

McCurdy, Lauren

From: KEVINMOHR04@sprintpcs.com on behalf of Kevin Mohr [kemohr@charter.net]
Sent: Thursday, October 01, 2009 2:15 PM
To: McCurdy, Lauren
Subject: [Fwd: RRC - 4-400 [1.8.3] - III.CC - October 16-17, 2009 Meeting Materials]
Attachments: RRC - 4-400 [1-8-3] - Dashboard - ADOPT - DFT2 (09-28-09)IR-KEM.doc; RRC - 4-400 [1-8-3] - Dash, Intro, Rule, Comment, Pub Com - COMBO - DFT2 (09-28-09)IR-KEM.pdf; RRC - 4-400 [1-8-3] - Public Comment Chart - By Commenter - DFT2 (09-28-09)IR-KEM.doc; RRC - 4-400 [1-8-3] - Compare - Introduction - DFT2.1 (09-28-09)IR-KEM.doc; RRC - 4-400 [1-8-3] - Compare - Rule & Comment Explanation - DFT2 (09-23-09)IR-KEM.doc

Here it is. KEM

----- Original Message -----

Subject:RRC - 4-400 [1.8.3] - III.CC - October 16-17, 2009 Meeting Materials

Date:Tue, 29 Sep 2009 20:32:51 -0700

From:Kevin Mohr <kemohr@charter.net>

To:Ruvolo, Ignazio <Ignazio.Ruvolo@jud.ca.gov>

CC:Kevin Mohr G <kejmoehr@gmail.com>, "Kevin Mohr (Work) (E-mail)" <kevinm@wsulaw.edu>, "kevin_e_mohr@csi.com" <kevin_e_mohr@csi.com>, "Kevin [two] Mohr" <kevin_e_mohr@compuserve.com>, "kejmoehr@netscape.net" <kejmoehr@netscape.net>, Paul Vapnek <pwvapnek@townsend.com>, "JoElla L. Julien" <CommissionerJ2@gmail.com>, 'Harry Sondheim' <hbsondheim@verizon.net>, Randall Difuntorum <Randall.Difuntorum@calbar.ca.gov>

References:<1704DBA85217934EAD07CB0CDFCBEC7B0423722CA6@1dcsvrmbx01.jcc.jud.ca.gov>
<4ABB7F83.5030005@charter.net>
<1704DBA85217934EAD07CB0CDFCBEC7B0423722CAE@1dcsvrmbx01.jcc.jud.ca.gov>
<4AC02E61.4020006@charter.net>

I've attached the following:

1. A single scaled PDF that includes the following documents:
 - a. Dashboard, Draft 2 (9/28/09)IR-KEM, that revises the dashboard per our style. I also added an introductory sentence to the Summary.
 - b. Introduction, Draft 2.1 (9/28/09)IR-KEM; I deleted the orphan "the" in the third line as Nace requested.
 - c. Rule & Comment Comparison Chart, Draft 2 (9/23/09)IR-KEM; the one Nace previously approved.
 - d. Public Comment Chart, Draft 2 (9/28/09)IR-KEM; merely re-sorted alphabetically.
2. Word versions of each document in item #1.

That should cover this Rule for the Agenda.

Kevin Mohr wrote:

Nace:

I just realized there was no dashboard attached. Please re-send. Thanks,

Kevin

Ruvolo, Ignazio wrote:

Kevin,

I am attaching a completed Dashboard. The checkmark symbol in my version of Word may be too stylized to use. The only change on the charts I recommend is the deletion of the word "the" in the third line of the introduction, after the word "which"

Nace

From: Kevin Mohr [<mailto:kemohr@charter.net>]

Sent: Thursday, September 24, 2009 7:18 AM

To: Ruvolo, Ignazio

Cc: Kevin Mohr G; Kevin Mohr (Work) (E-mail); kevin_e_mohr@csi.com; Kevin [two] Mohr; kejmohr@netscape.net; Paul Vapnek; JoElla L. Julien; 'Harry Sondheim'; Randall Difuntorum

Subject: Re: Rule 1.8.3

Nace:

Would you please resend the Dashboard. The document you sent (or at least the document I received) is 0 bytes has not text in it. I've included the template again in case the file became corrupted. I've suggested a brief, descriptive summary and added the references to rule & statute. We need you to fill out the Comparison w/ ABA MR section and the "controversy" section (as I recall, there were no dissents on the Commission but some of the public commenters objected to the addition of the "induce" or "attempt to induce" standards.

Thanks,

Kevin

Ruvolo, Ignazio wrote:

I attach for your consideration, the following relating to proposed rule 1.8.3:

Dashboard

Introduction

Rule and Comment comparison chart with explanations

Public Comment chart (I found a few typos)

Nace

Proposed Rule 1.8.3 [4-400] “Gifts from Client”

(Draft # 4.1, 6/27/08)

Summary: Rule 1.8.3, which is based on Model Rule 1.8(c), addresses a lawyer’s duties with respect to gifts from a client. See Introduction for details as to how proposed Rule 1.8.3 differs substantively from Model Rule 1.8(c).

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules	RPC 4-400
Statute	Probate Code § 21350(b).
Case law	<i>McGee v State Bar</i> (1962) 58 Cal 2nd 423.

