

**Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
(Commission's Proposed Rule Adopted on November 13 – 14, 2015 – Clean Version)**

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), a lawyer may:
 - (1) pay or agree to pay such expenses to third persons,* from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
 - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with Rules 1.7(b) and 1.8.1 before making the loan or agreeing to do so;
 - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent or pro bono client in a matter in which the lawyer represents the client.
- (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.
- (d) Nothing in this Rule shall be deemed to limit the application of Rule 1.8.9.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.5
(Current Rule 4-210)
Payment of Personal or Business Expenses Incurred by or for a Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 4-210 (Payment of Personal or Business Expenses Incurred by or for a Client) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 1.8(e) (Conflict Of Interest: Current Clients: Specific Rules), pertaining to financial assistance to a client. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the evaluation is proposed rule 1.8.5 (Payment of Personal or Business Expenses Incurred by or for a Client). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The main issues considered were whether to permit lawyers to pay the costs and expenses for a pro bono or indigent client, and whether to allow gifts to existing clients. While the Commission adopted payments to pro bono or indigent clients in order to promote access to justice, permitting gifts to existing clients was excluded from the proposed rule due to the potential of unintended expectations and confusion between the personal and professional relationship between the lawyer and client.

Proposed rule 1.8.5(a) prohibits the direct or indirect payment of personal or business expenses of a prospective or existing client.

Paragraph (b) allows for a lawyer to make payments to a client under the following defined circumstances:

- (1) with the client consent, making payments to third parties from funds collected on behalf of the client during the representation;
- (2) after being retained by the client, loaning money to the client with client’s written promise to repay the loan and the lawyer’s compliance with rules 1.7(b)¹ and 1.8.1;
- (3) advancing the costs of prosecuting or defending a client’s claim or action, repayment of which may be contingent on the outcome of the matter;
- (4) paying the costs of prosecuting or defending a claim or action of an indigent or pro bono client.

Paragraph (c) clarifies costs under (b)(3) and (b)(4) to include reasonable expenses for litigation or providing other legal services to the client.

¹ One member of the Commission submitted a written dissent stating general support for the Commission’s draft rule but objecting to the inclusion of a reference to proposed rule 1.7(b). The full text of the dissent is attached to this summary. (See also, the executive summary of proposed rule 1.7.)

Paragraph (d) reinforces the applicability of proposed rule 1.8.9 (Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review).

**Commission Member Dissent to the Recommended Adoption
of Proposed Rule 1.8.5, Submitted by Robert L. Kehr**

Proposed Rule 1.8.5 states the general prohibition on a lawyer bidding for clients by promising benefits to a potential client other than the benefit of the quality of the lawyer's services and the price at which they will be provided. I don't disagree with that policy, which is part of our current Rules as rule 4-210. I dissent for the single reason that the proposed Rule, in proposed paragraph (b)(2), makes compliance with rule 3-310(B) a condition to a lawyer making a loan to the lawyer's client.

Proposed paragraph (b) (2) continues the current exception to the general prohibition on a lawyer providing benefits to a client, the exception permits a lawyer's post-retention agreement to lend money to the client based on the client's written promise to repay the loan. Current rule 4-210 treats a lawyer's loan to a client as a business transaction within the meaning of current rule 3-300 (which will be Rule 1.8.1 under the new numbering system). However, proposed Rule 1.8.5(b)(2) would add to the Rule 1.8.1 reference a reference to what currently is rule 3-310(B).

Current rule 3-310(B) contains four subparagraphs. The only one that has any conceivable connection to a lawyer's loan to a client is subparagraph (4). It includes within a lawyer's "disclosure" requirement the situation in which the lawyer "has or had a legal, business, financial, or professional interest in the subject matter of the representation." (emphasis added).²

The Commission's discussion on the rule 3-310(B)(4) reference was to the effect that the existence of a creditor – debtor relationship between lawyer and client could have an effect on the representation as might occur if there were any unwanted change in the lawyer's position as a debtor, such as might occur if the client were to default on the loan or the lawyer were to sense that possibility. This of course is correct, but the logic of this view would require lawyers to make rule 3-310(B) disclosures to their clients whenever any relationship between a lawyer and client might change and, in changing, affect the lawyer-client relationship. This would mean that rule 3-310(B)(4) would require a "disclosure" whenever a lawyer has a "legal, business, financial, or professional" relationship with the client. This would include the representation of family members, neighbors, acquaintances from clubs and other social situations, social relationships based on common connections (the client was referred to the lawyer by their common accountant or dentist), and so on. To take one of many possible examples, imagine a lawyer who represents her brother-in-law in a matter. In that situation, the Commission's logic is that the lawyer's "disclosure" would have to warn the brother-in-law about the possible hazard to the lawyer-client relationship if the new client were to divorce the lawyer's sister.

