

**McCurdy, Lauren**

RE: Rule 1.8.1  
6/25&26/10 Commission Meeting  
Open Session Agenda Item III.K.

**From:** Lamport, Stanley W. [SLamport@coxcastle.com]  
**Sent:** Wednesday, June 16, 2010 5:40 PM  
**To:** Difuntorum, Randall  
**Cc:** CommissionerJ2@gmail.com; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin\_e\_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; linda.foy@jud.ca.gov; martinez@lbbslaw.com; mtuft@cwclaw.com; pecklaw@prodigy.net; pwvapnek@townsend.com; rlkehr@kscllp.com; snyderlaw@charter.net; Lee, Mimi; McCurdy, Lauren  
**Subject:** RRC: Rule 1.8.1 - June 25-26, 2010 Agenda

Randy:

I had a computer problem today that kept me from corresponding with Paul about this. Happily all is well that ends well computer wise. The following is my recommendation. I have not been able to solicit Paul's input.

I am recommending two changes to the Comments in light of comments we received.

We have received comments from COPRAC, OCTC, Bill Balin, Richard Zitrin for a consortium of law professors and San Diego County Bar Association, which is a rehash of comments to which we responded previously.

The first proposed change is to revise Comment [6]. Comment [6] currently states: "An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case."

I am proposing to revise the Comment along the lines suggested by COPRAC and OCTC to state: "This Rule is not intended to apply to an advance to or deposit with a lawyer of a sum to be applied to fees or costs incurred in the future. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case, unless the agreement the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client."

The first sentence is requested by COPRAC. It simplifies the sentence. I know Harry thought we should make this change as well. OCTC thought the first sentence is unnecessary. I think it addresses what has been an ongoing issue and should be retained. OCTC wanted the change in the second sentence. I think they make a good point.

The second change is to last sentence in Comment [9]. It currently states: "Except in a disciplinary proceeding, the burden is always on the lawyer to show that the transaction or acquisition and its terms are fair and just and that the client was fully advised (*Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].)"

I am proposing to revise the Comment to state: "The burden is always on the lawyer to show that the transaction or acquisition and its terms are fair and just and that the client was fully advised (*Hunnicutt v. State Bar* (1988) 44 Cal.3d 362 [243 Cal.Rptr. 699]; *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].)"

The change deletes the exception for disciplinary proceedings and updates the cite to include *Hunnicutt*, which is a modern statement of the rule in a disciplinary context. OCTC's comment was that the statement is not a correct statement of the law. They cite *Rodgers*, *Hunnicutt*, *Clancy* and three State Bar Court decisions showing that the same rule applies in disciplinary proceedings. I looked at the Supreme Court cases and concluded that OCTC is correct. OCTC would like the sentence stricken, but I think we resolve their concern with the change.

I am not proposing any changes in response to the other comments. The Balin comment has to do with fee agreement modifications. His view is that it is a business transaction requiring disclosure and that the change in 1.5 is not enough. The Zitrin et al comment deals with fee agreement modifications (without dealing with the change to 1.5.) I think what we have in Rule 1.5 adequately addresses the issue without creating a burden that would deter modifications that would be beneficial to a client.

Zitrin et al also have a problem with the provisions that do not require a lawyer to advise a client to seek independent counsel when the client is represented in the transaction and the corresponding Comments dealing with independent counsel. This is an issue that was raised before. I have again considered their comments about this, but continue to believe that the objection is not warranted. If a client is already represented by an independent lawyer, I continue to believe it is unnecessary to advise a client to seek the advice of someone they already have in place. Nor can I discern a rationale for disciplining a lawyer for failing to give that advice in that circumstance. The Zitrin et al comment suggests that a corporate general counsel might be viewed as independent counsel and that would be improper for reasons that are not explained. The Zitrin et al. comment also suggests that an independent lawyer would have to be a California lawyer schooled in the requirements of the California rules and contracts. I am not aware of such a requirement. Other than UPL issues, I don't see a reason why we would limit independent counsel to California ethics experts. I think Zitrin et al are not seeing that we afford more disclosure on the part of the lawyer in the transaction when the client is represented by independent counsel that the Model Rule affords.