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.3* Gifts from Clients

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.8.3 is based on Model Rule 1.8(c), and is intended to replace current California rule 4-400. Proposed Rule 1.8.3 reorganizes ABA 1.8(c), and includes several changes that improve client protection and conform the rule to California law. First, the Rule retains the prohibition against “inducing” or “attempting to induce” a gift, which provides broader protection than the Model Rule, which merely prohibits the “solicitation” of gifts. Second, rather than restate in the rule the scope of related persons excluded from the gift prohibition, reference instead is made to Probate Code § 21350(b), which defines “a person who is related by blood or marriage.” See proposed paragraph (b). Third, to conform to California law, the Commission has included a requirement in Comment [2] that an unrelated client have independent legal advice before an attorney may draft an instrument giving a substantial gift to the lawyer. Model Rule 1.8(c), comment [7] merely states that the client “should” have such advice.

Variations in Other Jurisdictions. Nearly every jurisdiction has adopted Model Rule 1.8(b), some with minor variations. See State Variations chart, below.

A Note on Rule Numbering. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 its own separate rule number.

* Proposed Rule 1.8.3, Draft #4.1 (6/27/08).

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.8.3 Gifts from Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.</p>	<p>(a) <u>A lawyer shall not:</u></p> <p>(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.</p>	<p>Proposed Rule 1.8.3 is based on Model Rule 1.8(c), but has been reorganized into three subparts to improve its readability.</p>
	<p>(1) <u>induce or attempt to induce a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or</u></p>	<p>The Commission has retained the prohibition in current California rule 4-400, which prohibits “inducing” or “attempting to induce” a client gift, because it provides broader client protection than the ABA rule which simply prohibits “solicitation” of a gift.</p>
	<p>(2) <u>prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,</u></p>	<p>Subparagraph (2) is taken verbatim from Model Rule 1.8(c).</p>

* Proposed Rule 1.8.3, Draft 4.1 (6/27/08).

BLUE UNDERLINE indicates that language has been added to the ABA Model Rule.

~~REDLINE STRIKEOUT~~ shows text that has been deleted from the ABA Model Rule.

~~Green STRIKEOUT~~ indicates that text from the ABA Model Rule has been moved and

Green UNDERLINE shows the new location where that language has been placed in the proposed Rule.

<p align="center"><u>ABA Model Rule</u> Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.8.3 Gifts from Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>unless the lawyer or other recipient of the gift is related to the client.</p>	<p>The closing clause of paragraph (a) is taken verbatim from Model Rule 1.8(c).</p>
	<p>(b) For purposes of this Rule, related persons include "a person who is related by blood or marriage" as that term is defined in Cal. Probate Code, section 21350(b).</p>	<p>Rather than restate in the a description of people excluded from the Rule's coverage, as does Model Rule 1.8(c), the Commission recommends including a reference to Probate Code § 21350, which includes a statutory definition of "a person who is related by blood or marriage."</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.8.3 Gifts from Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Gifts to Lawyers</p> <p>[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).</p>	<p>Gifts to Lawyers</p> <p>[6] A lawyer may accept <u>This Rule prohibits</u> a gift <u>lawyer</u> from <u>persuading or influencing</u> a client, if the transaction meets general standards of fairness. <u>For example, to give a simple gift such as a present given at a holiday or as a token of appreciation is permitted.</u> If a client offers the lawyer a more <u>substantial gift,</u> paragraph (c) does not prohibit <u>that is, one that has more than nominal extrinsic value.</u> <u>A lawyer</u> from accepting it, although such a gift <u>however,</u> may be voidable <u>take steps that might result in a client making a permitted gift, such as</u> by <u>sending</u> the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent <u>a wedding announcement.</u> In any event <u>Nevertheless,</u> due to concerns about overreaching and imposition on clients, a lawyer may not suggest that <u>induce or attempt to induce</u> a substantial gift be made to the lawyer or for the lawyer's benefit, <u>from a client</u> except where the lawyer is related to the client as set forth in paragraph (c). <u>Where impermissible influence occurs, discipline is appropriate. (See Magee v. State Bar (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)</u></p>	<p>Comment [1] is based on Model Rule 1.8(c), cmt. [7]. Modifications have been made to improve readability. In particular, the commission has changed the example to better illustrate the point of the Comment. Reference to Supreme Court authority confirming imposition of discipline where the lawyer induces a substantial gift has been included.</p> <p>(Note to commission: I think our comment [1] is still a bit muddled and incorporates too many thoughts in it. I invite particular comment as to how this might be improved.)</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(c) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.8.3 Gifts from Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.</p>	<p>[7] If effectuation ofeffecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client shouldmust have the detachedindependent advice that from another lawyer can provide. (Cal. Probate Code, sections 21350 et seq.) The sole exception to this Rule is where the client is a relative of the donee.</p>	<p>Comment [2] is based on Model Rule 1.8, cmt. [7]. Other than changing the text of Model Rule comment to make it more readable, the Commission has retained the requirement that an unrelated client actually have independent legal advice before an attorney may draft an instrument giving a substantial gift to the lawyer. This conforms to California law. Model Rule Comment [7] merely states that the client “should” have such advice. Thus, the proposed Comment provides greater client protection.</p>
<p>[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.</p>	<p>[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisionprovisions in Rule 1.7 (d) when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent todisclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.</p>	<p>Comment [3] largely tracks the language in Model Rule 1.8, cmt. [8], except it deletes an explanation of what the referenced rule 1.7 states. The Commission has not recommended the adoption of the “materially limit” standard in Model Rule 1.7, so including the description would be inaccurate.</p>