² Rule 3-310(A)(1) states in full: "Disclosure' means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;"

That “disclosure” would be plain silly. It would trivialize the important role that a “disclosure” has under the conflict rules by requiring the lawyer to say things that are perfectly obvious. It would be a waste of effort by the lawyer, would make the lawyer appear foolish to the client and thereby potentially interfere with the client’s willingness to rely on the lawyer’s advice, and would be a trap for unwary clients without any client protection benefit. Given the frequency with which many lawyers represent their social acquaintances, this is not a small matter.

Most important, the use of rule 3-310(B)(4) in these situations would be possible only by reading out of the current rule that the lawyer’s interest be “in the subject matter of the representation.” One example of what is included within this Rule is a lawyer who is asked to sue a company in which the lawyer has invested. There, the disclosure would include “the relevant circumstances” (lawyer has an investment in the target defendant) and the “reasonably foreseeable adverse consequences” (that investment amounts to roughly \$X, which the client might consider to be large enough to compromise the lawyer’s zeal in the representation).

It should be perfectly obvious to the hypothetical brother-in-law/client that his relationship with his lawyer would be affected if he were to divorce his lawyer’s sister, so no explanation should be needed. But disclosures currently required under rule 3-310(B)(4) are of facts that might not be known to the client (the lawyer’s interest in or relationship with others), and the consequences of that interest or relationship (the client’s confidence that the lawyer performance of her duties of loyalty, confidentiality, and competence would not be affected).

There is three-fold mischief of the Rule 1.8.5 reference to rule 3-310(B). First, to the extent the reference is recognized as altering the meaning of rule 3-310(B), it will lead to “disclosures” that have no client benefit and make the lawyer and the legal system appear foolish. Second, it is unlikely that practitioners looking at the conflict rules would be sophisticated enough to see that Rule 1.8.5 might have inferentially amended rule 3-310(B)(4), and this would create a trap for unwary lawyers that would leave them vulnerable to later attack. Third, there would be a conflict between the words of rule 3-310(B)(4) and the inferential meaning of Rule 1.8.5 that would lead to uncertain results.

I would remove from Rule 1.8.5 the reference to what currently is rule 3-310(B) but otherwise would adopt Rule 1.8.5 as drafted by the Commission.

**Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred by or for a Client
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (Aa) A ~~member~~lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent, ~~or sanction a representation~~ that the ~~member or member's~~lawyer or lawyer'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.~~
- (b) Notwithstanding paragraph (a), a lawyer may:
- (1) ~~With the consent of the client, from paying or agreeing~~pay or agree to pay such expenses to third persons,* from funds collected or to be collected for the client as a result of the representation, with the consent of the client; ~~or~~
 - (2) ~~After employment, from lending~~after the lawyer is retained by the client, agree to lend money to the client ~~upon the client's~~based on the client's written* promise ~~in writing~~ to repay ~~such~~the loan; ~~or, provided the lawyer complies with Rules 1.7(b) and 1.8.1 before making the loan or agreeing to do so;~~
 - (3) ~~From advancing~~advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the ~~client's~~client's interests, the repayment of which may be contingent on the outcome of the matter. ~~Such costs; and~~
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent or pro bono client in a matter in which the lawyer represents the client.
- (c) “Costs” within the meaning of ~~this subparagraph (3) shall be limited to~~ all paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation ~~or, including court costs, and~~ reasonable* expenses in ~~preparation~~preparing for litigation or in providing ~~any other~~ legal services to the client.
- (Bd) Nothing in ~~rule 4-210~~this Rule shall be deemed to limit ~~rules 3-300, 3-310, and~~the application of Rule 1.8.9.