I have not obtained Paul's input on these changes and invite his comment. Since I am now past the 5:00 p.m. deadline, I wanted to make sure this got in.

STAN

**Rule 1.8.1: Business Transactions with a Client and Acquiring Interests Adverse to the Client**  
(Rule 1.7 Audit Draft)

A lawyer shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that reasonably can be understood by the client; and
- (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (c) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.

**COMMENT**

*Scope of Rule*

- [1] A lawyer's legal training and skill, and the relationship of trust and confidence that arises between a lawyer and client, create the possibility that a lawyer, even unintentionally, will overreach or exploit client information when the lawyer enters into a business transaction with the client or acquires a pecuniary interest adverse to the client. In these situations, the lawyer could influence the client for the lawyer's own benefit, could give advice to protect the lawyer's interest rather

that the client's, and could use client information for the lawyer's benefit rather than the client's. This Rule is intended to afford the client the information needed to fully understand the terms and effect of the transaction or acquisition and the importance of having independent legal advice. (See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [239 Cal.Rptr. 121].) This Rule also requires that the transaction or acquisition be fair and reasonable to the client.

- [2] Except as set forth in Comment [5], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a personal interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(a)(2).

*Business Transactions With Clients*

- [3] This Rule applies even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client agrees to make a loan to the client to pay expenses that are not related to the representation. This Rule also applies when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as insurance, brokerage or investment products or services to a client.
- [4] This Rule does not apply to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the

lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include banking and brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. The Rule also does not apply to similar types of standard commercial transactions for goods or services offered by a lawyer when the lawyer has no advantage in dealing with the clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. This Rule also ordinarily would not apply where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the lawyer's client makes the same investment on the same terms. When a lawyer and a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" the client for purposes of this Rule.

- [5] This Rule does not apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client, and material modifications to such agreements that are adverse to the interests of the client, are governed in part by Rule 1.5. Even when this Rule does not apply to the negotiation of the agreement by which a lawyer is

retained by a client, other Rules, statutes and fiduciary principles might apply. See Rule 1.5, Comment [3B].

- [6] An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.

#### *Adverse Pecuniary Interests*

- [7] An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client's property that is or may become detrimental to the client, even when the lawyer's intent is to aid the client. *Hawk v. State Bar* (1988) 45 Cal.3d 589 [247 Cal.Rptr. 599]. An adverse pecuniary interest arises, for example, when the lawyer's personal financial interest conflicts with the client's interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client's interest in the client's property. (See *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58].) An adverse pecuniary interest also arises when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].)

### Full Disclosure to the Client

- [8] Paragraph (a) requires that full disclosure be transmitted to the client in writing in a manner that reasonably can be understood by the client. Whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances.
- [9] Full disclosure under Paragraph (a) requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection with the transaction or acquisition. It also requires the lawyer to fully inform the client of risks of the transaction or acquisition and facts that might discourage the client from engaging in the transaction or acquisition. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; *Clancy v. State Bar* (1969) 71 Cal.2d 140 [77 Cal.Rptr. 657]; *Brockway v. State Bar* (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836].) Except in a disciplinary proceeding, the burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].
- [10] The risk to a client is heightened when the client expects the lawyer to represent the client in the transaction or acquisition itself. Under this Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction or acquisition, such as the risk that the lawyer will structure the transaction or acquisition or give legal advice in a way that favors the

lawyer's interests at the expense of the client. Because the lawyer has a personal interest in the transaction or acquisition, the lawyer must also comply with Rule 1.7(a)(2). In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from representing the client in the transaction or acquisition.