**Rule 1.8.3 Gifts from Client.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Orange County Bar Association (Trudy C. Levindofske)	agree			Rule conforms more closely to ABA Model Rule. Agree with proposal to extend rule to cover "attempts" to induce gifts. Clients are protected by prohibiting attorneys from drafting the documents that may be necessary to provide a gift to the attorney	No response necessary.
3	Sall Law Firm, The (Robert K. Sall)	disagree			Unclear from (a)(1) and Comment [1] whether an attorney is prohibited from accepting a substantial gift from a client that the lawyer has not suggested or induced.	Comment [1]'s description of the purpose of the rule and the citation to California Supreme Court precedent is adequate to address this concern.
4	San Diego County Bar Association (Ross Simmons)	Agree, only if modified			Rule should track ABA Model Rule 1.8(c) but replace the term "solicit" with "induce." Greater instruction needed as to the terms "substantial" and "modest" as used in the rule and Comments [1] and [2]. Rule should not include the phrase "attempt to induce" because it adds an unnecessarily broad sweep to the rule and is too subjective, making compliance and enforcement little more than conjecture.	This language was revised and the term "induce" is used. The language was revised and the term "modest" is no longer used. Commission disagreed, in part, because prohibiting attempts affords greater public protection.

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

**Rule 1.8.3 Gifts from Client.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Statement in Comment [1] that lawyers may accept modest gifts should include the qualifier that is found in the Model Rule that the transaction must meet general standards of fairness.</p> <p>Add a Comment [4] which would state: "The term 'close, familial relationship.' apart from those expressly set out in the Rule, is intended to similarly situated relationships, which by way of example include registered domestic partners or equivalents in other jurisdictions, cohabitants, relatives within the third degree of the lawyer and of the lawyer's spouse (or domestic partner or equivalent, as applicable)."</p> <p>Add a Comment [5] which would state: "In interpreting the Rule, similarly worded authority from other jurisdictions is intended to be instructive although not binding. The term "induce," however, is intended to be broader than the term "solicit.""</p>	<p>Commission removed the discussion regarding "modest" gifts.</p> <p>Commission did not make the requested revision, in part, because the Probate Code references are adequate and controlling.</p> <p>Commission did not make the requested revision, in part, because the proposed language address the term "solicit" which is not use in the rule..</p>
2	San Francisco, Bar Association of (Philip Humphreys)	Agree			Rule should remain limited to legally defined relationships or, in the alternative, must define the term "close familial relationship" in paragraph (b).	Agree with alternative suggestion. Revised paragraph (b) to read "related persons include "a person who is related by blood or marriage: as that term is defined in Cal. Probate Code, section 21350(b)."

**Rule 1.8.3 Gifts from Client.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>If the gift is permissible, the lawyer does not provide any advice and only acts as scrivener. As such, Comment [1] should include the deleted second sentence of present Discussion paragraph 1, which reads: "The member who participates in the preparation of an instrument memorializing a gift which is otherwise permissible ought not to be subject to professional discipline."</p> <p>Comment [2] should only require opportunity to obtain independent advice.</p> <p>Comment [3] should include the requirement that the client be advised of the circumstances and other alternatives which might preserve more of the estate. Comment should not mention conflict of interest because in the case of a testamentary document the client is dead and the beneficiaries have no attorney-client relationship.</p>	<p>The Commission did not make the requested revision, in part, because Comment [1] is focused on stating the purpose and underlying policy of the rule.</p> <p>Commission did not make the requested revision, in part, because the relevant code sections provide for an exception if an independent lawyer "counsels the client (transferor) about the nature of his or her intended transfer. . . ." Probate Code section 21352(b).</p> <p>Commission did not make the requested revision, in part, because the Commission believes that lawyers will be guided by referring to the conflicts rules and studying those rules will allow lawyers to make their own determination on possible conflict issues.</p>

**Rule 1.8.3 Gifts from Client.
[Sorted by Commenter]**

TOTAL = __ **Agree =** __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Santa Clara County Bar Association (Christine Burdick)	Agree, only if modified			<p>Change the last sentence of 1.8.3(a) to read “unless the lawyer or other recipient of the gift is related to the client or the client has had independent advice from another lawyer.” This eliminates the need for Comment [2] as currently drafted. Comment [2] can read: “It is the intent of this rule that it be applied consistent with PC 21350 et seq.”</p> <p>In the third line of 1.8.3(b) the word “and” should be changed to “or”</p>	<p>Commission did not make the requested revision, in part, because the language of the rule is accurate and Comment [2] provides additional guidance that should be helpful to lawyers who are unfamiliar with Cal. Probate Code section 21350.</p> <p>This language was revised in a manner that obviates the commenter’s requested revision. .</p>
6	Simmons, Ross (as an individual)	Agree, only if modified			<p>Defining what constitutes “inducing” is inexact and the language “attempt to induce” is even more ambiguous.</p> <p>Using the term “solicit” instead of “induce” would properly narrow the rule and more clearly define the prohibited conduct by requiring something more affirmative.</p> <p>Unclear what constitutes a “substantial” gift.</p>	<p>Commission did not make the requested revisions, in part, because the description of the purpose of the rule and the citation to relevant California Supreme Court authority helps address the commenter’s concerns.</p>

Rule 1.8.3: Gifts from Client

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman. The text relevant to proposed Rule 1.8.3 is highlighted.)

Alabama. In the rules effective June 2008, Alabama's Rule 1.8(e)(3) provides as follows:

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer.

