

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Thursday, October 01, 2009 6:43 AM
To: Melchior, Kurt W
Cc: McCurdy, Lauren
Subject: RRC - 4-300 [1.8.12] - III.FF - October 16-17, 2009 Meeting Materials

Greetings Lauren:

To make your job a little easier, I've attached all the materials you need for 1.8.12 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

Kurt: Please note that I've made some revisions to your drafts to conform to the style we've been using in our charts (e.g., we refer to the Commission in the third person and not "we"). I've made such changes only to the Intro & Rule/Comment Chart. I've attached a redline PDF of those charts so you can see what I did.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (9/29/09)-KM-KEM. Just some formatting changes; no change to substance.
2. Introduction, Draft 2 (9/29/09)-KM-KEM.
3. Rule & Comment Chart, Draft 2 (9/29/09)-KM-KEM.
4. Public Comment Chart, Draft 2.1 (9/29/09)-KM-KEM. Just resorted alphabetically.

Finally, there's a second combo PDF file in redline that shows the changes I've made to Kurt's drafts.

Please let me know if you have any questions. Thanks,

Kevin

Melchior, Kurt W wrote:
[#3 -- and that's all I owe](#)

From: Melchior, Kurt W
Sent: Monday, September 28, 2009 6:08 PM
To: 'Foy, Linda'; Stan Lamport (E-mail); kemohr@charter.net; McCurdy, Lauren; Randall Difuntorum (E-mail)
Subject: RRC - 1-8-12 - Introduction.doc

Here's the intro, which finishes this rule.

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Proposed Rule 1.8.12 [4-300]

“Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review”

(Draft #2.2, 5/16/08)

Summary: Proposed Rule 1.8.12, for which there is no Model Rule counterpart, carries forward current rule 4-300’s prohibition on lawyers’ (i) purchasing property at various legally required sales such as foreclosure, execution, receiver’s and similar sales, or (ii) representing the seller at such a sale in which a spouse or associate of the lawyer is the buyer. Unlike the current rule, however, the proposed Rule does not regulate probate sales. See Introduction.

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

Primary Factors Considered

Existing California Law

Rules RPC 4-300

Statute Probate Code §§ 9880-9885.

Case law

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:

The Commission's decision to remove probate sales from the scope of the current rule, under which participation in such sales is prohibited, might be viewed as lessening client protection because the Probate Code permits lawyer's participation in such sales under certain conditions.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.12* Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 1.8.12 prohibits lawyers' either purchasing property at various legally required sales such as foreclosure, execution, receiver's and similar sales, or representing the seller at such a sale in which a spouse or associate of the lawyer is the buyer.

There is no equivalent Model Rule, but the Commission believes that such a rule is a necessary public protection device, as it has been for many years.

There is only one substantive change to the current rule that the Commission proposes.. The current rule applies to probate sales as well as to other types of sales; but Probate Code sections 9880-9885 specifically allow such transactions under specified and detailed provisions including disclosure and court approval. This conflict between statute and rule has existed for a number of years. Consequently, the Commission proposes that the statute provides sufficient public protection and that therefore the Rule need not address probate sales. However, a cross reference to the pertinent Probate Code sections are provided so as to identify the issue and the statutory controls for any interested parties.

Minority. A minority of the Commission believes that the current rule appropriately regulates probate sales as well as other types of sales, there being no reason why a Rule of Professional Conduct cannot be stricter than the statute.

A Note on the Rule Number. 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 such concept its own separate rule number.

* Proposed Rule 1.8.12, Draft #2.2 (5/16/08).

