or judicial sale in an action or proceeding in which such ~~member~~lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that ~~member~~lawyer or with that ~~member's~~lawyer's law firm* is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.
- (Bb) A ~~member~~lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the ~~member~~lawyer or of another lawyer in the ~~member's~~lawyer's law firm* or is an employee of the ~~member~~lawyer or the ~~member's~~lawyer's law firm.*

V. RULE HISTORY

Current rule 4-300 originated in 1928 as former rule 8, operative on July 24, 1928. (See, *The State Bar Journal* (July 1928) Vol. III, No. 1, p. 17.) Rule 8 originally read: "A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member appears as attorney for a party."

In 1972, former rule 8 was renumbered as rule 5-103, "Purchasing Property in a Matter in Which a Member Appears as Attorney" with the identical text of former rule 8. Rule 5-103 was amended operative January 1, 1975 and titled "Purchasing Property at a Probate, Foreclosure or Judicial Sale." The 1975 version of the rule extended the proscription on purchasing property at the described sales to partners and associates of the member. The rule also prohibited a member from purchasing property at the specified sales if the member, or a partner or associate of the member acts as executor, trustee, administrator, or guardian or conservator. Finally, for the purposes of the rule, rule 5-103 defined the term "associate" to mean an employee or fellow employee who is a member of the State Bar. The 1975 version of the rule provided:

Rule 5-103. Purchasing Property at a Probate, Foreclosure or Judicial Sale.

A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member or any partner or associate of such member appears as attorney for a party or is acting as executor, trustee, administrator, or guardian or conservator.

As used in this rule, the term “associate” means an employee or fellow employee who is a member of the State Bar.

In 1989, rule 5-103 was amended and renumbered as rule 4-300 as part of a comprehensive revision and renumbering of the entire rules. Rule 4-300 was retitled “Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review.” Receiver’s and trustee’s sales were added to the rule because such sales were viewed as similar to the type of sales already prohibited under the rule. The rule was also amended to apply to members who may have never appeared on behalf of the client but had provided legal services to the client. In addition, the phrase “partner or associate of such member” was deleted and replaced with “any member affiliated by reason of personal, business, or professional relationship with that member or with that member’s law firm.” This last change rendered the definition of the term “associate” unnecessary to the rule and the definition was removed.¹ (See page 46 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 Explanations,” December 1987.) The 1989 version of rule 4-300 provided:

Rule 4-300. 5-103. Purchasing Property at a Probate, Foreclosure or a Judicial Sale Subject to Judicial Review

A member ~~of the State Bar~~ shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any ~~partner or associate of such member~~ affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm ~~appears as is an~~ attorney for a party or is acting as executor, receiver, trustee, administrator, guardian, or conservator.

~~As used in this rule, the term “associate” means an employee or fellow employee who is a member of the State Bar.~~

Rule 4-300 was last amended in 1992. An amendment to rule 1-100(B)(3)’s definition of “lawyer” extended the application of rule 4-300 to foreign-licensed attorneys, as well as California or out-of-state attorneys, who are affiliated by reason of personal, business or professional relationship with a member or a member’s firm. An additional, non-substantive change intended for brevity and clarity was made to paragraph (A). (See below).

¹ Nevertheless, the definition of “associate,” which is relevant to other current rules, was moved to current rule 1-100(B)(4).

Paragraph (B) was added to prohibit a member from representing a seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm. This addition extended the protection of a client's interest where the attorney's relationship to the buyer created a conflict with the lawyer's representation of the interests of the seller-client. (See pages 18 – 19 of Supreme Court File No. 24408, "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.) The 1992 version of rule 4-300 provided:

Rule 4-300. Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(A) A member shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such member or any ~~member~~ lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is ~~an attorney acting as a lawyer~~ for a party or is acting as executor, receiver, trustee, administrator, guardian, or conservator.

(B) A member shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the member or of another lawyer in the member's law firm or is an employee of the member or the member's law firm.

When current rule 4-300 was being revised during the 1992 rule revision process, the 1992 Rule Revision Commission was aware of Probate Code sections 9880 – 9885, which became operative on July 1, 1988. These Probate Code sections permit a "personal representative *or the personal representative's attorney*," (emphasis added), to purchase property from a probate estate if certain requirements are satisfied, including notice to, and consent of all heirs and devisees to the purchase, and approval after court review. Notwithstanding the direct conflict between rule 4-300 and the Probate Code, the 1992 Rule Revision Commission recommended that rule 4-300 should be continued.²

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.

