

**Rule 1.8.6 [3-310(F)] Compensation From One Other Than Client  
(Commission's Proposed Rule Adopted on March 31 – April 1, 2016  
– Clean Version)**

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;
- (b) information is protected as required by Business and Professions Code § 6068(e)(1) and Rule 1.6; and
- (c) the lawyer obtains the client's informed written consent\* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably\* practicable, provided that no disclosure or consent is required if:
  - (1) nondisclosure or the compensation is otherwise authorized by law or a court order; or
  - (2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

**Comment**

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been

identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably\* practicable.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.6**  
**(Current Rule 3-310 (F))**  
**Compensation From One Other Than Client**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-310(F) (Avoiding the Representation of Adverse Interest) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the 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(f) (Conflict of Interest Current Clients: Specific Rules), pertaining to accepting compensation for representing a client from one other than the client. The result of the Commission’s evaluation is proposed rule 1.8.6 (Compensation From One Other Than 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.

Current rule 3-310(F) prohibits a member from accepting compensation from one other than the client unless there is no interference with the lawyer’s independent professional judgment and the duty of confidentiality owed to a client. The rule is intended to protect the client in situations where the lawyer’s independent professional judgment may become compromised based upon the lawyer’s fees being paid by one other than the client. Proposed rule 1.8.6 retains the substance of current rule 3-310(F) while expanding the public protection of the current rule. The proposed rule expands the current language of “accepting compensation” to include “enter into an agreement for or charge or accept compensation.”

In general, the proposed rule would retain the disclosure and waiver requirements found in current rule 3-310(F)(3). A substantive change that is recommended by the Commission is the addition of a new timing requirement in proposed paragraph (c) that requires a lawyer to obtain a client’s consent “at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . .” The rationale for this addition is to enhance the ability of a client to render informed consent after duly considering the concerns that arise from a third-party payor arrangement. A possible concern posed by this addition is whether a lawyer’s ability to render services to the client in time sensitive matters would be compromised; however, this concern is mitigated by including the phrase “as soon thereafter as reasonably practical.”

Paragraph (a), incorporates the concept that the lawyer’s independent professional judgment shall not be compromised due to an agreement between the lawyer and a third-party payor. This is consistent with the language of 3-310(F)(1) and Model Rule 1.8 (f)(2).

Paragraph (b), the current rule uses the phrase “information relating to the representation of the client” to describe the information protected by the duty of confidentiality. The proposed rule substitutes the phrase “information protected by the Business and Professions Code § 6068 (e)(1) and Rule 1.6.” The Commission believes the proposed phrase provides enhanced guidance by citing to the specific provisions of California law that establish a lawyer’s duty of confidentiality.

Paragraph (c), of proposed rule 1.8.6 requires the lawyer to obtain a client's consent "at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably practicable. . . ." (See discussion above.)

Paragraph (c)(1). The current rule excepts a lawyer from the requirement to obtain consent where the lawyer's compensation is otherwise authorized by law. The proposed rule would expand the exemption to include court orders.

Paragraph (c)(2) excepts a lawyer from the requirement to obtain consent where the lawyer is rendering legal services on behalf of any public agency that provides legal services to the public or other public agencies. The proposed rule expands the concept of public agency to include non-profit organizations.

Proposed rule 1.8.6 contains four comments all of which provide interpretive guidance or clarify how the rule is to be applied. Of particular note is Comment [1], which recognizes the existence of overlapping duties in a situation where the lawyer represents both a client and the third-party payor in the same matter. Comment [2] has been added to clarify the scope of the exemption from the disclosure and consent requirements under paragraph (c). Comment [3] further clarifies the scope of the rule as it relates to existing relationships between insurers and insureds. Comment [4] acknowledges that there might be some limited situations where a lawyer might not be able to obtain a client's consent

**Rule 1.8.6 [3-310(F)] ~~Avoiding the Representation of Adverse Interests~~  
Compensation From One Other Than Client  
(Redline Comparison of the Proposed Rule to Current California Rule)**

~~(F)~~ A ~~member~~lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

~~(1)(a)~~ ~~There~~ there is no interference with the ~~member's independence of~~lawyer's independent professional judgment or with the ~~client-lawyer~~lawyer-client relationship; ~~and~~

~~(2)(b)~~ ~~Information relating to representation of the client~~ information is protected as required by Business and Professions Code ~~section~~§ 6068, ~~subdivision~~(e)(1) and Rule 1.6; and

~~(3)(c)~~ ~~The member~~ the lawyer obtains the client's informed written consent\* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably\* practicable, provided that no disclosure or consent is required if:

~~(a)(1)~~ ~~such~~ nondisclosure or the compensation is otherwise authorized by law or a court order; or

~~(b)(2)~~ the ~~member~~lawyer is rendering legal services on behalf of any public agency ~~which~~or nonprofit organization that provides legal services to other public agencies or the public.

**~~Discussion~~Comment**

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[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] ~~Paragraph (F)~~This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors'

committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this Rule as soon thereafter as is reasonably\* practicable.