<p style="text-align: center;"><u>ABA Model Rule</u> No Comparable ABA Model Rule</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 1.8.12 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review</p>	<p style="text-align: center;"><u>Explanation of Changes to the California Rule 4-300</u></p>
	<p>(Aa) A memberlawyer shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such memberlawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member'slawyer's law firm is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.</p>	<p>Since there is no comparable ABA Model Rule, this Explanation will only address changes to the existing California Rule, 4-300. The Commission believes that this Rule protects the public against self-dealing by lawyers who are performing professional functions in connection with various forms of property sales under legal processes, such as receiver's, trustee's, or judicial sales, and should be continued. The Commission is not aware of any reasons why the ABA has not addressed this subject; but it believes that the possibility for self-dealing or abuse in these situations is apparent wherever a lawyer performs professional functions concerning a public or semi-public sale under legal process.</p> <p>Thus, proposed Rule 1.8.12 virtually all of current California rule 4-300, with one significant exception. Lawyers' roles in probate sales have been regulated both by rule 4-300 and by statute (Probate Code §§ 9880-9885). The current rule completely prohibits lawyers' self-dealing (directly or indirectly through family members etc.) in such transactions; but the Probate Code allows such transactions upon court order, given after notice to all interested parties as specified in the Code.</p> <p>After extensive consideration whether to continue the current rule's total prohibition of that which the legislature has decided to allow with specified conditions, the Commission decided that the statutory provision afforded adequate public protection in probate sales transactions, and has deleted that part of current rule 4-300 from the proposed Rule.</p>

* Redline/strikeout showing changes to the current California rule as there is no ABA Model Rule counterpart.

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.12 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review</p>	<p align="center"><u>Explanation of Changes to the California Rule 4-300</u></p>
		<p>The only other changes to part (a) are that the qualification which describes the nature of the "affiliation" which precludes participation in such a sale was eliminated as unnecessary and perhaps too limiting, and that "lawyer" was substituted for "member."</p>
	<p>(B) A memberlawyer shall not represent the seller at a probate, foreclosure, receiverreceiver's, trusteetrustee's, or judicial sale in an action or proceeding in which the purchaser is a spouse of relative <u>or other close associate</u> of the memberlawyer or of another lawyer in the member'slawyer's law firm or is an employee of the member or the member's law firm. (Amended by order of Supreme Court, operative September 14, 1992.)</p>	<p>See Explanation of Changes for paragraph (a).</p>
	<p>(c) <u>This Rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but such transactions remain subject to the provisions of Rules 1.8.1 [3-300] and 1.7 [3-310].</u></p>	<p>New paragraph (c) excepts probate sales from the Rule and cross-references the specific provision of the Probate Code. See Explanation to part (a) of this proposed rule. Paragraph (c) also adds the caveat that although probate sales might be regulated under the statute, a lawyer's participation in such transactions is still subject to other rules.</p>

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.12 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review Comment</p>	<p align="center"><u>Explanation of Changes to the California Rule 4-300</u></p>
	<p>[1] A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880 - 9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this Rule.</p>	<p>Comment [1] has been added to caution lawyers that failure to comply with the conditions of the Probate Code as to probate sales is a violation of this Rule.</p>

**Rule 1.8.12 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review.
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	San Diego County Bar Association (Ross Simmons)	A			Rule 4-300 conflicted with Probate Code 9880-9885 which provided that a lawyer could participate in a probate proceeding sale. This revision aligns both statutes.	No response necessary.
1	San Francisco, Bar Association of (Philip Humphreys)	A			Current rule (4-300) is overbroad; this proposal properly limits the individuals covered by the Rule to the lawyer and any other lawyer affiliated with the lawyer's firm. In favor of provision creating exception for transactions complying with Probate Code 9980-9885 and the provision requiring compliance with 3-300 and 3-310. Only concern is that since this rule requires more than the Probate Code it could be considered an invalid de facto amendment.	No response necessary. No response necessary. Commission disagreed, in part, because the rule does not seek to vary from the applicable Probate Code provisions.

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

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August 27, 2009 McCurdy E-mail to Melchior, 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

No lead drafter assignments.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. III.EE. Rule 1.8.11 Relationship with Other Party's Lawyer [3-320] (Post Public Comment Draft #4 dated 5/16/08) Codrafters: Julien, Voogd

Assignment: (1) a chart comparing proposed Rule 1.8.11 to RPC 3-320; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

**2. III.FF. Rule 1.8.12 Purchasing Property at a Foreclosure Sale [4-300]
(Post Public Comment Draft #2.2 dated 6/27/08) Codrafters: Foy, Lamport**

Assignment: (1) a chart comparing proposed Rule 1.8.12 to RPC 4-300; (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.I. Possible Rule re: A-C Privilege Waiver (no counterpart rules)
Codrafters: Sapiro, Tuft, Voogd**

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

**2. IV.J. Possible Rule re: Advice of Counsel (see Oregon Rule 8.6)
Codrafters: Ruvolo, Sapiro**

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

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

September 18, 2009 McCurdy E-mail to Drafters (Melchior, Foy & Lamport), cc RRC:

Kurt & Codrafters (Linda & Stan):

This message provides the assignment background materials for Rule 1.8.12 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)KEM
- Public Comment Chart, Draft 1 (9/18/09)

September 26, 2009 Melchior E-mail to Drafters (Foy & Lamport), cc Chair & Staff:

I gather that Linda, Stan and I are the drafters for this rule. I have tried to fill in the blanks in the dashboard, explanation and rules comparison, and refer these for your attention.

Attachments:

- Dashboard, Draft 1 (9/26/09)KM
- Introduction, Draft 1 (9/26/09)KM
- Rule & Comment Chart, Draft 1 (9/26/09)KM
- Public Comment Chart, Draft 1 (9/26/09)KM

September 26, 2009 Foy E-mail to Drafters, cc Chair & Staff:

Your annotations to the public comment chart were attached, but the attached dashboard, introduction, and explanation of rule comparison were blank. Would you kindly re-send?

September 28, 2009 Melchior E-mail to Drafters, cc Chair & Staff:

They have disappeared from my version as well. I guess that I just have to do them over

September 28, 2009 Foy E-mail to Drafters, cc Chair & Staff:

Ok, I am soon to be out of email touch, but will check back as soon as able.

September 28, 2009 Melchior E-mail to Drafters, cc Chair & Staff:

This is the Dashboard.

Attached: Dashboard, Draft 1 (9/26/09)

September 29, 2009 Melchior E-mail to Drafters, cc Staff:

I'm trying again. I have checked the attachment this minute, and this contains my (newly repeated) proposed explanation of changes. Please let me know if you have problems in receiving this version as complete.

I will send the other materials separately so that we will try to avoid more spoliation.

Attached:

Rule & Comment Chart, Draft 1 (9/26/09)KM

September 29, 2009 Melchior E-mail to Drafters, cc Staff:

Here's the intro, which finishes this rule.

Attached:

Introduction, Draft 1 (9/26/09)KM

September 30, 2009 Melchior E-mail #1 to McCurdy & KEM:

I have had no response from co-drafters. To meet the deadline, here is the material I sent them earlier. (2 more messages to follow)

Attached: Dashboard, Draft 1 (9/26/09)KM

September 30, 2009 Melchior E-mail #3 to McCurdy & KEM:

#3 -- and that's all I owe

Attached: Introduction, Draft 1 (9/26/09)KM

October 1, 2009 KEM E-mail to McCurdy & Melchior, cc Difuntorum & Lee:

To make your job a little easier, I've attached all the materials you need for 1.8.12 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

Kurt: Please note that I've made some revisions to your drafts to conform to the style we've been using in our charts (e.g., we refer to the Commission in the third person and not "we"). I've made such changes only to the Intro & Rule/Comment Chart. I've attached a redline PDF of those charts so you can see what I did.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (9/29/09)-KM-KEM. Just some formatting changes; no change to substance.

2. Introduction, Draft 2 (9/29/09)-KM-KEM. I've added two paragraphs, a minority position and a paragraph explaining the Rule number that we've been adding to the Intros for the 1.8 series of rules.
3. Rule & Comment Chart, Draft 2 (9/29/09)-KM-KEM.
4. Public Comment Chart, Draft 2.1 (9/29/09)-KM-KEM. Just resorted alphabetically.

Finally, there's a second combo PDF file in redline that shows the changes I've made to Kurt's drafts.

Please let me know if you have any questions.

October 1, 2009 Melchior E-mail to KEM, cc Drafters, Chair & Staff:

Your changes are fine -- but I don't think it's really controversial

October 3, 2009 Kehr E-mail to RRC:

My only comment on these materials is that I am not clear on the meaning of “legally required sales” in the first line of the Introduction. I notice that the paragraph (a) explanation refers to “sales under legal processes”, and I think something along those lines would be more easily understandable. I suggest changing the first line of the Introduction to say: “... at sales made under legal process, such as foreclosure, ...”

I otherwise vote to send these materials to the Board.

October 5, 2009 Sondheim E-mail to RRC:

Unless someone objects, Bob's suggestion will be deemed a nit.

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

1. I strongly object to sending this rule to the Board of Governors if this means that the rule might not be brought back to us for further substantive consideration. I objected to the change in this rule when we proposed it, and I objected to it again in our meeting on March 1, 2008. My recollection is that, at the March 1, 2008, meeting, we agreed that we would reconsider the change in the policy after final public comment. I dissented then, and I dissent now.
2. When we recommended adoption of current Rule 4-300 in 1990, we expressly pointed out to the Board of Governors and to the Supreme Court the conflict between our then proposed rule and then new Probate Code sections 9880 through 9885. We recommended that the Supreme Court adopt Rule 4-300 because it affords clients protection from predatory

lawyers in situations where clients, for emotional or other reasons, will likely have difficulty exercising independent or objective judgment. That was correct in 1990, and it is correct today.

3. There may be circumstances in which the personal representative of an estate and the heirs and beneficiaries of the estate are all sufficiently sophisticated, independently advised, and able to exercise independent judgment. In such a situation, a purchase of an asset from an estate by an attorney for the personal representative of the estate may not cause harm.
4. However, that is usually not the case. Particularly when a close relative, spouse, or lover dies, a normal reaction of the survivors is one of shock and pain. Often, the full emotional impact of the death is more than the survivor or survivors can tolerate, and they become dependent on their attorney to guide them through the transition. Even if the survivors would normally have the ability to exercise independent judgment, after the death of a loved one they often do not. I have met with surviving spouses and parents, and months later they admit that they were in such shock that they did not even remember that we met, let alone what we discussed.
5. An attorney who has the opportunity to recommend a sale of an asset and to guide the survivors in how to sell, to whom to sell, under what circumstances, and at what price, may perform a valuable service. However, an attorney who has a direct interest in the sale because he or she is a buyer is more likely to perform a huge disservice. The attorney's own financial, business, property, and personal interests will conflict with the interests of the client. The attorney may find it very difficult to set his or her personal interests aside, and the client will not receive advice based upon independent professional judgment. This will occur precisely when the client is most vulnerable.
6. The client is not adequately protected by court procedures. For example, because the executrix trusts the attorney, she and the heirs consent to the petition without obtaining any independent advice. The petition comes on for an unopposed hearing before a judge who may not have time to examine the merits, let alone give attention to the lawyer's conflicts of interest.*
7. For decades, California has strictly prohibited an attorney from purchasing at a probate or other judicial sale if the attorney represents a party to the matter. This prophylactic rule is intended to remove any temptation for a lawyer to deal unfairly and is intended to protect the reputation of the legal profession. In *Eschwig v. State Bar* (1969) 1 Cal. 3d 8, 16, the attorney was disbarred for purchasing property that was an asset of an estate in which he was an attorney for the executrix. He was disbarred because of the prophylactic nature of the rule, the Court stating:

An attorney representing the representative of an estate is under an obligation to seek the highest possible price on the sale of an estate asset. As a purchaser, however, he would be inclined to seek the lowest possible price. The resulting conflict of interest where the attorney becomes the purchaser is apparent. Because of the conflict of interest inherent in the situation, [former] Rule 8 is applicable even where an attorney is acting in good faith and even where there is competitive bidding. A conflict of interest exists, and is inherently more dangerous, in a sale during probate such as occurred here, because it was not public, was unknown to the court, did not involve competitive bidding, and

allowed petitioner to overreach or exercise undue influence upon his client.

Id., 1 Cal. 3d at 15. Attorneys should not be allowed to purchase, directly or indirectly, any property at a probate, foreclosure, or judicial sale in which the attorney represents a party. See, e.g., *Marlowe v. State Bar* (1965) 63 Cal. 2d 304 [attorney's wife bought at judicial sale. Held act of moral turpitude and breach of fiduciary duty.]; *Sodikoff v. State Bar* (1975) 14 Cal. 3d 422 [attorney bought asset through his corporate *alter ego*: six months suspension].

8. The type of transaction that would be promoted by the proposed new rule is inherently abhorrent. It will victimize clients and other members of the public who are inherently vulnerable. Deviating from established norms of our profession is not justified by the lobbying that the probate bar did to induce the Legislature to permit lawyers to buy at a probate sale.
9. The Supreme Court has inherent jurisdiction to control conduct of the bar in probate cases. See Bus. & Prof. Code §§ 6077 & 6103. The Supreme Court can require attorneys to adhere to stricter standards than the Legislature may require. Legislative standards are only minimal standards that must be applied for discipline, and the Supreme Court retains inherent power to make its rules more strict than the Legislature requires. See, e.g., *Stratmore v. State Bar* (1975) 14 Cal. 3d 887, 889-90.
10. If we make this change, we will create a very substantial risk that parties to probate proceedings will be represented in the courts by attorneys who cannot give them objective advice and who cannot objectively represent them in court. When an attorney for a personal representative appears on the petition for authority to sell property, he or she is advocating that the property should be sold to the attorney, himself or herself, not to a bona fide purchaser. The attorney will be advocating what is in his or her own interest when, instead, the lawyer should be advocating what is in the best interests of the estate and those beneficially interested in it.
11. Particularly in probate cases, the courts are uniquely dependent upon the integrity of counsel. Many matters are unopposed, so no advocate urges that a petition for authority to sell is not in the best interests of the estate or those interested in it. Often, the personal representative has no idea what the consequences of a sale at a given price may be and is dependent on the attorney to ascertain what is in the personal representative's or the heirs' best interests. Permitting lawyers to buy assets from probate estates will impair the ability of clients to obtain independent advice and representation and will cut the courts off from advocacy from someone without a personal stake in the outcome.
12. We should be embarrassed by proposing to enrich lawyers by blessing inherent conflicts of interest that jeopardize the public. I vote "no" on both the rule and the subject of whether the rule should be forwarded to the Board.
13. The statement of minority position in our report to the Board is an understatement of the seriousness with which I consider this recommendation a mistake. I request either that all of the foregoing be included in the report to the Board of Governors or that this email be given to them.

October 11, 2009 Sondheim E-mail to Melchior, cc Staff:

This rule is a consent item. If there are not 3 no votes, do you believe I should exercise my discretion and allow the Commission to consider the concern expressed by Jerry as set forth below?

October 12, 2009 Tuft E-mail to RRC:

I am sympathetic with the goal of reconciling our current rule 4-300 with Probate Code section 9880 et. seq. However, because there is no requirement under proposed rule 1.7 for a lawyer to obtain the informed written consent of the client in order for the lawyer or the lawyer's relation to purchase an asset of the client's estate, there is an absence of public protection under our rule in comparison to the rule in other jurisdictions. Section 9881 is not intended to serve as a substitute for the rules and does not absolve the lawyer of the duty to address the significant conflict of interest in this situation. For this reason I reluctantly join Jerry in objecting to sending this rule to the Board.

If this view does not sway others, I ask that this comment be included as a minority position in the Introduction to the Rule.

October 12, 2009 Melchior E-mail to RRC List:

Rule 1.8.12 (see what I mean about the complex and disconcerting sub-numbers?):

Nit: Syntax problem in l. 5 of 3d para. of intro: should be singular, not plural

Other nit: 2d para of explanation, l. 1 misses a verb. Should be "retains."