

# Proposed Rule 1.8.8 [RPC 3-400]

## “Limiting Liability to Client”

(Draft #6, 10/10/09)

**Summary:** Proposed Rule 1.8.8 carries forward the substance of current rule 3-400 and rejects the approach in Model Rule 1.8(h)(1) that permits a lawyer to obtain a client’s waiver of the lawyer’s prospective malpractice liability if the client is represented by independent counsel. Otherwise, the Rule largely tracks the remainder of the Model Rule.

### Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input checked="" type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

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### Primary Factors Considered

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Existing California Law

Rule	RPC 3-400
Statute	Business and Professions Code § 6090.5
Case law	

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 10

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart  Yes  No

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.8.8\* Limiting Liability to Client

October 2009

(Draft rule following consideration of public comment)

### *INTRODUCTION:*

Proposed Rule 1.8.8 is based on Model Rule 1.8(h), but incorporates the principles of current California Rule 3-400 on limiting liability to a client. The major difference between the proposed Rule and Model Rule 1.8(h) is found in paragraph (a) in that the proposed Rule does not have an exception for limiting prospective liability for malpractice if the client is represented by independent counsel. Paragraph (a) is more client-protective by not permitting lawyers in any circumstances to obtain prospective waivers of future malpractice claims. Paragraph (b) of the proposed Rule is substantially similar to the equivalent Model Rule paragraph. The Comments to the proposed Rule have been substantially shortened to eliminate excess verbiage that adds little to comprehension of the Rule.

The Commission concluded that its proposed Rule offers substantially more public protection than does the Model Rule and has clearer and more easily understood language. See Explanation of Changes for paragraph (a).

*Variations in other Jurisdictions.* Most jurisdictions have adopted Model Rule 1.8(h) without substantial change. Two states have added provisions relating to the reporting of complaints to the appropriate disciplinary authorities, a prohibition that is covered by statute in California (Business and Professions Code § 6090.5). A reference to that code section has been added to the Comment pursuant to a suggestion by the Los Angeles County Bar Association.

*A Note on Rule Numbering.* Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 to its own separate rule number.

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\* Proposed Rule 1.8.8, Draft 6 (10/10/09).

<p align="center"><u>ABA Model Rule</u> Rule 1.8(h)</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.8.8</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(h) A lawyer shall not:</p> <p>(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or</p>	<p><del>h)</del>A lawyer shall not:</p> <p><del>(1) make an agreement</del><u>Contract with a client</u> prospectively limiting the lawyer's liability to <del>a client for malpractice unless the client is independently represented in making for the agreement,</del><u>lawyer's professional malpractice</u>; or</p>	<p>Proposed paragraph (a) rejects the advance waiver of a client's possible future malpractice claim. As explained in Restatement § 54, Comment b: "Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement." In addition, a lawyer who recognizes some particular risk in a proposed representation should direct his or her efforts to explaining that to the client, not to obtaining a limitation on the lawyer's liability.</p>
<p>(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.</p>	<p><del>(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is</del> advised in writing <del>that</del><u>by the lawyer to seek the advice of an [independent lawyer] of the desirability of seeking client's choice regarding the settlement</u> and is given a reasonable opportunity to seek <del>the</del><u>that</u> advice <del>of independent legal counsel in connection herewith.</del></p> <p><u>(1) represented by independent counsel concerning the settlement; or</u></p>	<p>The proposed language of paragraph (b) is substantially similar to that of the Model Rule but offers more client protection by mandating that the lawyer advise the client to seek independent counsel rather than advise of the desirability of doing so.</p> <p>Paragraph (b)(1) has been added in recognition that, if the client is already represented by independent counsel, the lawyer should have no duty to advise the client to seek independent counsel.</p>