- [11] There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. Before entering into the transaction or making the acquisition, the lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.
- [12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's

independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(a)(2) when the lawyer has a personal interest in the subject matter of the representation as a result of the transaction or acquisition.

acquisition when the lawyer knows or reasonably should know that the client has not been informed of such facts. The fact that the client was independently represented in the transaction or acquisition is relevant in determining whether the terms of the transaction or acquisition are fair and reasonable to the client as paragraph (a) requires.

*Full Disclosure and Consent*

*Opportunity to Seek Advice of Independent Counsel*

- [13] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.
- [14] A lawyer is not required to advise the client to seek the advice of independent counsel if the client already has independent counsel with respect to the transaction or acquisition; however, the lawyer must still afford the client a reasonable opportunity to seek the advice of the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; however, the lawyer is still required under paragraph (a) to make full disclosure to the client in writing of all material facts related to the transaction or

**June 9, 2010 McCurdy E-mail to Lamport, cc Chair, Vice-Chairs & Staff:**

Stan,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

**ASSIGNMENT SUBMISSION DEADLINE:** The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15<sup>th</sup> has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15<sup>th</sup> comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

**LIST OF ASSIGNED RULES** (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

1.5.1 (Agenda Item III.H)

1.8.1 (Agenda Item III.K)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

**Attached:**

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - LAMPORT - DFT1 (06-09-10).pdf

RRC - 2-200 [1-5-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc

RRC - 3-300 [1-8-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc

RRC - 2-200 [1-5-1] - Rule - PCD [9.1] (10-13-09) - CLEAN-LAND.pdf

RRC - 2-200 [1-5-1] - Rule - PCD [9.1] (10-13-09) - CLEAN-LAND.doc

RRC - 3-300 [1-8-1] - Rule - PCD [15] (12-15-09) - CLEAN-LAND.pdf

RRC - 3-300 [1-8-1] - Rule - PCD [15] (12-15-09) - CLEAN-LAND.doc

**June 10, 2010 Sondheim E-mail to RRC re June 25-26, 2010 Agenda:**

Since I am going out of town this Saturday until June 24 with 2 of my grandchildren and will not have time to send e-mails regarding the proposed RRC responses to comments on our rules (including oral comments we heard today) as I will be busy taking care of these grandchildren, I want to send a few thoughts on some of the comments or rules based upon a quick review of what we have received and heard so far.

**Rule 1.4**

While this is not based upon a comment, in reviewing this rule it seemed to me that there may be an inconsistency between (c)(2) and comment 6.

**Rule 1.8.1**

The COPRAC comment appears to me to be a clarification of out intent.

**Rule 3.4**

While I realize that most, if not all, of the SDCBA comments are reiterations of what was submitted before, I think further consideration should be given to Comment 1 regarding (e) (3).

**Rule 6.3**

We should give further consideration to what we mean by "legal service organization." Do we mean just those organizations covered by B&P section 6213? If so, then we should make a

reference to 6213. I have asked Toby Rothschild to give this matter some thought and he may be sending an email regarding his views.

Based upon the oral testimony we heard today, I have the following observations:

#### Rule 1.5

It is my understanding that Barry Tarlow believes that "non-refundable" and "earned on receipt" language is useful in avoiding forfeiture, seizure, etc. of the attorney's fee and that if this language is permitted, he would not be adverse to requiring the fee agreement to state that the client "may or may not be entitled to a refund." I would suggest that consideration be given to this type of language, rather than our proposed disclosure regarding seeking a return of the fee. As to the disclosure that the client can terminate the representation, it was my understanding that he believes this language would create a greater risk that the fee may be forfeited, seized, etc. He pointed out that this language is not required by our proposed rules in other types of fee agreements. We can discuss this further at the meeting.

#### Rule 6.1

Toby pointed out that we deleted the last sentence of ABA comment 4 and suggested that the sentence be retained as it makes it clear that the attorney's fees can be donated when the matter has been referred to someone willing to do pro bono work. At least one other speaker supported this view. We may want to reconsider this deletion.