² Specifically, the recommendation to adopt rule 4-300 notwithstanding a conflict with the Probate Code was presented in Enclosure 6 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.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Three comments, including the above comment from OCTC, were received. Two agreed with the proposed rule, and one agreed if modified. 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

California has had a variation of rule 4-300 since 1928. There is no ABA Model Rule directly analogous to rule 4-300. Although the first Commission numbered its proposed rule 4-300 successor as Rule 1.8.9, suggesting the rule is analogous to Model Rule 1.8(i), neither RRC1's rule nor current rule 4-300 should be considered analogous to Model Rule 1.8(i), which applies to a lawyer's acquisition of "a proprietary interest in the cause of action or subject matter of litigation," a scope of coverage that is broader (not limited to specific types of sales connected to the litigation) than rule 4-300's.³

California's divergence from ABA rules regulating lawyers with respect to rule 4-300 and its predecessors is long-standing. The 1908 ABA Canons of Professional Ethics, Canon 10, provided: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting." In 1928, the State Bar of California adopted its Rules of Professional Conduct, including Rule 8, which provided: "A member of the State Bar shall not directly or indirectly purchase property at a probate, foreclosure or judicial sale in an action or proceeding in which such member appears as attorney for a party." (See, The State Bar Journal (July 1928) Vol. III, No.1, p. 17.) There was no rule analogous to ABA Canon 8 in the 1928 Rules, nor has California adopted a rule analogous to current Model Rule 1.8(i) [successor to ABA Canon 8] in the intervening years.

Nevertheless, Model Rule 1.8(a)⁴ [ABA counterpart to Cal. Rule 3-300] and its predecessor, ABA Model Code of Professional Responsibility DR 5-104, have been

³ Model Rule 1.8(i) provides:

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

⁴ Model rule 1.8(a) is very similar to current California rule 3-300 and provides:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

applied to facts that would fall under rule 4-300. For example, in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Stamp* (Iowa 1999) 590 N.W.2d 496, 500, a lawyer who probated an estate was disciplined for violating Iowa rule DR 5-104(A) [the predecessor to MR 1.8(a)], in part, for representing the estate and purchasing stock from the estate without required court approval and at a price substantially below market value. (See also, citations in 35 A.L.R.3d 674 reporting on “Attorney and client: disciplinary proceeding based upon attorney’s direct or indirect purchase of client’s property.”)

Although California is not unique in regulating the described lawyer conduct through discipline, California presently diverges from the approach taken in other jurisdictions by its adoption of a rule specifically regulating a lawyer’s purchase of assets at any of the identified types of sales subject to judicial review.

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

A. Introduction: History of Rule 4-300 and related Probate Code sections, and Reasons For the Commission’s Recommendation

As noted in Section VIII, above, California is unique in its adoption of a rule that regulates a lawyer’s purchase of client assets at specific types of sales. Other jurisdictions appear to regulate such transactions by applying their rule corresponding to Model Rule 1.8(a) [Cal. Rule 3-300]. (See Section VII.) This raises the question whether rule 4-300 is still necessary. The Commission concluded it is. Current rule 3-300 [MR 1.8(a)] by its terms refers only to transactions between a lawyer *and a client* or a lawyer’s acquisition of a pecuniary interest adverse to a client. Rule 4-300, on the other hand, applies not only to such transactions or interests, but whenever the lawyer or a lawyer in the lawyer’s firm is representing a party (e.g., an estate’s personal representative) or is acting as an “executor, receiver, trustee, administrator, guardian, or conservator” in the matter. By its terms, rule 4-300 applies to a much broader set of situations than does rule 3-300. Moreover, rule 4-300 provides for an absolute prohibition on lawyer purchases; unlike 3-300, there is no procedure under which a lawyer might obtain the consents of interest persons to the purchases.

However, current rule 4-300 conflicts with Probate Code §§ 9880-9885, which do permit a lawyer for an estate’s personal representative to make *probate* purchases, provided

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

all known heirs and devisees are notified and consent, and subject to judicial review.⁵ Thus, at least with respect to probate sales, rule 4-300 conflicts with the Probate Code.

In recognition of this conflict, the first Commission (“RRC1”) proposed a rule that removed probate sales from the prohibitory language of 4-300(A) and added a rule section that informed lawyers of the existence of the Probate Code requirements and added further requirements with which the lawyer must comply, rule 1.8.1 [current rule 3-300] and 1.7 [current rule 3-310(B)].⁶

Because of the conflict between rule 4-300 and the Probate Code sections permitting probate sales to the personal representative’s lawyer subject to certain conditions, the Commission thoroughly considered RRC1’s proposed rule. However, after consideration of the legislative history and the process by which current rule 4-300 was adopted by the Board and approved by the Supreme Court, the Commission consensus is to recommend retaining current rule 4-300, revised to incorporate the Commission’s global changes, i.e., Model Rule numbering, format and style and substitution of “lawyer” for “member.”