\* Proposed Rule 1.8.8, Draft 6 (10/10/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.8(h) Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.8 Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule Comments</u></p>
<p><b>Limiting Liability and Settling Malpractice Claims</b></p> <p>[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.</p>	<p><del>[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.</del></p> <p>[1] <a href="#">This Rule precludes a lawyer from taking unfair advantage of a client or former client in settling a claim or potential claim for malpractice.</a></p>	<p>The Commission decided to eliminate a large amount of verbiage that added little to comprehension of the Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.8(h)</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.8.8</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule Comments</u></p>
<p><b>Limiting Liability and Settling Malpractice Claims</b></p> <p>[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.</p>	<p><del>[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph</del><u>Rule</u><del> does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement e.g., Powers v. Dickson, Carlson &amp; Campillo (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; Lawrence v. Walzer &amp; Gabrielson (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this paragraph</del><u>Rule</u><del> limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.</del></p>	<p>The Commission decided to eliminate a large amount of verbiage that added little to comprehension of the Rule. The Commission added a pointer on the permissibility of entering into an agreement with the client to arbitrate a legal malpractice claim, citing cases.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.8(h) Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.8 Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule Comments</u></p>
	<p>[3] <a href="#">Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code § 6090.5.</a></p>	<p>This Comment was added to make certain that lawyers are aware of the statutory prohibition on agreements that purport to preclude the reporting of complaints to the State Bar.</p>
	<p>[4] <a href="#">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.)</a></p>	<p>This paragraph clarifies the meaning of the Rule by describing important limitations on its scope, and by reminding that Rule 1.2 allows a lawyer to limit the scope of a representation.</p>

## Rule 1.8.8 Limiting Liability to Client

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

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 independent counsel 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 is given a reasonable opportunity to seek that advice.

### COMMENT

- [1] This Rule ~~prohibits lawyers from settling claims and potential claims for malpractice without complying with the requirements of the Rule. In view of the danger that~~ precludes a lawyer ~~will take~~ from taking unfair advantage of ~~an unrepresented~~ a client or former client, ~~the lawyer must first advise such a person in writing to seek independent representation in connection with such~~ settling a settlement. ~~In~~

~~addition, the lawyer must give the client~~ claim or former client ~~a reasonable opportunity to find and consult independent counsel~~ potential claim for malpractice.

- [2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity. ~~[Placeholder for cross-reference to Task Force's proposed Rule Of Professional Conduct re disclosing insurance coverage].~~
- [3] Paragraph (b) ~~addresses only particular aspects of agreements that limit a lawyer's liability to a client or former client.~~ It is not intended to override ~~any obligation~~ obligations the lawyer ~~might~~ may have under other law. See, e.g., Business and Professions Code § 6090.5.
- [4] This Rule ~~is~~ does not ~~intended to~~ apply to customary qualifications and limitations in legal opinions and memoranda, nor ~~is~~ does it ~~intended to~~ prevent a lawyer from reasonably limiting the scope of the lawyer's representation. (See Rule ~~[1.2].~~)

**Rule 1.8.8 ~~3-400~~ Limiting Liability to Client**  
(Comparison of the Current Proposed Rule to Current California Rule)

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 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 independent counsel concerning the settlement; or
- ~~(B)~~(2) ~~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~~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.

Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity.

- [3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code § 6090.5.
- [4] This Rule ~~3-400 is~~does not ~~intended to~~apply to customary qualifications and limitations in legal opinions and memoranda, nor ~~is~~does it ~~intended to~~prevent a ~~member~~lawyer from reasonably limiting the scope of the ~~member's employment or~~lawyer's representation. (~~Amended by order of Supreme Court, operative September 14, 1992~~See Rule 1.2.)

**Discussion:COMMENT**

- [1] This Rule precludes a lawyer from taking unfair advantage of a client or former client in settling *a claim or potential claim for malpractice.*
- [2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63

**Rule 1.8.8 [3-400] Limiting Liability to Client**  
**(Commission's Proposed Rule – Clean Version)**

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 independent counsel 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 is given a reasonable opportunity to seek that advice.

- [3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code section 6090.5.
- [4] 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.

**COMMENT**

- [1] This Rule precludes a lawyer from taking unfair advantage of a client or former client in settling a claim or potential claim for malpractice.
- [2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity.

## Rule 1.8.8: Limiting Liability to Client

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew Perlman. The text relevant to proposed Rule 1.8.8 is highlighted)

**Alabama.** In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

**Arizona:** Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

**California:** California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a

prospective or existing client, except that this rule shall not prohibit a member: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

**Connecticut** adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

**District of Columbia:** D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary

to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

**Florida** adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client "or a representative of a client" that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client

sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

**Georgia:** Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

**Illinois:** Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer “shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.” Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: “(1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent.” Illinois Rule 1.8(h) provides that a lawyer “shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in

connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

(h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in *In re Rinella*, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar's investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

**Louisiana:** Rule 1.8(g) permits an aggregate settlement if “a court approves the settlement in a certified class action.” Rule 1.8(e) permits a lawyer to “provide financial assistance to a client who is in necessitous circumstances” subject to strict controls, including:

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

**Massachusetts:** Rule 1.8(b) forbids a lawyer to use confidential information “for the lawyer’s advantage or the advantage of a third person” without consent.