### **June 15, 2010 McCurdy E-mail to Lamport, cc Chair, Vice-Chairs & Staff:**

Stan,

Additional comments in opposition or recommending modifications have been received for the following rules previously assigned and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

**1.5.1** (Agenda Item III.H)

**1.8.1** (Agenda Item III.K)

If the drafters prepared and shared with staff an updated public commenter chart with proposed RRC responses, we have tried to use that version for this updated assignment.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

#### **Attached:**

RRC - 2-200 [1-5-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc  
RRC - 2-200 [1-5-1] - Public Comment Compete - REV (06-15-10)2.pdf  
RRC - 3-300 [1-8-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc  
RRC – 3-300 [1-8-1] - Public Comment Compete - REV (06-15-10)2.pdf

**June 16, 2010 McCurdy E-mail to Lamport, cc Chair, Vice-Chairs & Staff:**

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site should be up-to-date shortly (<http://sites.google.com/site/commentsrrc/byrule> ).

**1.5.1** (Agenda Item III.H) - OCTC (sent with Randy's 6/15/10 e-mail)

**1.8.1** (Agenda Item III.K) - 3 Comments: **Balin/Dilworth (attached)**; OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

**2.1** (Agenda Item III.GG) - 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

**3.6** (Agenda Item III.PP) – 2 Comments: **LA Public Defender-Michael Judge (attached)**; and, OCTC (sent with Randy's 6/15/10 e-mail)

**5.3.1** (Agenda Item III.CCC) – 1 Comment: OCTC (sent with Randy's 6/15/10 e-mail)

**NOTE:** As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

**Attached:**

RRC - 5-120 [3-6] - 06-14-10 LAPD (Judge) Comment.pdf

RRC - 3-300 [1-8-1] - Balin-Dillworth Comment.pdf

**June 16, 2010 Lamport E-mail to Difuntorum, cc RRC:**

I had a computer problem today that kept me from corresponding with Paul about this. Happily all is well that ends well computer wise. The following is my recommendation. I have not been able to solicit Paul's input.

1. I am recommending two changes to the Comments in light of comments we received.
2. We have received comments from COPRAC, OCTC, Bill Balin, Richard Zitrin for a consortium of law professors and San Diego County Bar Association, which is a rehash of comments to which we responded previously.

3. The **first proposed change** is to revise Comment [6]. Comment [6] currently states: "An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case."
4. I am proposing to revise the Comment along the lines suggested by COPRAC and OCTC to state: "This Rule is not intended to apply to an advance to or deposit with a lawyer of a sum to be applied to fees or costs incurred in the future. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case, unless the agreement the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client."
5. The first sentence is requested by COPRAC. It simplifies the sentence. I know Harry thought we should make this change as well. OCTC thought the first sentence is unnecessary. I think it addresses what has been an ongoing issue and should be retained. OCTC wanted the change in the second sentence. I think they make a good point.
6. The **second change** is to last sentence in Comment [9]. It currently states: "Except in a disciplinary proceeding, the burden is always on the lawyer to show that the transaction or acquisition and its terms are fair and just and that the client was fully advised (*Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].)"
7. I am proposing to revise the Comment to state: "The burden is always on the lawyer to show that the transaction or acquisition and its terms are fair and just and that the client was fully advised (*Hunniecutt v. State Bar* (1988) 44 Cal.3d 362 [243 Cal.Rptr. 699]; *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494].)"
8. The change deletes the exception for disciplinary proceedings and updates the cite to include *Hunniecutt*, which is a modern statement of the rule in a disciplinary context. OCTC's comment was that the statement is not a correct statement of the law. They cite *Rodgers, Hunniecutt, Clancy* and three State Bar Court decisions showing that the same rule applies in disciplinary proceedings. I looked at the Supreme Court cases and concluded that OCTC is correct. OCTC would like the sentence stricken, but I think we resolve their concern with the change.
9. I am not proposing any changes in response to the other comments. The Balin comment has to do with fee agreement modifications. His view is that it is a business transaction requiring disclosure and that the change in 1.5 is not enough. The Zitrin et al comment deals with fee agreement modifications (without dealing with the change to 1.5.) I think what we have in Rule 1.5 adequately addresses the issue without creating a burden that would deter modifications that would be beneficial to a client.
10. Zitrin et al also have a problem with the provisions that do not require a lawyer to advise a client to seek independent counsel when the client is represented in the transaction and the corresponding Comments dealing with independent counsel. This is an issue that was raised before. I have again considered their comments about this, but continue to believe that the objection is not warranted. If a client is already represented by an independent lawyer, I continue to believe it is unnecessary to advise a client to seek the advice of someone they already have in place. Nor can I discern a rationale for disciplining a lawyer for failing to give that advice in that circumstance. The Zitrin et al comment suggests that a

