

TOTAL = 2 Agree = 2
Disagree =
Modify =
NI =

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel	A	Yes		OCTC would recommend 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 rules limiting liability because it 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 3-300 (ABA Model Rule 1.8(a)). (See Hazard & Hodes, "The Law of Lawyering, 3 rd Edition § 12.19.)	The proposed rule follows Model Rule 1.8(h) fairly closely; the Model Rule has no such requirement. Since the proposed rule requires that the client be represented by counsel or be advised to seek such counsel, there appears to be no compelling reason to also require that any such settlement be fair and reasonable.
				Comments [1] & [2]	Comments [1] and [2] seem more appropriate for treatises, law review articles, and ethics opinions.	The Commission believes that the Comments are essential to a full comprehension of the rule.
2	COPRAC	A	Yes		Support as drafted.	No response required.

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

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.