Alabama also adds Rule 1.8(k), which identifies when a lawyer can represent both parties to an uncontested divorce or domestic relations proceeding. Relating to Rule 1.8(h), the Alabama Legal Services Liability Act, Ala. Code §6-5-570 et seq., provides as follows: "There shall be only one form and cause of action against legal service providers in courts in the State of Alabama and it shall be known as the legal service liability action." Finally, Rules 1.8(l) and (m) describe prohibitions on sexual relations between lawyers and clients. Notably, Rule 1.8(m) states that "except for a spousal relationship or a relationship that existed at the commencement of the lawyer-client relationship, sexual relations between the lawyer and the client shall be presumed to be exploitative [and thus violate Rule 1.8(l)]. This presumption is rebuttable."

Arizona: Rule 1.8(h)(2) adds a clause forbidding a lawyer to "make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities." Rule 1.8(l), which retains the 1983 version of ABA Model Rule 1.8(i), provides: "A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

California: California's rules are generally equivalent to Model Rule 1.8, but two exceptions deserve attention. Rule 3-320 provides as follows:

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

And Rule 4-210 provides in part as follows:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member'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: . . . (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan.

Connecticut adds the following language to Rule 1.8(a), providing that lawyers can enter into business transactions with clients under the following circumstances:

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction.

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and [makes either disclosure set out in paragraph (a)(4)]. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase "former client" shall mean a client for whom the two year period starting from the conclusion of representation has not expired.

District of Columbia: D.C. Rule 1.8(d) permits lawyers to advance "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." Rule 1.8(i) provides as follows:

A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Florida adds Rule 4-8.4(i), which provides that a lawyer shall not engage in sexual conduct with a client "or a representative of a client" that:

exploits or adversely affects the interests of the client or the lawyer-client relationship including, but not limited to:

(1) requiring or demanding sexual relations with a client or a representative of a client incident to or as a condition of a legal representation;

(2) employing coercion, intimidation, or undue influence in entering into sexual relations with a client or a representative of a client; or

(3) continuing to represent a client if the lawyer's sexual relations with the client or a representative of the client cause the lawyer to render incompetent representation.

In 2004, the Florida Supreme Court deleted language from the comment to Rule 8.4, which had stated that lawyer-client sexual relations do not violate the rule if a sexual relationship existed between the lawyer and client before commencement of the lawyer-client relationship.

Georgia: Rule 1.8(a), drawing on DR 5-104 of the ABA Code of Professional Responsibility, applies “if the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client.” Georgia retains the language of deleted ABA Model Rule 1.8(i) but adds that the disqualification of a lawyer due to a parent, child, sibling, or spousal relationship “is personal and is not imputed to members of firms with whom the lawyers are associated.” Georgia adds that the maximum penalty for violating Rule 1.8(b) (which relates to confidentiality) is disbarment, but the maximum penalty for violating any other provision of Rule 1.8 is only a public reprimand.

Illinois: Rule 1.8(a), which borrows heavily from DR 5-104 of the ABA Model Code of Professional Responsibility, provides that unless the client has consented after disclosure, a lawyer “shall not enter into a business transaction with the client if: (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or (2) the client expects the lawyer to exercise the lawyer’s professional judgment therein for the protection of the client.” Illinois deletes the language of ABA Model Rule 1.8(b), and retains the original 1983 version of ABA Model Rule 1.8(c). Illinois Rule 1.8(e) permits a lawyer to advance or guarantee the expenses of litigation if: “(1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent.” Illinois Rule 1.8(h) provides that a lawyer “shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in

writing that independent representation is appropriate in connection therewith.” Illinois adds language to Rule 1.8, providing as follows:

(h) A lawyer shall not enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Attorney Registration and Disciplinary Commission.

Illinois has no provision regulating sex with clients, but in *In re Rinella*, 175 Ill. 2d 504, (1997), the court suspended a lawyer for three years for having sexual relations with three different clients (and then lying about it during the Bar’s investigation). The court said that no lawyer could reasonably have considered such conduct acceptable under the existing ethics rules even though the rules do not expressly address sex with clients.

Louisiana: Rule 1.8(g) permits an aggregate settlement if “a court approves the settlement in a certified class action.” Rule 1.8(e) permits a lawyer to “provide financial assistance to a client who is in necessitous circumstances” subject to strict controls, including:

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer’s behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer’s behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

Massachusetts: Rule 1.8(b) forbids a lawyer to use confidential information “for the lawyer's advantage or the advantage of a third person” without consent.

Michigan: Rules 1.8(a)(2) and 1.8(h)(2) (regarding business transactions with clients and settlement of legal malpractice claims) both require that the client be given a reasonable opportunity to seek the advice of independent counsel but lack the ABA requirement that the client be “advised in writing of the desirability of seeking” independent counsel. Michigan Rule 1.8(g), regarding aggregate settlements, lacks the ABA requirement that the client's consent be “in a writing signed by the client.” Michigan retains the language of deleted ABA Model Rule 1.8(i) verbatim.

Minnesota: Rule 1.8(e)(3) allows a lawyer to guarantee a loan necessary for a client to withstand litigation delay. Rule 1.8(k)'s provision on sexual relationships with clients prohibits a lawyer from having sexual relations with a client unless a consensual relationship existed between the lawyer and client when the client-lawyer relationship commenced. The rule also defines “sexual relations” and adds the following Rules 1.8(k)(2)-(3) to explain the meaning of sex with a “client” when a lawyer represents an organization:

(2) if the client is an organization, any individual who oversees the representation and gives instructions to the lawyer on behalf of the organization shall be deemed to be the client . . .

(3) this paragraph does not prohibit a lawyer from engaging in sexual relations with a client of the lawyer's firm provided that the lawyer has no involvement in the performance of the legal work for the client ...

Mississippi: Rule 1.8(e)(2) permits a lawyer to advance medical and living expenses to a client under certain narrowly defined circumstances.

New Hampshire: The New Hampshire rules include a Rule 1.19 (Disclosure of Information to the Client), which requires a lawyer (other than a government or in-house lawyer) to inform a client at the time of engagement if “the lawyer does not maintain professional liability insurance” of at least \$100,000 per occurrence and \$300,000 in the aggregate “or if the lawyer's professional liability insurance ceases to be in effect.”

New Jersey: Rule 1.8(e)(3) creates an exception allowing financial assistance by a “non-profit organization authorized under [other law]” if the organization is representing the indigent client without a fee. Rule 1.8(h)(1), while forbidding agreements prospectively limiting liability to a client, contains an exception if “the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request.” (New Jersey Rule 1.8(k) and (l) provide as follows:

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

New York: Relating to ABA Model Rule 1.8(a), New York DR 5-104(A) governs business deals between a lawyer and

client only if “they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client.” If so, the lawyer shall not enter into a business transaction unless the lawyer meets conditions identical to Rule 1.8(a)(1), the lawyer advises the client to seek the advice of independent counsel in the transaction, and the client “consents in writing, after full disclosure, to the terms of the transaction and to the lawyer’s inherent conflict of interest in the transaction.” DR 5-104 does not govern acquisition of “an ownership, possessory, security or other pecuniary interest adverse to a client.”

Relating to Rule 1.8(e), New York DR 5-103(B)(1) permits a lawyer representing “an indigent or pro bono client” to pay court costs and reasonable expenses of litigation on behalf of the client. For all clients, DR 5-103(B)(2) tracks ABA Model Rule 1.8(f)(1) verbatim. New York adds DR 5-103(B)(3), which provides:

(3) A lawyer, in an action in which an attorney’s fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer’s own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In addition, N.Y. Judiciary Law §488 generally permits a lawyer to advance the costs and expenses of litigation contingent on the outcome of the matter.

Relating to Rule 1.8(j), New York DR 5-111(B) provides that a lawyer shall not “(1) Require or demand sexual relations with a client or third party incident to or as a condition of any professional representation,” or “(2) Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.” DR 5-111(B)(3) forbids lawyers to begin

a sexual relationship with a “domestic relations” client, not with other clients.

New York has no specific counterpart to Rule 1.8(k), and New York’s counterpart to Rule 1.8(c) is found only in EC 5-5, but various Disciplinary Rules in Canons 4 and 5 generally parallel the provisions of Rules 1.8(b), (d), and (f)-(i).

North Dakota: Rule 1.8(g), regarding aggregate settlements, applies “other than in class actions.” North Dakota adds Rule 1.8(k), which restricts the practice of law by a part-time prosecutor or judge in certain circumstances.

Ohio: Rule 1.8(c) forbids a lawyer to solicit “any substantial gift from a client” and forbids a lawyer to “prepare on behalf of the client an instrument giving the lawyer, the lawyer’s partner, associate, paralegal, law clerk or other employee of the lawyer’s firm, a lawyer acting ‘of counsel’ in the lawyer’s firm, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client.” “Gift” is defined to include “a testamentary gift.” Ohio Rule 1.8(f)(4) provides a detailed “statement of insured client’s rights” that a lawyer “selected and paid by an insurer to represent an insured” must give to the client.

Oregon: Rule 1.8(b) permits a lawyer to use confidential information to a client’s disadvantage only if the client’s consent is “confirmed in writing” (except as otherwise permitted or required by the Rules). Rule 1.8(e) permits a lawyer to advance litigation expenses only if “the client remains ultimately liable for such expenses to the extent of the client’s ability to pay.” Finally, Oregon’s rule governing sexual relations with clients contains a detailed description of “sexual relations,” providing that it includes “sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate

parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party.”

Pennsylvania: Rule 1.8(g) does not require that client consent be “confirmed in writing.”

Texas: Rule 1.08(c) provides that prior to the conclusion of “all aspects of the matter giving rise to the lawyer’s employment,” a lawyer shall not make or negotiate an agreement “with a client, prospective client, or former client” giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation. Rule 1.08(d) provides as follows:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

(1) a lawyer may advance guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Virginia: Rule 1.8(b) forbids the use of information “for the advantage of the lawyer or of a third person or to the disadvantage of the client.” Rule 1.8(e)(1) requires a client ultimately to be liable for court costs and expenses. Rule 1.8(h) contains an exception where the lawyer is “an employee” of the client “as long as the client is independently represented in making the agreement” prospectively limiting the lawyer’s liability for malpractice.

Washington: Rule 1.8(e) permits a lawyer to (1) advance or guarantee the expenses of litigation “provided the client remains ultimately liable for such expenses; and (2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.” Washington deletes ABA Model Rule 1.8(e)(2) (permitting lawyers to pay litigation costs for indigent clients).

Wisconsin: Rule 1.8(c) creates an exception to testamentary gifts where:

(1) the client is related to the donee, (2) the donee is a natural object of the bounty of the client, (3) there is no reasonable ground to anticipate a contest, or a claim of undue influence or for the public to lose confidence in the integrity of the bar, and (4) the amount of the gift or bequest is reasonable and natural under the circumstances.

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August 3, 2009 Suzanne Mellard E-mail to KEM:

I understand that you are the "human repository of the RRC memory" (per Ellen Peck). I am therefore hoping you can help answer a question I have re Rule 4-400. I noticed that the current rrc proposal prohibits an attorney inducing or "attempting to induce" a substantial gift. As you know, the current rule does not specifically prohibit an "attempt to induce." Was there a consensus or understanding among RRC members that the current rule was not violated unless the client actually offered or made a substantial gift?

I would greatly appreciate any insight you have on this subject.

August 6, 2009 KEM E-mail to Suzanne Mellard:

My apologies for taking so long to get back to you but it's been a pretty hectic week with school beginning in a couple of weeks, an impending Commission deadline and yes, a visit from some pesky relatives (though it went well).

1. At any rate, to answer your question, there was no objection made to including a prohibition of "attempts to induce". Here is footnote 1 to draft 1 (5/19/06), in which the drafters explained their rationale for including "attempts" and retaining California's use of "induce" instead of the Model Rule's "solicit":

The drafters have retained the word "induce" rather than the word "solicit" as used in Model Rule 1.8(c) but have added the concept of "attempt to induce." The Oxford English Dictionary defines "induce" as follows:

"trans. To lead (a person), by persuasion or some influence or motive that acts upon the will, to (into, unto) some action, condition, belief, etc.; to lead on, move, influence, prevail upon (any one) to do something." (Bolded emphasis added).

Induce would therefore only cover those attempts at persuading the client that are successful in obtaining a substantial gift from the client. The drafters believe that a lawyer should not even request or otherwise signify the lawyer's interest in receiving a substantial gift from a client.

2. No Commission member or member raised an issue about "attempt to induce." and only the San Diego Bar raised objected to the addition of "attempts" to the Rule.

3. In a memo dated 2/13/08 to the RRC, the drafters responded to San Diego's objection to the use of "induce" and including "attempts":

Drafters' Note: We deliberately broadened the rule to include attempts. There is no adequate justification to reverse that decision. The words "substantial" and "modest" are vague, and some definition is needed. (coincidentally, students in my PR class asked me last week what these terms meant). I think it is clear enough that someone can accept a gift not induced by the lawyer. See 2/13/08 Memo, at paragraph A.1.c. (page 1).

**RRC – Rule 1.8.3 [4-400]
E-mails, etc. – Revised (10/13/2009)**

4. Following circulation of that memo, no Commission member either disagreed with the drafters' recommendation or raised the issue at the 2/29-3/1/08 meeting at which the public comment concerning proposed Rule 1.8.3 was discussed.

5. Having said this, the Rule will be reconsidered in the next couple or three months. As the Commission members have been revisiting the already-considered rules following further guidance from the Bar's Board of Governors, they have been aligning the rules' language more closely with the relevant Model Rule to eliminate unnecessary divergences. I can't say it will happen with this rule, but it might.

I hope this helps. Take good care. And please let me know if you have any questions.

August 27, 2009 McCurdy E-mail to Ruvolo, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

1. III.D. Rule 1.4 Communication [3-500, 3-510] (Comparison Chart Draft #2 – Post Public Comment Rule Draft #7 dated 8/5/09) Codrafters: Julien

Assignment: (1) a chart comparing proposed Rule 1.4 to MR 1.4; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

2. III.G. Rule 1.8.10 Sexual Relations With Client [3-120] (Dec. 2008 Comparison Chart – Post Public Comment Rule Draft #6 dated 6/17/07) Codrafters: Foy, Julien

Assignment: (1) a chart comparing proposed Rule 1.8.10 to MR 1.8(j); (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

3. **III.H. Rule 2.4 Lawyer as Third-Party Neutral [N/A] (Post Public Comment Rule Draft #6.1 dated 6/16/07) Codrafters: Melchior, Mohr**
Assignment: (1) a chart comparing proposed Rule 2.4 to MR 2.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **III.I. Rule 2.4.1 Lawyer as Temporary Judge [1-710] (Post Public Comment Rule Draft #5 dated 6/23/07) Codrafters: Melchior, Mohr**
Assignment: (1) a chart comparing proposed Rule 2.4.1 to RPC 1-710; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

5. **III.J Rule 2.4.2 Lawyer as Candidate for Judicial Office [1-700] (Post Public Comment Rule Draft #4 dated 6/23/07) Codrafters: Melchior, Mohr**
Assignment: (1) a chart comparing proposed Rule 2.4.2 to RPC 1-700; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. **III.CC. Rule 1.8.3 Gifts from Client [4-400] (Post Public Comment Draft #4.1 dated 6/27/08) Codrafters: Julien, Vapnek**
Assignment: (1) a chart comparing proposed Rule 1.8.3 to MR 1.8(c); (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **IV.B. Rule 3.9 Non-adjudicative Proceedings [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Foy, Lamport, Voogd**
Assignment: (1) a chart comparing proposed Rule 3.9 to MR 3.9; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

2. **IV.H. Rule 8.2(a) Judicial and Legal Officials [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Sapiro, Vapnek**
Assignment: (1) a chart comparing proposed Rule 8.2(a) to MR 8.2(a); and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

September 18, 2009 McCurdy E-mail to Drafters (Ruvolo, Vapnek & Julien), cc RRC:

Nace & Codrafters (Paul & JoElla):

This message provides the assignment background materials for Rule 1.8.3 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attachments:

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

September 21, 2009 Ruvolo E-mail to Drafters, cc Chair, McCurdy & KEM:

I attach for your consideration, the following relating to proposed rule 1.8.3:

- Dashboard, Draft 1 (9/21/09)-IR
- Introduction, Draft 1 (9/21/09)-IR
- Rule and Comment comparison chart, Draft 1 (9/21/09)-IR
- Public Comment chart Draft 1, (9/21/09)-IR (I found a few typos)

September 23, 2009 KEM E-mail to Ruvolo, cc Drafters, Chair & Difuntorum:

Would you please resend the Dashboard. The document you sent (or at least the document I received) is 0 bytes has not text in it. I've included the template again in case the file became corrupted. I've suggested a brief, descriptive summary and added the references to rule & statute. We need you to fill out the Comparison w/ ABA MR section and the "controversy" section (as I recall, there were no dissents on the Commission but some of the public commenters objected to the addition of the "induce" or "attempt to induce" standards.

September 23, 2009 KEM E-mail to Ruvolo, cc Drafters, Chair & Staff:

I've attached the following:

1. Introduction, Draft 2 (9/23/09)IR-KEM, redline, compared to Draft 1 (9/21/09). In PDF.
2. Introduction, Draft 2 (9/23/09)IR-KEM, clean, in Word.
3. Rule & Comment Comparison chart, Draft 2 (9/23/09)IR-KEM, redline, compared to Draft 1 (9/21/09). In PDF.
4. Rule & Comment Comparison chart, Draft 2 (9/23/09)IR-KEM, clean, in Word.

I've revised the Intro and Rule & Comment Comparison chart to conform to the style and citation we've been using for the these submissions. I've also added two paragraphs to the Intro, one on state variations and the other on our approach to numbering in the 1.8 series of rules (we've been adding the latter notation to the 1.8 rules).

I haven't made any suggestions for Comment [1]. I don't think it's that muddled. In any event, it's an improvement on the Model Rule.

Please let me know if you have any questions.

September 24, 2009 Ruvolo E-mail to KEM, cc Drafters, Chair & Staff:

I am attaching a completed Dashboard. The checkmark symbol in my version of Word may be too stylized to use. The only change on the charts I recommend is the deletion of the word "the" in the third line of the introduction, after the word "which"

September 29, 2009 KEM E-mail to Drafters, cc Chair & Staff:

I've attached the following:

1. A single scaled PDF that includes the following documents:
 - a. Dashboard, Draft 2 (9/28/09)IR-KEM, that revises the dashboard per our style. I also added an introductory sentence to the Summary.
 - b. Introduction, Draft 2.1 (9/28/09)IR-KEM; I deleted the orphan "the" in the third line as Nace requested.
 - c. Rule & Comment Comparison Chart, Draft 2 (9/23/09)IR-KEM; the one Nace previously approved.
 - d. Public Comment Chart, Draft 2 (9/28/09)IR-KEM; merely re-sorted alphabetically.
2. Word versions of each document in item #1.

That should cover this Rule for the Agenda.

September 30, 2009 Vapnek E-mail to Drafters, cc Chair & Staff:

This drafter approves the material for this rule for the Agenda package.

October 3, 2009 Kehr E-mail to RRC:

Here are my comments on these materials:

1. In the second paragraph of the Introduction, should the reference to Model Rule 1.8(b) be to 1.8(c)?

2. The Comment [1] explanation invites suggestions on how to simplify the Comment. See the attached.

3. The statement in Comment [2], line three, that the Commission “has retained the requirement” might cause confusion by suggesting retention of a MR requirement b/c the MRs are the reference point for the chart. I suggest inserting “California” between “the” and “requirement” and eliminating the sentence that follows (“This conforms to California law.”).

October 4, 2009 KEM E-mail to Kehr, cc Ruvolo & Staff:

In your proposed revision of Comment [1], you include a parenthetical: "(citation omitted)". Did you not want to type it out (understandable) or are you suggesting we omit the typo? I think the former is accurate but I want to clarify.

October 4, 2009 KEM E-mail #2 to Kehr, cc Ruvolo & Staff:

One other point. On reviewing the clean version of your proposed, I would substitute "engaging in conduct" for "taking steps". Using "taking steps" implies that we think it's OK to plan this out and "take steps" that will lay a guilt trip on the client to deliver a gift to the lawyer. This is what I think Comment [1] should provide:

[1] Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal extrinsic value, except where the lawyer is related to the client. However, a lawyer does not violate this Rule merely by taking steps engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

October 4, 2009 Kehr E-mail to KEM, cc Ruvolo & Staff:

I'm fine with your suggestion.

October 5, 2009 Sondheim E-mail to RRC:

Unless someone objects, Bob's comments are deemed nits.

October 5, 2009 Kehr E-mail to RRC:

Kevin in a 10/4 e-mail recommended a change in my suggested Comment [1], and I agreed with Kevin's suggestion in an e-mail a short time later. I hope this all still comes within the nit category (for which I'm working on a definition for Rule 1.0.1).

October 6, 2009 KEM E-mail to RRC:

Here is my suggested revision of Bob's proposal (Bob is OK w/ it):

[1] Paragraph (a) prohibits a lawyer from persuading or influencing a client to give the lawyer any gift of more than nominal extrinsic value, except where the lawyer is related to the client. However, a lawyer does not violate this Rule merely by **taking steps engaging in conduct** that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. (See Magee v. State Bar (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

My reasoning was that "taking steps" implies that we think it's OK to plan this out and "take steps" that will lay a guilt trip on the client to deliver a gift to the lawyer.

