

**Rule 1.8.8 [3-400] Limiting Liability to Client**  
**(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – 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 an independent lawyer 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 given a reasonable\* opportunity to seek that advice.

**Comment**

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] 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(b).

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.8**  
**(Current Rule 3-400)**  
**Limiting Liability to Client**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-400 (Limiting Liability to 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 ABA counterpart, Model Rule 1.8(h) (Conflict Of Interest: Current Clients: Specific Rules) as well as relevant California statutes, rules, and case law. 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.

Proposed rule 1.8.8 carries forward the substance of current rule 3-400. The main issues considered were whether to require a lawyer to advise the client to seek the advice of an independent lawyer regarding the settlement, and whether to not require a lawyer to advise the client to seek advice from an independent lawyer when the client is already represented by an independent lawyer concerning the settlement. The Commission adopted both substantive changes.

Paragraph (a) restricts a lawyer from contracting prospectively with the client for the purpose of limiting liability to the client for the lawyer’s professional malpractice.

Paragraph (b) restricts a lawyer from settling a claim or potential claim for the lawyer’s professional malpractice liability to a current or former client, unless the client is either:

- (1) represented by an independent lawyer concerning the settlement;
- (2) advised by the lawyer in writing to seek the advice of an independent lawyer of the client’s choice regarding the settlement and the client is provided with a reasonable opportunity to seek that advice.

Comment [1] clarifies that Paragraph (b) of the proposed rule does not absolve the lawyer from their obligation to comply with other law, specifically California Business and Professions Code § 6090.5.<sup>1</sup>

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<sup>1</sup> Business and Professions Code § 6090.5:

- (a) It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that:
  - (1) The professional misconduct or the terms of a settlement of a claim for professional misconduct shall not be reported to the disciplinary agency.
  - (2) The plaintiff shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the disciplinary agency.
  - (3) The record of any civil action for professional misconduct shall be sealed from review by the disciplinary agency.
- (b) This section applies to all settlements, whether made before or after the commencement of a civil action.

Comment [2] is derived from the Discussion section of current rule 3-400 and adds that a lawyer may reasonably limit the scope of representation, which cross-references proposed rule 1.2 (Scope of Representation and Allocation of Authority).

**Rule 1.8.8 [3-400] Limiting Liability to Client  
(Redline Comparison of the 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 ~~member's~~lawyer's liability to ~~the~~a client or former client for the ~~member's~~lawyer's professional malpractice, unless the client or former client is ~~informed~~either:
- (1) represented by an independent lawyer concerning the settlement; or
- ~~(B)~~(2) 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.

**Comment~~Discussion~~**

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. See, e.g., Business and Professions Code § 6090.5.

[2] This Rule ~~3-400 is~~does not ~~intended to~~ apply to customary qualifications and limitations in legal opinions and memoranda, nor ~~is it intended to~~does it prevent a ~~member~~lawyer from reasonably\* limiting the scope of the ~~member's employment~~ or lawyer's representation. See Rule 1.2(b).