corporate general counsel might be viewed as independent counsel and that would be improper for reasons that are not explained. The Zitrin et al. comment also suggests that an independent lawyer would have to be a California lawyer schooled in the requirements of the California rules and contracts. I am not aware of such a requirement. Other than UPL issues, I don't see a reason why we would limit independent counsel to California ethics experts. I think Zitrin et al are not seeing that we afford more disclosure on the part of the lawyer in the transaction when the client is represented by independent counsel that the Model Rule affords.

11. I have not obtained Paul's input on these changes and invite his comment. Since I am now past the 5:00 p.m. deadline, I wanted to make sure this got in.

**June 16, 2010 Vapnek E-mail to Lamport, cc RRC:**

I appreciate the input. The deadline was for letting Randy et al know whether we are recommending any Rule changes. There are some modest changes that Randy, Kevin and I have been working on and which will be in the materials for the 25th and 26th meeting. I will spend some more time on your suggestions later this week or early next week, before the meeting.

**June 20, 2010 Kehr E-mail to KEM:**

I just was looking at Stan's suggested revision of Rule 1.8.1, Comment [6], and saw that his redraft speaks of the intention of the Rule. I had thought the Commission decided to not speak of the intention of any rule. Is my memory failing?

**June 20, 2010 KEM E-mail to Kehr, cc Difuntorum, McCurdy & Lee:**

Good catch. You are correct and I've added that to the list of nits, etc., for the final pass-through. I've been going through all the rules and searching for "intend" but his is one rule I haven't gotten to yet. In this instance, we should not use "intend."

However, please note that where the Model Rules use the clause "this Rule is not intended," we've left it as is. See e.g., MR 3.6, Cmt. [4] (in our Cmt. [3] to proposed Rule 3.6). See also MR 3.8, cmt. [5] ("Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c)."), which is also found in our proposed Rule 3.8, Cmt. [5].

In addition, when we state an affirmative purpose of the Rule, we use "intended". See, e.g., proposed Rule 3.6, Cmt. [1] ("The Rule is intended to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution.") and proposed Rule 3.8, Cmt. [4] ("[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.") I think we can unqualifiedly state what the rule does not do (e.g., does not limit a court in deciding DQ motions), but it would be presumptuous of us to state as a fact that we have actually accomplished what we intended by the Rule; that will be up to a tribunal [whatever that may be ... :-)] down the road.

I've copied Randy et al. to make sure we make the change you've identified.