October 6, 2009 Vapnek E-mail to RRC:

Do we really need "extrinsic" in the comment? What does it add other than confusion? And if we keep it, wouldn't "intrinsic" be the better word?

October 6, 2009 Kehr E-mail to RRC:

Your message reminds me that when I did my draft I tripped on the same word. **My solution, which I neglected to include, was to change "extrinsic" to "market"**. My thought was that the rule should govern gifts of money or its equivalent, not gifts of something of sentimental value. Pictures of grandma as a child should not be included unless the photos have market value. I'm sorry for my omission, but this is a reminder of how important it is that others watch for errors given the speed that we have to maintain.

October 6, 2009 Sondheim E-mail to RRC:

Whatever definition of "nit" you propose, Kevin's change is deemed a nit to a nit.

October 7, 2009 Sapiro E-mail to RRC List:

1. I agree with Bob Kehr's recommendations.
2. I disagree with proposed Comment [2]. It understates the requirements for independent counsel. The independent lawyer is not required merely to give "advice." The independent lawyer is required to counsel the client about the nature and consequences of the intended transfer; attempt to determine whether the consequences are the result of fraud, menace, duress, or undue influence; and sign a certificate in the form dictated by Probate Code section 21351(b). This is far more exacting than any other requirements of independent advice of which I am aware. Comment [2] should be more expansive to alert lawyers to the real burdens.
3. I do not think that we have adequately dealt with the point raised by Robert Sall. The comment and the rule do not say whether a lawyer may accept a substantial gift from the client if a lawyer did not suggest or induce the gift.

4. I vote "no" so we can discuss these issues

October 8, 2009 Sondheim E-mail to Ruvolo, cc Staff:

In the event there are not 3 no votes on this rule, do you think I should exercise my discretion and make Jerry's concerns subject to discussion at our meeting?

October 8, 2009 Ruvolo E-mail to Sondheim, cc Staff:

No.

October 8, 2009 Tuft E-mail to RRC List:

My comments on proposed Rule 1.8.3:

1. "Dashboard": The moderate controversy should be explained. The controversy centers around "attempt to induce" (See San Diego Co. Bar's comment) and "solicit" v. "induce" (Ross Simon's comment and appearance at the public hearing on this rule).
2. Introduction: Bob is correct that the reference in the second paragraph should be to MR. 1.8(c).
3. Paragraph (a)(1): I agree with San Diego that "attempt to induce" is an ambiguous standard of professional conduct. Unless, defined, it suffers from facial vagueness. I do not know of a case that has interpreted or enforced conduct that is an attempt to induce a gift that did not constitute inducement. If there is one, we should cite it. A lawyer is subject to discipline for inducing a client to make a substantial gift even if no gift is made. What does "attempting to induce" add? Whatever that is, the answer to Rob Sall's question whether a lawyer may except a substantial gift that the lawyer did not suggest or induce would probably be no, since the lawyer would always be vulnerable to a claim that the lawyer "attempted to induce" the gift by befriending the client or other conduct. This is an area where there is no demonstrable harm that warrants departing from the standard reflected in the Model Rule.

4. **Comment [1]:** I agree the comment is muddled and need work.

First, I agree with San Diego that we should include the first sentence in MR Comment [6] as the first sentence in this comment. This sentence helps answer San Diego's question about accepting a substantial gift from a client.

Second, I suggest we change "a lawyer" to "the lawyer". Reason: the rule does not prohibit inducing the client to make a gift to another lawyer unless that person is related.

Third, add "or a person related to the lawyer" after "to give [the] lawyer a substantial gift" to accurately reflect the scope of the rule.

Fourth, add the second sentence to MR Comment [6] as the second sentence to this comment to also helps explain what constitutes a substantial gift.

Fifth, Add "or other recipient of the gift is" after "except where the lawyer" and before "is related to".

5. **Comment [3]:** Which provision of proposed rule 1.7(d) is meant to apply in this conflict situation? Is it paragraph (d)(1) or is it paragraph (d)(4)? The comment should not leave lawyers guessing which provision is intended to apply in this situation.

There also should be a better explanation why client consent is not required in this conflict situation even when the lawyer has a financial interest in the appointment and where the appointment will materially affect client loyalty and the lawyer's professional judgment.

6. **Minority Statement:** Please include the following minority position to the explanation to Comment [3]:

The explanation for not including Model Rule 1.8, cmt. [8] illustrates the lack of public protection under proposed Rule 1.7(d) for conflicts described in this comment that can materially affect a lawyer's duty of loyalty and professional judgment. Contrary to the rule in virtually every other jurisdiction, proposed Rule 1.7(d) imposes no obligation to obtain the client's consent where the lawyer seeks to have himself named or have a partner or associate in the firm named as executor, trustee or to other "potentially lucrative fiduciary position" no matter how significant the risk that the recommendation, or the appointment, will materially limit the lawyer's professional judgment. See minority report to proposed Rule 1.7.

7. **Explanation of Changes:** Comment [1] is based on MR Comment [6] not [7]

It would be more politic to say that the changes between proposed Comment [2] and MR Comment [7] were made to make the comment more "concise" rather than more "readable."

October 12, 2009 Melchior E-mail to RRC:

Rule 1.8.3, P. 72, comment 2: This is substantive. Shouldn't it be in the rule itself?