There are numerous reasons for the Commission’s recommendation. *First* and most important, when the Supreme Court approved rule 4-300, effective September 14, 1992, it was fully aware of the conflict that existed between the Probate Code sections and the rule. (See the State Bar’s 1991 Supreme Court filing, case #S024408, seeking Supreme Court approval of the current rule, Enclosure 6.) Enclosure 6 fully explained the conflict between the rule and the Probate Code. Notwithstanding the described conflict, the Supreme Court apparently concluded that the more stringent protections afforded by rule 4-300 were warranted. *Second*, Rule 4-300 reflects a substantial and long-standing ethical policy in California that prohibits an attorney from purchasing, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. See *Eschwig v. State Bar* (1969) 1 Cal. 3d 8 (attorney purchased

⁵ Probate Code §§ 9881 and 9882 provide:

9881. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative’s attorney to purchase property of the estate if all of the following requirements are satisfied:

- (a) Written consent to the purchase is signed by (1) each known heir whose interest in the estate would be affected by the proposed purchase and (2) each known devisee whose interest in the estate would be affected by the proposed purchase.
- (b) The written consents are filed with the court.
- (c) The purchase is shown to be to the advantage of the estate.

9882. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative or the personal representative’s attorney to purchase property of the estate if the will of the decedent authorizes the personal representative or the personal representative’s attorney to purchase the property.

See also Probate Code 9880-9885 (2015), attached.

⁶ See note 7 for RRC1’s proposed Rule 1.8.9.

principal asset of estate while representing executor in probate proceeding); *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 (purchase of second deed of trust by wife of attorney deemed adverse to client where the property constituted the major, if not the only, source from which client could recover alimony payments); *Ames v. State Bar* (1973) 8 Cal.3d 910 (an attorney "must avoid circumstances where it is reasonably foreseeable that his acquisition may be detrimental, i.e., adverse, to the interests of his client."). Therefore, the fact that the Probate Code allows such purchases (upon court approval but with limited judicial supervision), does not vitiate a lawyer's obligation to comply with these higher ethical standards. Rules adopted by the Supreme Court can hold lawyers to a higher standard than corresponding legislation. *Third*, the Commission is not aware of any problems in enforcement that have arisen in the intervening 24 years of the rule's coexistence with the Probate Code sections. Fourth, a review of the legislative history has revealed no evidence that either the legislature or the California Law Review Commission, the principal sponsor of the comprehensive revision of Probate Code in 1987 and 1991, considered rule 5-103, the predecessor to rule 4-300, or considered the public protection policies underlying the rule. There is no mention at all of rule 5-103 anywhere in the legislative history, including the California Law Revision Commission's two lengthy reports on the proposed amendments to the Probate Code.

B. Concepts Accepted (Pros and Cons):

1. Retain the substance of the current rule and only revise the language to implement non-substantive terminology and format changes.
 - Pros: The current rule sets the appropriate standard of public protection and there are no known problems notwithstanding inconsistency with the Probate Code. (See also paragraph A (Introduction), above.)
 - Cons: There is a risk of confusion in having a rule that subjects a lawyer to discipline even though the conduct is authorized by statutory law.

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. Concepts Rejected (Pros and Cons):

1. Change the rule to state that it is not a violation for a lawyer to participate in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but that such transactions remain subject to other applicable rules, such as the rules governing business transactions with a client [current rule 3-300] and the representation of adverse interests [current rule 3-310]. In effect, this proposal is to adopt RRC1 proposed Rule 1.8.9.⁷

⁷ RRC1 proposed Rule 1.8.9 provided:

- Pros: This change would harmonize the rule with statutory law and avoid the potential anomalous result of a lawyer who participates in a legally enforceable probate sale under the Probate Code would nevertheless be subject to discipline.
- Cons: This change would diminish the existing public protection afforded by the absolute prohibition in current rule 4-300 and facilitate attorney self-dealing. (See also paragraph A (Introduction), above.)

D. Changes in Duties/Substantive Changes to the Current Rule:

None.

E. 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.

Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

- (a) A lawyer shall not directly or indirectly purchase property at a foreclosure, receiver’s, trustee’s, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated with that lawyer’s law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian or conservator.
- (b) A lawyer shall not represent the seller at a foreclosure, receiver’s, trustee’s, or judicial sale in which the purchaser is a spouse, relative or other close associate of the lawyer or of another lawyer in the lawyer’s law firm.
- (c) This Rule does not prohibit a lawyer’s participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 and 1.7.

Comment

[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.

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 1.8.9 to the proposed rule rather than follow the Model Rule numbering for the 1.8 series of rules, which designates the Model Rule that is rule 4-300's closest analog as rule 1.8(i).

- Pros: The Commission 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.

F. Alternatives Considered:

None.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed Rule 1.8.9 [4-300] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.9 [4-300] in the form attached to this Report and Recommendation.