**June 20, 2010 Kehr E-mail to KEM, cc Difuntorum, McCurdy & Lee:**

I went through the same exercise, and here is my list of where we should remove the statement of intention ---

- Rule 1.1, Comment [6]
- Rule 1.4, Comments [2], [9], and [10]
- Rule 1.5.1, Comment [2]
- Rule 1.7, Comment [37]
- Rule 1.8.1, Comment [6]
- Rule 1.8.6, Comment [4]
- Rule 1.8.8, Comment [3]
- Rule 1.15, Comment [11]
- Rule 1.16, Comment [9]
- Rule 2.4, Comments [4] and [8]
- Rule 2.4.1, Comments [1] and [3]
- Rule 3.8, Comments [4] and [5]
- Rule 4.2, Comments [5] and [20]
- Rule 5.1, Comment [3]
- Rule 7.3, Comment [4]
- Rule 8.4, Comments [2C] and [4]

There are some judgment calls in this – some uses that I included or excluded that you and others might see differently. However, I would not make any decision based on the MR having a hedged statement of intention. Rule 3.6, Comment [4] seems to me to be a perfect example of a statement that should be definite.

**June 20, 2010 Kehr E-mail to KEM:**

Has there been a commenter chart on this Rule since last December? Stan's 6/16 email says the S.D. letter is a rehash of what we responded to previously, but I can't locate that earlier response. Can you help?

**June 20, 2010 KEM E-mail to Kehr:**

Here is the Word version of the public comment chart that went out as one of the documents in the final public comment circulation.

***Attached:***

RRC - 3-300 [1-8-1] - Public Comment Chart - By Commenter DFT4 (02-05-10) RD-KEM-RD.doc

**June 21, 2010 McCurdy E-mail to Lamport, cc Chair, Vice-Chairs & Staff:**

Stan,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

**If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22<sup>nd</sup>.**

***Attached:***

RRC - 1-311 [5-3-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 5-120 [3-6] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc  
RRC - 1-110 [8-1-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-300 [1-8-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)-LC.doc  
RRC - 2-200 [1-5-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**June 21, 2010 Sapiro E-mail to RRC List:**

1. I agree with the substance of all of Stan's recommendations.
2. However, I would make three changes in his proposed rewording of Comment [6]. I would change the phrase "is not intended to apply" to the phrase "does not apply." I would make that change in both the first and second sentences. In the second sentence, Stan repeated the phrase "the agreement." Obviously, that is a typographical error, but it should be corrected before our report goes out.

3. I agree with Stan's response to the comment of Mr. Zitrin, et al., in the next to last paragraph on page 38 of the agenda materials. However, I still disagree with the next to last sentence in proposed Comment [14]. To me, the lawyer still represents the client and should still owe a duty to the client to give the client the advice against the transaction that should permeate the relationship. If the client's independent counsel does not spot the issue, I think the lawyer's fiduciary duty nevertheless is to call that situation to the attention of the client or of the other lawyer or both.



**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

TOTAL = 5 Agree = 1  
Disagree = 1  
Modify = 3  
NI =

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes	Comment [6]	The first sentence of Comment [6] does not make it entirely clear that the Rule is not applicable to a deposit or advance. The second sentence of Comment [6] makes this point more directly as to contingent fee agreements. Accordingly, if the RRC intends that this Rule not apply to an advance or deposit, then perhaps a more accurate expression of that would be to frame the statement as the RRC had done in the second sentence, that is, to say, "This Rule is not intended to apply to an advance to or deposit with a lawyer of a sum to be applied to fees or costs incurred in the future."	
2	San Diego County Bar Association	M	Yes		1.8.1(a) fair and reasonable requirement should apply at the time of the transaction or acquisition. Also, change Comment [9] to reflect this.  Add sentence at end of Comment [4] that states: "However, the rule may apply if the lawyer has, or should have, any reason to believe the client is investing, in part, because	Commission did not make the requested revision. Paragraph (a) tracks the current rule, which has been in place for years. The recommended change would be a substantive revision. It cannot be said that the consideration whether a transaction is fair and reasons cannot account for what transpired in the transaction. The comment does not offer a rationale that would justify this change.  Commission did not make the requested revision. The last sentence in Comment [4] states that the exception applies "when the lawyer does not advise, influence or solicit the client with respect to the

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>of the client's confidence in the lawyer's judgment."</p> <p>Comment [5]: delete words "or to the modification of such an agreement" in line 2 and the words "and modifications to such agreements" in line 6.</p> <p>Comment [6]: first two sentences (including citation to Seltzer) are misleading because some courts have not found negotiation of a</p>	<p>transaction..." The quoted language adequately addresses the concern raised in the comment.</p> <p>Commission did not make the requested revision. Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] below, provides an adequate remedy in those situations where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client.</p> <p>Commission did not make the requested revision. The first two sentences in the Comment correctly state the law</p>

**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>retainer to be an arms-length transaction.</p> <p>Add sentence at end of Comment [8] that states: "However, a lawyer who has reason to believe that the client does not understand the disclosure must explain the issues further."</p> <p>Revise of the first two sentences of comment [9] as follows:</p> <p>The requirement for full disclosure in writing in paragraph (a) <del>requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. <i>Beery v. State Bar</i> (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121].</del> It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection the transaction or acquisition.</p> <p>Comment [10] should say "the lawyer must also comply with Rule 1.7(b) and 1.7(d)." (Not only 1.7(d)).</p>	<p>Commission did not make the requested revision. The reference to "objectively reasonable <u>under the circumstances</u>" addresses the concern raised in the comment. No further change is required.</p> <p>Commission did not make the requested revision.</p> <p>The proposed revision does not accurately state the law. The first sentence of the draft comment is an accurate statement.</p> <p>Commission did not make the requested revision. However, the Commission added the following language at the beginning of the sentence: "Because the lawyer has an interest in the transaction or acquisition..." The language was added in order to clarify why citation to Rule 1.7(d)</p>

**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Requests for improved clarification that the Commission insert “before the transaction or acquisition is completed” after “must” in the fourth sentence: “The lawyer must <u>before the transaction or acquisition is completed</u> either (i) inform the client ...” and also substitute “1.7” for “1.7(d)” in the last sentence of the Comment.</p> <p>Delete Comment [13] entirely.</p> <p>Since the ABA Rule has a comment on imputation, the Commission should add a Comment [16] which would read as follows: “The obligations imposed under this rule apply to lawyers associated in a firm with the lawyer who represents the client directly. These lawyers must make all of the required disclosures before entering into a business transaction with or acquiring an interest adverse to the client.”</p>	<p>is appropriate.</p> <p>The Commission agrees with the first of the two requested changes and added the following words at the beginning of the fourth sentence “Before entering into the transaction or making the acquisition...” The Commission did not make the second requested change. Rule 1.7(d) is the appropriate rule to cite with respect to a lawyer’s interest in the subject matter of a representation.</p> <p>Agree with change. Comment deleted.</p> <p>Commission did not make the requested revision. Comment [16] has been deleted.</p>
3	William Balin and Andrew Dilworth	M	No		Proposed Rule 1.8.1, Comments [5] and [6], together with Proposed Rule 1.5, leave a gap that allows an attorney to add language to an existing contract that materially adversely affects the rights of the client without compelling the attorney to make the	

**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>appropriate disclosures and to obtain the requisite written consent.</p> <p>Comment [5] to the Proposed Rule specifically excludes the original agreement by which a client hires a lawyer as well as any “modification of such an agreement.” Comment [6] states that the Rule “is not intended to apply to an agreement with a client for a contingent fee in a civil case.” However, we can envision at least two scenarios in which a change in the fee agreement will not give the attorney “an ownership, possessory, security or other pecuniary interest adverse to the client” yet would materially impact the client’s rights with a concomitant advantage to the attorney. The first instance is where the attorney, in mid-representation, asks the client to change a contingent fee agreement to an hourly fee agreement, or vice versa. The second instance is where the attorney asks the client to modify the agreement by adding a clause making all disputes subject to binding private arbitration.</p> <p>We are concerned that Proposed Rule 1.5, subdivision (f) does not provide sufficient protections for clients under the scenarios outlined above, while the application of</p>	

**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Proposed Rule 1.8.1 to such scenarios is specifically precluded. We also note that there are no Comments in Rule 1.5 that address subdivision (f). We therefore recommend changing or adding a Comment to Rule 1.8.1 that applies the Proposed Rule to modifications in a fee agreement that are adverse to the client's interests.</p> <p>While we view the protections of Proposed Rule 1.5 as insufficient to protect the interests of clients in the situations outlined above, we urge the Commission, at a minimum, to add a Comment to Rule 1.5 that clearly applies the Proposed Rule to situations in which an attorney materially alters an existing fee agreement to the detriment of the client, such as in the instances we have outlined.</p>	
4	Office of Chief Trial Counsel	M	Yes		<p>There are too many Comments and many are too long and incorporate other Proposed Rules and Comments. They seem more appropriate for treatises, law review articles, and ethics opinions.</p> <p>While OCTC believes modifications normally apply to this rule, it supports the compromise adopted that states in most cases modifications will be governed by Proposed Rule 1.5(f).</p>	

**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [6]	The first sentence of Comment [6] seems unnecessary. Comment [6]'s last sentence should make clear that a contingent fee could fall within this rule if the lawyer obtains a proprietary interest in the client's property. For example, if an attorney represents a client in a civil lawsuit over the shares of a company and if the agreement states that if successful the lawyer obtains a percentage of the shares and not just a percentage of the worth of the shares the attorney's agreement should come within Proposed Rule 1.8.1. The Commission rejected ABA Rule 1.8(i) because they believed Proposed Rule 1.8.1 was sufficient. Thus, when we are discussing an actual interest in the subject of the representation, and not just monetary percentage, Proposed Rule 1.8.1 should apply, even for contingency agreements.	
				Comment [9]	The last sentence of Comment [9] should be stricken as it is legally incorrect. If the Commission is stating or implying that in a disciplinary proceeding the attorney does not have the burden of showing that the transaction or acquisition and its terms were fair and reasonable or just and that the client was fully advised, the Commission is wrong. It is well established that the attorney in a disciplinary proceeding has the burden of	

**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [10]-[14]	<p>showing that the transaction is fair and reasonable and was fully known and understood by the client. (See, <i>Rodgers v. State Bar</i>; <i>Huniecutt v. State Bar</i>; <i>Clancy v. State Bar</i>; <i>In the Matter of Hagen</i>; <i>In the Matter of Peavey</i>; <i>In the Matter of Gillis</i>.)</p> <p>Comments [10]-[14] could be shortened and tightened.</p>	
5	Zitrin, Richard (law professor group)	D	Yes		<p>"...draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients, and also be at odds with California case law on fiduciary duty. Despite widespread criticism, the Commission has improvidently insisted on a clearly anti-client rule that serves only the interests of lawyers wishing to change their fee structure in the middle of a representation."</p> <p>"Any <u>subsequent modification</u> of a fee agreement with a client, however, is done under circumstances where the lawyer has already taken <u>on ongoing fiduciary duties to the client</u>. Thus a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client..."</p>	

**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [5]	<p>“...current draft...simply eliminates these requirements, and excludes modifications of fee contracts from the rule. This proposed language adds the italicized language to the existing comment: ‘This Rule is not intended to apply to an agreement by which a lawyer is retained by a client <u>or to the modification of such an agreement.</u>’”</p> <p>“...the draft sets up a <u>conflict between common law principles of fiduciary duty and the ethics rules themselves.</u> “</p> <p>“The phrase relating to modifications of fee contracts in Comment 5 must be stricken.”</p>	
				Comments [13]-[14]	<p>Definition includes corporate general counsel who may not be California counsel and need not be schooled in California rules and contracts. “Thus, independent counsel not hire for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction.</p>	
				Comment [4]	<p>“...having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction. The ABA language in MR 1.8(a)(2) and Comment 4 should replace the ill-advised Commission language.”</p>	

**Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response