**Michigan:** Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be “advised in writing of the desirability of seeking” independent counsel. Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client’s consent be “in a writing signed by the client.” Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

**Minnesota:** Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)’s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines “sexual relations” and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a “client” when a lawyer represents an organization:

(2) if the client is an organization. any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .

(3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer’s firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

**Mississippi:** Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

**New Hampshire:** The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if “the lawyer does not maintain professional liability insurance” of at least \$100,000 per occurrence and \$300,000 in the aggregate “or if the lawyer’s professional liability insurance ceases to be in effect.”

**New Jersey:** Rule 1.8(e)(3) creates an exception allowing financial assistance by a “non-profit organization authorized under [other law]” if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if “the client fails to act in accordance with the lawyer’s advice and the lawyer nevertheless continues to represent the client at the client’s request.” (New Jersey Rule 1.8(k) and (l) provide as follows:

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer’s responsibilities to the public entity would limit the lawyer’s ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

**New York:** Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and

client only if “they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client.” If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client “consents in writing, after full disclosure, to the terms of the transaction and to the lawyer’s inherent conflict of interest in the transaction.” DR 5-104 does not govern acquisition of “an ownership, possessory, security or other pecuniary interest adverse to a client.”

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing “an indigent or pro bono client” to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

(3) A lawyer, in an action in which an attorney’s fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer’s own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not “(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation,” or “(2) Employ coercion, intimidation, or undue influence in entering into sexual

relations with a client.” DR 5-111(B)(3) forbids lawyers to begin a sexual relationship with a “domestic relations” client, not with other clients.

New York has no specific counterpart to Rule 1.8(k), and New York’s counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

**North Dakota:** Rule 1.8(g), regarding aggregate settlements, applies “other than in class actions.” North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

**Ohio:** Rule 1.8(c) forbids a lawyer to solicit “any substantial gift from a client” and forbids a lawyer to “prepare on behalf of the client an instrument giving the lawyer, the lawyer’s partner, associate, paralegal, law clerk or other employee of the lawyer’s firm, a lawyer acting ‘of counsel’ in the lawyer’s firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client.” “Gift” is defined to include “a testamentary gift.” Ohio Rule 1.8(f)(4) provides a detailed “statement of insured client’s rights” that a lawyer “selected and paid by an insurer to represent an insured” must give to the client.

**Oregon:** Rule 1.8(b) permits a lawyer to use confidential information to a client’s disadvantage only if the client’s consent is “confirmed in writing” (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if “the client remains ultimately liable for such expenses to the extent of the client’s ability to pay.” Finally, Oregon’s rule governing sexual relations with clients contains a detailed description of “sexual relations,” providing that it includes “sexual intercourse or any touching of the sexual or other intimate parts of a person or

causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”

**Pennsylvania:** Rule 1.8(g) does not require that client consent be “confirmed in writing.”

**Texas:** Rule 1.08(c) provides that prior to the conclusion of “all aspects of the matter giving rise to the lawyer’s employment,” a lawyer shall not make or negotiate an agreement “with a client, prospective client, or former client” giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

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

(1) a lawyer may advance guarantee court costs, expenses of litigation or administrative-proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

**Virginia:** Rule 1.8(b) forbids the use of information “for the advantage of the lawyer or of a third person or to the disadvantage of the client.” Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is “an employee” of the client “as long as the client is independently represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

**Washington:** Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

**Wisconsin:** Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

**Rule 1.8.8 Limiting Liability to Client.  
[Sorted by Commenter]**

**TOTAL = 1**    **Agree = 0**  
**Disagree = 0**  
**Modify = 1**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Los Angeles County Bar Association	M			To be complete, a reference to Bus. & Prof. Code section 6090.5 should be added to the Comment.	Commission agreed and added a reference in Comment [3]

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED