

# Proposed Rule 1.8.1 [3-300]

## “Business Transactions with a Client and Acquiring Interests Adverse to the Client”

(Draft #11, 11/17/08)

**Summary:** Proposed Rule 1.8.1 sets forth a lawyer’s duties when entering into a business transaction with a client or acquiring an adverse pecuniary interest. It largely tracks Model Rule 1.8(a), but retains concepts found in current California rule 3-300.

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

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### Primary Factors Considered

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- Existing California Law
  - Rules
  - Statute
  - Case law
- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)
- Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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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

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

OCTC, COPRAC, Los Angeles County Bar Association, San Diego County Bar Association, Orange County Bar Association, Prof. Richard Zitrin, Robert Sall, Carol Langsford

Very Controversial – Explanation:

1. Whether modification to lawyer fee agreements are subject to the rule
2. Whether a lawyer subject to the rule is required to provide legal advice to the client with respect to the transaction or acquisition when the client is represented by independent counsel

Moderately Controversial – Explanation:

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.8.1\* Business Transactions with a Client and Acquiring Interests Adverse to the Client

September 2009

(Draft rule following consideration of public comment)

### *INTRODUCTION:*

Proposed Rule 1.8.1 would replace current California Rule 3-300, which is similar to Model Rule 1.8(a). Proposed Rule 1.8.1 tracks Model Rule 1.8(a) with some exceptions. The proposed Rule differs from the Model Rule in that it clarifies that all of the Rule's requirements apply to both business transactions with a client and the lawyer's acquisition of an adverse pecuniary interest. The proposed Rule retains the current California Rule requirement that the lawyer affirmatively advise the client to seek the advice of independent counsel in place of the less client protective Model Rule requirement that the lawyer advise the client of the "desirability" of seeking independent counsel. The proposed Rule incorporates a concept found in the Model Rule Comment that the lawyer is not required to advise the client to seek the advice of independent counsel when the client is already represented by independent counsel.

The proposed Rule contains a more expansive Comment than the Model Rule. The proposed Rule Comment discusses the scope of the proposed Rule, the full disclosure and consent requirements and the client's opportunity to consult with independent counsel.

The Comments to the Proposed Rule address two issues that were the subject of considerable public comment. First, the Discussion in Current California Rule 3-300 states that the current California Rule does not apply to an agreement by which the lawyer is retained by the client, unless the agreement confers on the lawyer an ownership, possessory, security or other adverse pecuniary interest. Comment [5] expands on the Discussion in the current California Rule by adding that the Rule also does not apply to modifications to the agreement

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\* Proposed Rule 1.8.1, Draft 11 (11/17/08).

*INTRODUCTION (Continued):*

by which the client retains the lawyer. The reference was added because (i) the Discussion in the current California Rule is unclear, (ii) the Office of Chief Trial Counsel informed the Commission that it considered modifications to agreements by which a lawyer is retained by a client subject to Rule 3-300, and, (iii) the legal profession should be informed regarding the scope of the Rule in light of the first two considerations. A majority of the Commission believes that modifications to lawyer-client engagement agreements occur in many lawyer client relationships and are frequently beneficial to the client. The California Supreme Court has referred to the requirements in the Proposed Rule as a rigorous protocol. A majority of the Commission believes that imposing the Proposed Rule's protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship and could deter modifications to engagement agreements in cases where the modification would benefit the client. In addition, the majority concluded that existing California case law protects the client in situations involving overreaching or undue influence that cannot be addressed adequately in a disciplinary rule. A minority of the Commission believes that once a lawyer-client relationship is formed the lawyer is in a trust relationship with a client that does not exist at the time the lawyer enters into the lawyer-client relationship. As a result of that trust relationship, the lawyer is in a position to exercise the kind of overreaching and undue influence the proposed Rule is intended to address. In the view of the minority, the law is evolving in this area and that the application of the Rule should be left to the courts. The Commission received public comment in support and in opposition to this change.

Second, the Comment to the Proposed Rule modifies the Model Rule comment which states that the obligation to make full disclosure under the Model Rule is satisfied by written disclosure by either the lawyer in the transaction or independent counsel. The Commission modified the Comment to state that the lawyer is not required to give legal advice to the client when the client is represented by independent counsel, but is required to disclose all material facts that lawyer knows or reasonably should know have not been disclosed to the client. The Commission concluded that the Model Rule Comment is unworkable. One of the purposes of the Rule is to afford a client the protection of advice from a lawyer who is free of the conflict of interest the lawyer subject to the proposed Rule has as a result of that lawyer's involvement in the transaction or acquisition. In the majority's view, it does not make sense to require the lawyer who has a conflict to continue to advise the client when the client is being advised by a lawyer who does not have the conflict. In addition,

*INTRODUCTION (Continued):*

requiring the lawyer in the transaction to continue to advise the client when the client has independent counsel could interfere with the client's confidential relationship with independent counsel. Several commenters objected maintaining that requiring the lawyer in the transaction to make full disclosure without limitation assures that the client receives the fullest disclosure and protects the client in the event that independent counsel does not advise the client properly.

*A Note on the Rule Number.* As noted, the Proposed Rule appears in the Model Rules numbered 1.8(a). The Commission has not proposed that California follow the Model Rules construct of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within current client, former client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier to locate and use, the Commission has recommended that each rule in the 1.8 series be given a separate number.



<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.8.1 Conflict Of Interest: Current Clients: Specific Rules</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:</p>	<p><del>(a)</del> A lawyer shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless <u>each of the following requirements has been satisfied:</u></p>	<p><u>Model Rule 1.8(a) has been reformatted to become the introductory paragraph. It retains the language in current rule 3-300, which, is the same as the text of Model Rule 1.8(a) with the exception of the language added at the end of the sentence. The Commission decided to retain the additional language in rule 3-300, which emphasizes a lawyer's responsibility to satisfy all of the Rule's requirements.</u></p>
<p>(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;</p>	<p><del>(1a)</del> <del>the</del> <u>The</u> transaction <u>or acquisition</u> and <u>its</u> terms <del>on which the lawyer acquires the interest</del> are fair and reasonable to the client and are fully disclosed and transmitted in writing <u>to the client</u> in a manner that <u>reasonably</u> can be <del>reasonably</del> understood by the client; <u>and</u></p>	<p><u>Paragraph (a) is an amalgamation of Model Rule 1.8(a)(1) and current California rule 3-300(A). The Model Rule language was modified to refer to both a transaction and an acquisition of an adverse pecuniary interest. The Commission believes that the Model Rule reference to terms "on which the lawyer acquires the interest" narrows the focus to the terms of an acquisition, rather than all of the aspects of the acquisition. The deletion of the Model Rule language and replacement with the term "acquisition" broadens the scope of the Rule and affords greater client protection. The change conforms to the current California rule.</u></p> <p><u>The Commission added the words "to the client" to clarify that the client is the person to whom the terms are transmitted. The change conforms to the language in the current California rule.</u></p> <p><u>The word "reasonably" was moved to correct grammar. The word "and" was added at the end of the paragraph to emphasize that the requirements are conjunctive.</u></p>

\* Proposed Rule 1.8.1, Draft 11 (11/17/08). Redline/strikeout showing changes to the ABA Model Rule

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<p>(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and</p>	<p><del>(2b) the</del> The client <u>either is represented in the transaction or acquisition by an independent lawyer of the client's choice or</u> is advised in writing <u>by the lawyer to seek the advice of an independent lawyer</u> of the <del>desirability of seeking</del> <u>client's choice</u> and is given a reasonable opportunity to seek <del>the</del> <u>that</u> advice <del>of independent legal counsel on the transaction</del>; and</p>	<p>Paragraph (b) is a substantial revision of both <a href="#">Model Rule 1.8(a)(2)</a> and <a href="#">California Rule 3-300(B)</a>.</p> <p>First, the rule has been revised to provide that compliance with the Rule occurs either if the client is represented in the transaction or acquisition by independent counsel of the client's choice or advise to seek such advice. Comment [14] to the Model Rule states the requirement to advise the client to seek independent counsel does not apply when the client is already represented by independent counsel. The Commission was concerned that the Model Rule Comment conflicted with the Rule, which did not suggest any limitation on the lawyer's obligation to advise the client to seek the advice of independent counsel. As a result, the Commission added the limitation into the Rule.</p> <p>The Commission concluded that it is not necessary to require a lawyer to advise the client to seek the advice of independent counsel which the client is actually receiving such advice. The Commission concluded that it did not advance the purposes of the Rule or the interest of client protection to discipline a lawyer for not advising the client to seek the advice of independent counsel in such circumstances.</p> <p>Second, the Commission replaced the Model Rule reference to advising a client "of the desirability of seeking" advice from independent counsel with the reference in the current California rule to advising the client "to seek the advice of an independent lawyer." The California Supreme Court has held that a lawyer must encourage the client to seek such advice and cannot imply that such advice is unnecessary. (<i>Rose v. State Bar</i> (1989) 49 Cal.3d 646, 663; <i>Rodgers v. State Bar</i> (1989) 48 Cal.3d 300, 309,</p>

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		<p><a href="#">314.) The Commission believes that this construction of the current California rule offers greater client protection than the Model Rule approach, which suggests that a lawyer does not need to be as emphatic in advising the client to seek the advice of an independent lawyer as is mandated under the current California rule and the Supreme Court's application of the language in the current rule.</a></p> <p><a href="#">At the same in revising the Model Rule, the Commission departed from the current California rule language, which states that the client must be advised that the client "may seek the advice" of independent counsel. The proposed Rule requires the lawyer to advise the client "to seek the advice" of independent counsel. The change was made in response to an observation in <i>Matter of Silverton II</i> (2004) 4 Cal.State Bar Rptr. 643, n. 16 that "the language of Rule 3-300(B) appears inconsistent with the Supreme Court precedent that requires attorneys to advise their clients to seek independent counsel."</a></p> <p><a href="#">Third, the Model Rule was revised to refer to both transaction and acquisition. The terms "transaction" and "acquisition" refer to the two types of business dealing between lawyer and client that are covered by the Rule. The ABA Model Rule language refers only to a "transaction," which suggests that advising a client to seek independent counsel is limited to business transactions and not to adverse pecuniary interests. The Commission believes that the obligation to advise a client to seek independent counsel should apply to both transactions and acquisitions.</a></p> <p><a href="#">Finally, the Commission modified the last clause of the rule. The change conforms to the language in the current California Rule. In addition, since the reference to advice of an independent lawyer</a></p>

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		<p><a href="#">now appears earlier in the draft rule than it does in the Model Rule, the reference to "independent counsel" at the end of the rule is unnecessary and wordy.</a></p>
<p>(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.</p>	<p>(3c) <del>the</del> The client <del>gives informed consent, thereafter consents</del> in a writing <del>signed by the client,</del> to the <del>essential</del> terms of the transaction <del>or the terms of the acquisition</del> and the lawyer's role in the transaction <del>or acquisition</del>, including whether the lawyer is representing the client in the transaction <del>or acquisition</del>.</p>	<p><a href="#">Paragraph (c) is adapted from the Model Rule and would expand the scope of current rule 3-300 by including a requirement that the lawyer disclose his or her role in the transaction or acquisition, including whether the lawyer is representing the client in that matter. The Model Rule language was modified to include a reference to the acquisition of an adverse pecuniary interest in order to clarify that the paragraph applies to both transactions and acquisitions.</a></p>

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<p>[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client.</p> <p><b>[CONTINUED...]</b></p>	<p><u>Scope of Rule</u></p> <p>[1] A lawyer's legal <del>skill and training</del> <u>and skill, together with</u> the relationship of trust and confidence <u>that arises</u> between a lawyer and client, create the possibility <del>of overreaching</del> <u>that a lawyer, even unintentionally, will overreach or exploit client information</u> when the lawyer <del>participates in</del> <u>enters into</u> a business, <del>property or financial</del> <u>transaction with</u> <del>athe client, for example, a loan or sales</del> <u>acquires a pecuniary interest adverse to the client.</u> <u>In these situations, the lawyer could influence the client for the lawyer's own benefit, could give advice to protect the lawyer's interest rather than the client's, and could use client information for the lawyer's benefit rather than the client's.</u> This Rule is intended to <u>afford the client the information needed to fully understand the terms and effect of the transaction or a lawyer investment on behalf</u> <u>acquisition and the importance of a</u> <u>having independent legal advice.</u> (See, e.g., <i>Beery v. State Bar</i> (1987) 43 Cal.3d 802, 813 [239 Cal.Rptr. 121].) This Rule also requires <u>that the transaction or acquisition be fair and reasonable to the</u> client.</p>	<p><u>Comment [1] is a modified version of the first sentence of Comment [1] to the Model Rule and an elaboration of concepts related to the first sentence of the Model Rule Comment.</u> The Comment is intended to explain the purpose of the Rule in light of California law. The Commission departed from the Model Rule Comment, because the Model Rule Comment does not explain what client interests are protected by the Rule. The Commission concluded that explaining the underlying reasons for the Rule would assist lawyers in applying the Rule.</p> <p>The first sentence of the Comment is a modified version of the first sentence of Model Rule Comment [1]. The sentence in the Model Rule was modified to clarify that the Rule applies even if the possibility of overreaching is unintentional. The sentence also was revised to inform lawyers that the two principle considerations underlying the Rule are over reaching and exploitation of client information. The second sentence explains those two considerations in more detail.</p> <p>The rest of the Comment explains how the basic considerations that underlie the Rule are implemented in the Rule.</p>

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	<p>[2] <u>Except as set forth in comments [5] and [6], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a legal, business, financial or professional interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(d)(4) [Rule 3-310(B)(4)].</u></p>	<p><u>Comment [2] is new. The Comment clarifies that the Rule does not apply to a transaction or acquisition of an adverse pecuniary interest that predates the lawyer-client relationship, except in specified circumstances. It also explains that while Rule 1.8.1 does not apply, other rules may apply to the lawyer's interest. The Model Rule Comments do not address this point; however, because both the California Rule and the Model Rule apply to transactions and acquisitions of adverse pecuniary interests with a client, the Rules do not apply when the party to the transaction or acquisition is not a client at the time the transaction or acquisition occurs. The Commission concluded that adding the Comment would assist lawyers in understanding and applying the Rule.</u></p>
<p><b>[...COMMENT [1] CONTINUED]</b></p> <p><i>Business Transactions Between Client and Lawyer</i></p> <p>[1] The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent.</p>	<p><i>Business Transactions <del>Between Client and Lawyer</del> <u>With Clients</u></i></p> <p><del>[13] — The requirements of paragraph (a) must be met</del> <u>This Rule applies</u> even when the transaction is not <del>closely</del> related to the subject matter of the representation, as when a lawyer drafting a will for a client <del>learns that the client needs money for unrelated expenses and offers</del> <u>agrees</u> to make a loan to <del>the</del> <u>a</u> client. <del>The Rule applies to lawyers engaged in pay expenses that are not related to the sale of representation.</del> <u>This Rule also applies when a lawyer sells to a client</u> goods or <u>non-legal</u> services <del>that are</del> related to the practice of law, <del>for example, the sale of titles</del> <u>such as</u> insurance, brokerage or</p>	<p><u>Comment [3] is a modified version of the second and third sentences of Model Rule Comment [1].</u></p> <p><u>The Commission modified the second sentence of the Model Rule Comment to delete the reference to "closely" related transaction in order to clarify that no relationship between the representation and the transaction is required. The Commission also simplified the example given in the second sentence of Model Rule Comment [1] to avoid an inference that the Rule applies only when a lawyer, in the course of representing a client, learns about information leading to a transaction.</u></p> <p><u>The third sentence of the Model Rule Comment was revised to avoid the suggestion that the lawyer must be engaged in the</u></p>

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<p>[CONTINUED...]</p>	<p>investment <a href="#">products or services</a> to <del>existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent</del> <a href="#">a client</a>.</p>	<p><a href="#">business of selling goods and services related to the practice of law in order for the Rule to apply and to clarify that the Rule applies to any sale of law-related goods or services.</a></p> <p><a href="#">The fourth sentence of the Model Rule Comment was deleted because such transactions are currently prohibited under Rule 4-300.</a></p>
<p>[...COMMENT [1] CONTINUED]</p> <p>[1] It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.</p>	<p><del>[14] It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the</del> <a href="#">This</a> Rule does not apply to standard commercial transactions <del>between the lawyer and the client</del> for products or services that <a href="#">a lawyer acquires from a client on the same terms that</a> the client generally markets <del>them</del> to others, <del>for example</del> <a href="#">where the lawyer has no advantage in dealing with the client, and the requirements of the Rule are unnecessary and impractical. Examples of such products and services include</a> banking <del>or</del> <a href="#">and</a> brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. <del>It</del> <a href="#">such</a> The Rule also does not apply to similar types of <a href="#">standard commercial transactions, for goods or services offered by a lawyer when</a> the lawyer has no advantage in dealing with the <a href="#">clients, such as when a client purchases a meal at a restaurant owned by the lawyer or when the client pays for parking in a parking lot owned by the lawyer. (See State Bar</a></p>	<p><a href="#">Comment [4] is an expansion of the sixth and seventh sentences of Comment [1] to the Model Rule. It is intended to include all of the types of transactions that California authorities have recognized are not covered by the Rule and to explain the reason why the Rule does not apply to the types of transactions.</a></p> <p><a href="#">The first sentence of Comment [4] was added to introduce the concept that the Comment addresses. The second sentence combines the basic concepts in the two Model Rule Comment sentences in order to states the general rule. The Commission concluded that stating the general rule at the outset would assist lawyers in understanding the examples that follow.</a></p> <p><a href="#">The third sentence of the Comment is a slightly modified version of the examples given in the Model Rule Comment.</a></p> <p><a href="#">The fourth sentence includes examples of standard commercial transactions identified in State Bar Formal Opinion 1995-141. The Comment was drafted to explain the reason why the types of transactions described are not subject to the Rule.</a></p> <p><a href="#">The fifth and sixth sentences are derived from the second paragraph of the Discussion to current Rule 3-300. The Commission expanded the discussion to clarify the circumstances</a></p>

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	<p>Formal Opn. 1995-141.) This Rule also ordinarily would not apply where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof as when, for example, a lawyer invests in a limited partnership syndicated by a third party, and the <del>restrictions in paragraph</del> (lawyer's client makes the same investment on the same terms. When a) <del>are unnecessary lawyer and impracticable</del> a client each invest in the same business on the same terms offered to the public or a significant portion thereof, and the lawyer does not advise, influence or solicit the client with respect to the transaction, the lawyer does not enter into the transaction "with" the client for purposes of this Rule.</p>	<p><u>in which this exception applies.</u></p>
	<p>[5] This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement, unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. An agreement by which a lawyer is retained by a client and modifications to such agreements are governed, in part, by Rule 1.5 [Rule 4-200]. An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership.</p>	<p><u>Comment [5] is based on both the fifth sentence of Comment [1] to the Model Rule and the first paragraph of the Discussion to current Rule 3-300. The first sentence is derived from the Discussion to the current California Rule. With respect to agreements by which a lawyer is retained by a client, the first sentence states what has been the general rule in California for some time. Commission concluded that with respect to agreements by which the lawyer is retained by a client, the language in the Discussion to the current California Rule is a clearer statement than the Model Rule Comment and that changing to the Model Rule language might suggest a substantive change in the standard that is not intended.</u></p> <p><u>The first sentence expands on the Discussion in the current</u></p>

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	<p><u>possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.</u></p>	<p><u>California Rule by adding a reference to modifications to agreements by which a lawyer is retained by a client. The reference was added because the Discussion in the current California Rule is unclear, the Office of Chief Trial Counsel informed the Commission that it considered modifications to agreements by which a lawyer is retained by a client subject to Rule 3-300, and, Commission concluded that the legal profession should be informed regarding the scope of the Rule in light of the first two considerations.</u></p> <p><u>The inclusion of a reference to modifications to agreements by which a lawyer is retained by a client was the subject of considerable debate at the Commission. A minority of the Commission maintain that the agreement to retain a lawyer are outside the rule because they are arms-length transactions that occur before the lawyer-client relationship commences. The minority believe that once a lawyer-client relationship is formed, all of the circumstances that would trigger application of the Rule exist. The minority also maintain that the law is still evolving in this area and that the application of the Rule should be left to the courts.</u></p> <p><u>A majority of the Commission concluded that modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] below, provides an adequate remedy in those situations where there is overreaching or undue</u></p>

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		<p><u>influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client.</u></p> <p><u>The third sentence is adapted from the Model Rule Comment, with changes to conform to the terminology used in the rest of the Comment.</u></p> <p><u>The fourth sentence is new. It clarifies that an advance deposit for fees and costs is not an ownership, possessory, security or other adverse pecuniary interest. The Commission concluded that the addition was warranted because the current California Rule is silent on the subject and an advance for fees and costs could be construed as taking an interest in the client's property. The Commission concluded that adding the sentence would clarify the scope of the Rule.</u></p> <p><u>The last sentence clarifies that a contingency fee agreement is not subject to the Rule. The current California Rule does not address whether a contingent fee is an ownership, possessory or security interest in the client's property. In light of the fact that a contingent fee agreement has characteristics that could be construed as such an interest and the benefit such arrangements offer for clients, the Commission concluded that clarification was warranted.</u></p>

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	<p>[6] <a href="#">In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms-length transaction. <i>Setzer v. Robinson</i> (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524]. However, even when this Rule does not apply to the negotiation of the agreement by which a lawyer is retained by a client, other fiduciary principles might apply. Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement. Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities with respect to modifications to an agreement by which a client retains a lawyer's services. (See, e.g., <i>Ramirez v. Sturdevant</i> (1994) 21 Cal.App.4th 904, 913 [26 Cal.Rptr.2d 554]; <i>Berk v. Twentynine Palms Ranchos, Inc.</i> (1962) 201 Cal.App.2d 625 [20 Cal.Rptr. 144]; <i>Carlson, Collins, Gordon &amp; Bold v. Banducci</i> (1967) 257 Cal.App.2d 212 [64 Cal.Rptr. 915].)</a></p>	<p><a href="#">Comment [6] was added to clarify that while modifications to agreements by which a lawyer is retained by a client are not subject to the Rule, lawyers still have professional responsibilities to clients with respect to such modifications. The Comment is intended to alert lawyers about the existence of such duties and to direct lawyers to examples of current law on the subject.</a></p>

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	<p><u><i>Adverse Pecuniary Interests</i></u></p> <p><u>[7] An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client's property that is or may become detrimental to the client, even when the lawyer's intent is to aid the client. <i>Hawk v. State Bar</i> (1988) 45 Cal.3d 589 [247 Cal.Rptr. 599]. An adverse pecuniary interest arises, for example, when the lawyer's personal financial interest conflicts with the client's interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client's interest in the client's property. (See <i>Fletcher v. Davis</i> (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58].) An adverse pecuniary interest also arises when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client. (See <i>Rodgers v. State Bar</i> (1989) 48 Cal.3d 300 [256 Cal.Rptr. 381]; <i>Kapelus v. State Bar</i> (1987) 44 Cal.3d 179 [242 Cal.Rptr. 196].)</u></p>	<p><u>Comment [7] has no counterpart in the Model Rule. The Comment explains what constitutes an adverse pecuniary interest under the Rule. The Comment also helps clarify that the new Rule does not abrogate existing law on the subject.</u></p>

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	<p><i>Full Disclosure to the Client</i></p> <p><u>[8] Paragraph (a) requires that full disclosure be transmitted to the client in writing in a manner that reasonably can be understood by the client. Whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances.</u></p>	<p><u>Comment [8] does not have a counterpart in the Comment to the Model Rule. The proposed rule includes the Model Rule requirement that the disclosure be transmitted "in a manner that reasonably can be understood by the client." The Model Rule's Comment addresses other elements of the Rule, but does not address this element. The Commission concluded that because this is an important element of the Rule, it should be discussed in the Comment. The Comment alerts lawyers that the application of this element of the Rule will depend on the circumstances.</u></p>
<p>[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition</p>	<p><del>[29] Paragraph</del> <u>The requirement for full disclosure in writing in paragraph (a)(4) requires that a lawyer to provide the client with the same advice regarding the transaction itself be fair or acquisition that the lawyer would provide to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (transaction with a) third party. <i>Beery v. State Bar</i> (21987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires that a lawyer to inform the client also be advised, in writing, of all of the desirability terms and all relevant facts of seeking the advice transaction or acquisition, including the nature and extent of independent legal counsel the lawyer's role and compensation in connection the transaction or acquisition.</u> It also requires <del>that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the</del></p>	<p><u>Comment [9] addresses what the full disclosure element of the Rule requires. The Commission rejected most of Comment [2] to the Model Rule. The Comment largely restates the requirements of the Model Rule with little elaboration. The Commission concluded that discussion in the Model Rule Comment regarding disclosures to the client are vague, limited and incomplete and lack reference to the principles governing disclosure in general. California has a well developed body of law in this area, which better explains the nature of the duty than the Model Rule Comment.</u></p>

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<p>of informed consent).</p>	<p><del>client's informed consent, in a writing signed by to</del>  <a href="#">fully inform</a> the client, <del>both to the essential terms</del> of  the <del>transaction and to the lawyer's role.</del> When  necessary, <del>the lawyer should discuss both the</del>  <del>material risks of the proposed transaction, including</del>  <del>any risk presented by the lawyer's involvement, or</del>  <a href="#">acquisition</a> and <a href="#">facts that might discourage</a> the  <del>existence of reasonably available alternatives and</del>  <del>should explain why</del><a href="#">client from engaging in</a> the <del>advice</del>  <del>of independent legal counsel is desirable</del><a href="#">transaction</a>  or acquisition. (See <del>Rule 1.0</del><a href="#">Rodgers v. State Bar</a>  <del>(e)1989</del> 48 Cal.3d 300 [256 Cal.Rptr. 381]; <a href="#">Clancy v.</a>  <a href="#">State Bar</a> (<del>definition of informed consent</del>1969) 71  Cal.2d 140 [77 Cal.Rptr. 657]; <a href="#">Brockway v. State Bar</a>  (1991) 53 Cal.3d 51 [278 Cal.Rptr. 836].) Except in  a disciplinary proceeding, the burden is always on  the lawyer to show that the transaction or acquisition  and its terms were fair and just and that the client  was fully advised. <a href="#">Felton v. Le Breton</a> (1891) 92 Cal.  457, 469 [28 P. 490, 494].</p>	

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<p>[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.</p>	<p><del>[3]</del><sup>[10]</sup> The risk to a client is <del>greatest</del> heightened when the client expects the lawyer to represent the client in the transaction <del>itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7</del> acquisition itself. Under <del>that</del> <u>this</u> Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction <u>or acquisition</u>, such as the risk that the lawyer will structure the transaction <u>or acquisition</u> or give legal advice in a way that favors the lawyer's interests at the expense of the client. <del>Moreover</del> <u>Because the lawyer has an interest in the transaction or acquisition</u>, the lawyer must <del>obtain the client's informed consent</del> <u>also comply with Rule 1.7(d)</u>. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from <del>seeking</del> <u>representing</u> the <del>client's consent</del> <u>to client in</u> the transaction <u>or acquisition</u>.</p>	<p><u>Comment [10] is adapted from Comment [3] of the Model Rule. The Commission changed the reference in first line of the Model Rule Comment from "greatest" to "heightened." The Commission concluded that the reference to "greatest" was an overstatement and could be misconstrued to suggest that the Rule had less application in all other situations or that all other situations do not pose comparable risks, which is not the case.</u></p> <p><u>Although the second part of the first sentence of the Comment to the Model Rule is deleted in this Comment, it is addressed in Comments [11] and [12]</u></p> <p><u>The remaining changes are to conform the Comment to the terminology in the draft Rule, which distinguishes between business transactions and acquisition of adverse pecuniary interests. The terminology was added in order to clarify that the Comment applies to both. The sentence regarding the applicability of Rule 1.7(d) was revised to account for differences between the current Model Rule and the proposed new California Rule, which does not require a client's informed consent.</u></p>

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	<p><u>[11]There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition. For example, if the lawyer and the client enter into a transaction to form or acquire a business, the client might expect the lawyer to represent the business or the client with respect to the business after the transaction is completed. When the lawyer knows or reasonably should know that the client expects the lawyer to represent the business or the client with respect to the business or interest after the transaction or acquisition is completed, the lawyer must act in either of two ways. Before entering into the transaction or making the acquisition, the lawyer must either (i) inform the client that the lawyer will not represent the business, or the client with respect to the business or interest, and must then act accordingly; or (ii) disclose in writing the risks associated with the lawyer's dual role as both legal adviser and participant in the business or owner of the interest. The client consent requirement in paragraph (c) includes a requirement that the client consent to the risks to the lawyer's representation of the client, which the lawyer has disclosed to the client as required by this Rule. A lawyer must also comply with the requirements of Rule 1.7(d) when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.</u></p>	<p><u>Comment [11] addresses considerations when the lawyer continues to represent a client after entering into the transaction or acquisition. The Comment elaborates on the a more limited discussion of this subject in Comment [2] to the Model Rule and is directed to situations where the lawyer continues to represent the client with respect to the transaction or acquisition or the client expects the lawyer to do so.</u></p> <p><u>In addition, the Comment accounts for a decision by the State Bar Court and other authorities that hold that a lawyer's disclosure obligations under the current California Rule includes discussing effect of a transaction or acquisition on the lawyer-client relationship. The Commission concluded that Comment [2] to the Model Rule does not clearly include disclosure of the effect of the transaction or acquisition on the lawyer-client relationship as part of the Rule's disclosure requirement. Including such disclosure in the Rule affords greater client protection, because of the broad scope of the disclosure requirement in the proposed Rule and because the disclosure would be part of a protocol that includes the opportunity for review by independent counsel. At the same time, the Commission determined that lawyers are still required to comply with Rule 1.7, when that Rule applies.</u></p> <p><u>In light of these considerations, the Comment also addresses a lawyer's disclosure obligation when the lawyer knows or reasonably should know that the client expects the lawyer to continue representing the client with respect to the transaction or acquisition after the transaction or acquisition is consummated. The Comment clarifies that the lawyer has an affirmative obligation to disclose either that the lawyer will not represent the client or the risks of the lawyer's dual role when the lawyer will continue to represent the client.</u></p>

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	<p><a href="#">[12] Even when the lawyer does not represent the client in the transaction or acquisition, there may be circumstances when the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client in another matter. When the lawyer's interest in the transaction or acquisition may interfere with the lawyer's independent professional judgment or faithful representation of the client, the lawyer must also disclose in writing the potential adverse effect on the lawyer-client relationship that may result from the lawyer's interest in the transaction or acquisition and must obtain the client's consent under paragraph (c). A lawyer must also comply with the requirements of Rule 1.7(d) when the lawyer has an interest in the subject matter of the representation as a result of the transaction or acquisition.</a></p>	<p><a href="#">Comment [12] expands on the discussion at the end of Comment [10] above, which, in turn, is derived from Comment [2] to the Model Rule. It addresses when the lawyer continues to represent the client in matters other than with respect to the transaction or acquisition. As in the case of Comment [11], the Comment incorporates a requirement that the lawyer disclose the effect of the transaction or acquisition on the lawyer's representation of the client in other matters as part of the Rule's disclosure obligation. It also clarifies that the lawyer also is required to comply with Rule 1.7 where applicable.</a></p>
	<p><a href="#"><i>Full Disclosure and Consent</i></a></p> <p><a href="#"><i>Opportunity to Seek Advice of Independent Counsel</i></a></p> <p><a href="#">[14] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal,</a></p>	<p><a href="#">Comment [14] addresses the requirement that a lawyer encourage the client to seek the advice of independent counsel. Since the California Rule departs from the Model Rule in this regard and imposes a more client protective standard, the Commission concluded that the requirement should be addressed in the Comment.</a></p>

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	<p><u>business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.</u></p>	<p><u>The Comment also clarifies what constitutes independent counsel, which the Model Rule does not address. The elements described in the Comment are derived from California court decisions.</u></p>
<p>[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.</p>	<p><del>[4]15</del> <del>#A lawyer is not required to advise</del> the client <del>is independently represented into</del> <del>to seek the advice of independent counsel if the client already has independent counsel with respect to the transaction or acquisition; however, the lawyer must still afford the client a reasonable opportunity to seek the advice of the independent counsel. A lawyer is not required to provide legal advice to a client who is represented by independent counsel; however, the lawyer is still required under</del> paragraph (a)(2) <del>of this Rule is inapplicable, and the paragraph (a)(1) requirement for to make full disclosure is satisfied either by a written disclosure by</del> <del>to the lawyer involved</del> <del>client in</del> <u>writing of all material facts related to the transaction or by acquisition when the client's independent counsel</u> <del>lawyer knows or reasonably should know that the client has not been informed of such facts.</del> The fact that the client was independently represented in the transaction <u>or acquisition</u> is relevant in determining whether the <del>agreement was</del> <u>terms of the transaction or acquisition</u> <del>are</del> fair and reasonable to the client as paragraph (a)(1) <del>further</del> requires.</p>	<p><u>Comment [15] is an adaptation of Comment [4] to the Model Rule. It reiterates the limitation of the lawyer's duty to advise a client to seek the advice of independent counsel when the client is represented by such counsel. However, the Commission narrowed the limitation to only the advice to seek independent counsel. The Model Rule Comment exempts the lawyer from all of the requirements of paragraph (b) of the Rule, which would include the duty to afford a client a reasonable opportunity to obtain the advice of independent counsel. The Commission concluded that the Model Comment is too broad and does not assure the client would receive advice from independent counsel.</u></p> <p><u>The Commission also modified the portion of the Comment dealing with a lawyer's obligation to provide legal advice to the client when the client is represented by independent counsel. The Model Rule Comment states that the full disclosure requirements in the Rule are satisfied either by written disclosure by the lawyer in the transaction or by independent counsel. The Commission modified the Comment to state that the lawyer in the transaction is not required to give legal advice to the client when the client has independent counsel, but must disclose all material facts related to the transaction or acquisition when the lawyer knows or reasonably should know that the client has been informed of such facts.</u></p>

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		<p><u>A majority of the Commission concluded that the language in the Model Rule Comment is too broad in that it potentially would exempt a lawyer from disclosing material facts that are not known to the client if independent counsel has provided a disclosure to the client in writing. The Commission modified the Comment to require the lawyer who is subject to the Rule to disclose all material facts the lawyer knows or reasonably should know are not known to the client.</u></p> <p><u>However, a majority of the Commission also considered the reference to disclosure by either the lawyer in the transaction or independent counsel unworkable. As a result of the lawyer-client privilege between the client and the client's independent counsel, the lawyer subject to the Rule will lack information regarding what the client and independent counsel discuss, which, in turn, could limit the value of the advice the lawyer could give the client. The lawyer-client privilege in the client's relationship with independent counsel would prevent the lawyer subject to the Rule from knowing the content of the disclosure or the advice the client is receiving from independent counsel. Requiring the lawyer subject to the Rule to give the client legal advice when the client is already receiving advice from independent counsel interferes with the client's relationship with independent counsel and may invade the confidential relationship between the client and independent counsel.</u></p> <p><u>In addition, the Rule exists because the lawyer in the transaction or acquisition has a conflict of interest as a result of the lawyer's interest in the transaction or acquisition. One of the purposes of the Rule is to afford a client the protection of advice from a lawyer who is free of the conflict of interest. When the client is represented by independent counsel, the client receives that</u></p>

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		<p><a href="#">protection. In the view of a majority of the Commission it does not make sense to require the lawyer who has a conflict to continue to advise the client, when the client is being advise by a lawyer who does not have the conflict. As a result, a majority of the Commission voted not to require the client to receive legal advice from the lawyer in the transaction when the client is receiving advice from independent counsel.</a></p> <p><a href="#">The foregoing modification was the subject of considerable debate at the Commission. A minority of the Commission believe that the lawyer in the transaction should be required to make full disclosure to the client, including providing legal advice, when the client is represented by independent counsel. The minority maintain that not limiting the lawyer's disclosure obligation assures that the client receives full disclosure. It assures that the client does not suffer if the independent lawyer fails to advise the client properly.</a></p>
<p>* * *</p> <p><i>Imputation of Prohibitions</i></p> <p>[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.</p>	<p><del>* * *</del></p> <p><del><i>Imputation of Prohibitions</i></del></p> <p><del>[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.</del></p>	<p><a href="#">Comment [20] of the Model Rule is deleted. The subject of this Comment is addressed in proposed Rule 1.10.</a></p>

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

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Carol M. Langford	Disagree			Disagrees with Comments [5] and [6] which exclude modifications of fee agreements from the rule.	Commission did not make the requested revision. The Commission does not agree that the Comments create a potential conflict between fiduciary duties and ethics. The Rule sets forth a standard to be used in lawyer discipline. Neither case law nor ethics opinions to date have applied the rule to that extent. Making the rule applicable to modification of fee agreement would be a change in the law. Comments [5] & [6] are consistent with the standards stated in cases and ethics opinions. Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] provides an adequate remedy in those situations where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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

*TOTAL* = \_\_    Agree = \_\_  
                                  Disagree = \_\_  
                                  Modify = \_\_  
                                  NI = \_\_

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Modifications of fee agreements should qualify as adverse pecuniary interests. Modifications that increase attorney fees clearly represent a monetary loss on the part of the client that he did not agree to at the start of the representation.</p> <p>Modifications should also be considered business transactions.</p>	<p>would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client.</p> <p>Commission did not make the requested revision. Neither the business transaction paradigm nor the adverse pecuniary interest paradigm squarely addresses the amendment to a fee agreement. If the initial fee agreement is not a business transaction, it is difficult to see how the modification of the relationship which did not start as a business transaction becomes a business transaction. The comment distinguishes these situations based on the existence of the fiduciary relationship after the fee agreement is first signed, but the rule does not recognize such a distinction.</p> <p>There are similar problems with classifying a modification as an adverse pecuniary interest. It would require a broad construction of “adverse pecuniary interest” to include merely entering into a contract. Comment [5] currently provides as an example of an adverse pecuniary interest with respect to a fee agreement or modification of a fee agreement that is directed to situations “such as when the lawyer obtains an interest in the client’s property to secure the amount of the lawyer’s past</p>

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

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					<p>The “unconscionable” standard of rule 1.5 is not enough protection for clients; modifications should be subject to the “fair and reasonable” standard.</p> <p>Proposed rule conflicts with case law establishing the lawyer’s fiduciary duty to his client.</p>	<p>due or future fees.” To fit a fee agreement modification into the adverse pecuniary interest framework would involve a much broader conception of adverse pecuniary interest that is not consistent with how the term has been used in case law.</p> <p>Commission did not make the requested revision. Comments [5] and [6] do not limit client protection to Rule 1.5. Comment [6] specifically addresses a lawyer’s fiduciary duties as expressed in case law, which also afford protections to a client.</p> <p>Commission did not make the requested revision. The rule does not create a conflict with common law principles of fiduciary duty. Comment [6] directs lawyers to the common law, which the draft rule does not change. Because this is an issue that is being left to case law and ethics opinions, the Rule refers lawyers to case law, which is not inconsistent with the rule.</p>
2	COPRAC	Agree, only if modified			Comment [7] needs to better define “adverse pecuniary interest” to prevent the term from including all modifications of fee agreements.	Commission did not make the requested revision. The Comment is taken directly from Fletcher, which states:

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						<p>"Fletcher and the Court of Appeal have misread <i>Hawk</i>, which nowhere criticized Ames and instead acknowledged explicitly that "[w]e have also said that an attorney who has obtained an interest in the property of a client where it is reasonably foreseeable that his acquisition may become detrimental to the client, even though his intention is to aid the client, has acquired an interest adverse to a client." (<i>Hawk, supra</i>, 45 Cal.3d at p. 599; see also <i>Connor v. State Bar</i> (1990) 50 Cal.3d 1047, 1057.) That standard was triggered, we explained, when an attorney's " 'personal financial interest was in conflict with [his client's] interest in obtaining full repayment of its loan' " (<i>Hawk, supra</i>, at p. 599), when counsel had "acquired an interest in the subject matter of the litigation for which they had been retained" (id. at p. 600), and when a secured note "can be used to summarily extinguish the client's interest in the property." (Ibid.) Fletcher's proposed test would define only the last of these transactions as adverse. Plainly, the single sentence seized on by Fletcher merely described the adverse interest presented in that case. It did not purport to define what makes an interest adverse in all circumstances."</p> <p>The Comment refers to a lawyer's interest in property. The first sentence refers to an acquisition of an interest in the client's property. The second</p>

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					Comment [13] should include case citations or a more detailed description of potential factual scenarios explaining when this type of conflict would be nonwaivable.	<p>sentence refers to when the lawyer’s personal financial interest conflicts with the client’s interest in the property. The same concept is included in the discussion in Comment [5]. The qualifying language in Comments [5] and [7] addresses COPRAC’s concern.</p> <p>The Commission did not make the requested change. The Comment was deleted.</p>
3	Los Angeles County Bar Association (Toby J. Rothschild)	Agree, only if modified			<p>Second sentence of Comment [3] should be rewritten to read: “This Rule also applies to lawyers engaged in the sale of goods or non-legal services, such as when a lawyer acting as such sells insurance, brokerage or investment products or services to a client.”</p> <p>The current comment goes beyond incorporating Model Rule 5.7 because it does not clearly distinguish between “law related services” and services that are related to legal services because the provider is also serving as a lawyer.</p>	<p>The Commission did not make the requested revision. The proposed Rule states that it applies only when the goods or non-legal services are sold to a client. It, therefore, cannot reasonably be read as applying when the lawyer has not represented the buyer. In addition, the requirement that the sale be “concurrent” with the provision of legal services would weaken the rule by excluding transactions between a lawyer and the client on the basis that the lawyer was not rendering legal services at the moment that the lawyer engaged in the transaction. Commission discussion regarding this Comment did result in revisions to the second sentence of Comment [3] to clarify that the rule applies to the provision of non-legal services that are related to the practice of law.</p>

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					<p>Court in <i>Fletcher v. Davis</i> failed to apply the well accepted rule that only security arrangements that allow the lawyer to summarily extinguish the client's interest in property implicates the duty to comply with rule 3-300. Comment [7] should adopt a distinction between lien provisions which are coupled with a true summary security interest, from a contractual lien that requires judicial action for enforcement (the latter should not require compliance with this rule).</p> <p>Last sentence of Comment [9] should be deleted because it incorrectly states the burden of proof in attorney disciplinary proceedings.</p> <p>Comment [10] should say "The risk to a client is heightened when the client expects..."</p> <p>Discussions of conflicts of interest in Comments [10], [11], and [12] are confusing because rule 3-300 addresses the separate concept of the attorney's financial interest in property of the client.</p>	<p>Commission did not make the requested revision. While the commenter may believe that <i>Fletcher v. Davis</i> was wrongly decided, it is the most recent statement from the Supreme Court regarding what constitutes an adverse pecuniary interest. In that regard, it cannot be ignored. <i>Fletcher</i> is cited with respect to the discussion of what constitutes an adverse pecuniary interest, rather than with respect to the specific holding in the case.</p> <p>In response to this Comment, the Commission revised the last sentence of the Comment to add the words "Except in a disciplinary proceeding" at the beginning of the sentence.</p> <p>Agree with the change. Comment revised accordingly.</p> <p>Commission did not make the requested revision. The effect of a transaction or acquisition on the lawyer client relationship is a required element of a lawyer's disclosure to a client. (See <i>Matter of Lane</i> (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735.) The Commission believes that there needs to be a robust discussion of this subject in the Comment</p>

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					Delete Comment [13]. Conflict-based impairment is not a competency issue and the issue of attorney faithfulness to the client's interests is already sufficiently addressed in Comment [12].	Agree with change. Comment deleted.
4	Orange County Bar Association (Trudy Levindofske)	Agree, only if modified			<p>Recommends the following revisions to Comment [5]:</p> <p>This Rule <del>is not intended to</del> <u>may apply</u> to an agreement by which a lawyer is retained by a client, or to the modification of such an agreement, <del>unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client involving the payment of the lawyer's fees. In this regard, if the agreement, or modification of the agreement,</del> confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, (such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees), <u>then this Rule does apply</u>. An agreement by which a lawyer is retained by a client and modifications to such agreements are</p>	<p>Commission did not make the requested revision. The proposed modification would say that the rule "may" apply to both the initial fee agreement and modifications. It would have the Comment say that in that regard, fee agreements and fee agreement modifications are subject to the rule if they confer an ownership, possessory, security or other adverse pecuniary interest. It would also state that an agreement for an advance payment "generally" is not a ownership possessory, security or other adverse pecuniary interest.</p> <p>The proposed language does not add clarity and would introduce ambiguities into the Comment. The proposed first sentence would make the rule potentially applicable to all fee agreements and modifications. The second sentence does not exclude the possibility that a fee agreement or modification also could be construed as a business</p>

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					<p>governed, in part, by Rule 1.5 [Rule 4-200]. Generally, an agreement to advance to, or deposit with, a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.</p> <p>Delete last sentence of Comment [15] because whether client is represented by independent counsel is not relevant to whether the terms of the transaction are fair and reasonable.</p>	<p>transaction. The current formulation is clear and does not require modification. The OCBA comment does not discuss any particular problem with the current wording to warrant the revision.</p> <p>The second part of the OCBA proposal also would introduce ambiguities into the Comment. It would suggest that advance fees may be subject to the rule without identifying circumstances when the rule would apply. The OCBA comment does not suggest a rationale for when the rule should apply to an advance fee and when it should not. The language in the Comment is clear. The OCBA comment does not state a reason to change the language</p> <p>Commission did not make the requested revision. The Comment is consistent with the Model Rule Comment. Since one purpose of the Rule is to assure the client has independent advice, the fact that the client receives that advice is a relevant consideration.</p>
5	Richard Zitrin and California Legal Ethics Educators	Disagree			<p>Unlike 3-300, Comments [5] and [6] specifically exclude fee contract modifications yet Comment [6] also acknowledges that lawyers do have “other fiduciary principles [that] might apply.” This creates a potential conflict between common law principles of</p>	<p>Commission did not make the requested revision. The Commission does not agree that the Comments create a potential conflict between fiduciary duties and ethics. The Rule sets forth a standard to be used in lawyer discipline. Neither case law nor ethics opinions to date have applied the rule to that</p>

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					fiduciary duty and ethics rules themselves because any subsequent modification of a fee agreement with a client is done under circumstances where the lawyer has already taken on ongoing fiduciary duties to the client.	extent. Making the rule applicable to modification of fee agreement would be a change in the law. Comments [5] & [6] are consistent with the standards stated in cases and ethics opinions. Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] provides an adequate remedy in those situations where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client.

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					<p>Rule states that if client is already represented by independent counsel then no notice need be given under 1.8.1(b). Read together with Comments [14] and [15], this diminishes client protection.</p> <p>Unlike ABA 1.8(A)(3), the proposed CA rule does not require that the contracting lawyer disclose the “transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.”</p>	<p>Commission did not make the requested revision. The Rule and Comment do not diminish client protection. One of the purposes of the Rule is to afford a client the protection of advice from a lawyer who is free of the conflict of interest the lawyer subject to the proposed Rule has as a result of that lawyer’s involvement in the transaction or acquisition. It does not make sense to require the lawyer who has a conflict to continue to advise the client when the client is being advised by a lawyer who does not have the conflict.</p> <p>Agree with change. The Commission revised paragraph (c) to include client consent to the lawyer’s role in the transaction or acquisition and whether the lawyer is representing the client in the transaction or acquisition.</p>
6	Robert K. Sall	Disagree			Deleting a requirement to advise the client to seek the advice of independent counsel weakens the rule and may result in the client not receiving advice the client should have.	The Commission did not agree with the comment. The comment was directed to paragraph (b), which simply states that the lawyer is not required to advise a client to obtain the advice of independent counsel if the client is represented by independent counsel. Not requiring a lawyer to advise a client to seek the advice of independent counsel, when the client is represented by independent counsel does not lead to a situation where the client is not receiving advice from independent counsel.

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No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Fee modifications should be subject to the rule.	Commission did not make the requested revision. Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] below, provides an adequate remedy in those situations where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which are continued in Rule 1.8.1) as a “rigorous protocol.” The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client.
7	San Diego County Bar Association (Heather L. Rosing)	Agree, only if modified			1.8.1(a) fair and reasonable requirement should apply at the time of the transaction or acquisition. Also, change Comment [9] to reflect this.	Commission did not make the requested revision. Paragraph (a) tracks the current rule, which has been in place for years. The recommended change would be a substantive revision. It cannot be said

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					<p>Add sentence at end of Comment [4] that states: "However, the rule may apply if the lawyer has, or should have, any reason to believe the client is investing, in part, because of the client's confidence in the lawyer's judgment."</p> <p>Comment [5]: delete words "or to the modification of such an agreement" in line 2 and the words "and modifications to such agreements" in line 6.</p>	<p>that the consideration whether a transaction is fair and reasons cannot account for what transpired in the transaction. The comment does not offer a rationale that would justify this change.</p> <p>Commission did not make the requested revision. The last sentence in Comment [4] states that the exception applies "when the lawyer does not advise, influence or solicit the client with respect to the transaction..." The quoted language adequately addresses the concern raised in the comment.</p> <p>Commission did not make the requested revision. Modifications to engagement agreements occur in many lawyer-client relationships. Such modifications do not inherently involve the type of overreaching and misuse of confidential information that can occur in other types of transactions. Modifications can benefit a client and may even be requested by a client. There is no way to distinguish in a rule between modifications that involve overreaching or undue influence and those that do not. Existing law, discussed in Comment [6] below, provides an adequate remedy in those situations where there is overreaching or undue influence. The California Supreme Court has described the requirements of the current California Rule (which</p>

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					<p>Comment [6]: first two sentences (including citation to Seltzer) are misleading because some courts have not found negotiation of a retainer to be an arms-length transaction.</p> <p>Add sentence at end of Comment [8] that states: "However, a lawyer who has reason to believe that the client does not understand the disclosure must explain the issues further."</p> <p>Revise of the first two sentences of comment [9] as follows:</p> <p>The requirement for full disclosure in writing in paragraph (a) <del>requires a lawyer to provide the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction</del></p>	<p>are continued in Rule 1.8.1) as a "rigorous protocol." The majority concluded that imposing that protocol on every modification to an engagement agreement would create an unnecessary burden on the lawyer-client relationship by making every modification subject to discipline and could deter modifications to engagement agreements in cases where the modification would benefit the client.</p> <p>Commission did not make the requested revision. The first two sentences in the Comment correctly state the law</p> <p>Commission did not make the requested revision. The reference to "objectively reasonable <u>under the circumstances</u>" addresses the concern raised in the comment. No further change is required.</p> <p>Commission did not make the requested revision. The proposed revision does not accurately state the law. The first sentence of the draft comment is an accurate statement.</p>

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					<p>with a third party. <i>Beery v. State Bar</i> (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]. It requires a lawyer to inform the client of all of the terms and all relevant facts of the transaction or acquisition, including the nature and extent of the lawyer's role and compensation in connection the transaction or acquisition.</p> <p>Comment [10] should say "the lawyer must also comply with Rule 1.7(b) and 1.7(d)." (Not only 1.7(d)).</p> <p>Requests for improved clarification that the Commission insert "before the transaction or acquisition is completed" after "must" in the fourth sentence: "The lawyer must <u>before the transaction or acquisition is completed</u> either (i) inform the client ..." and also substitute "1.7" for "1.7(d)" in the last sentence of the Comment.</p> <p>Delete Comment [13] entirely.</p> <p>Since the ABA Rule has a comment on imputation, the Commission should add a Comment [16] which would read as follows:</p>	<p>Commission did not make the requested revision. However, the Commission added the following language at the beginning of the sentence: "Because the lawyer has an interest in the transaction or acquisition..." The language was added in order to clarify why citation to Rule 1.7(d) is appropriate.</p> <p>The Commission agrees with the first of the two requested changes and added the following words at the beginning of the fourth sentence "Before entering into the transaction or making the acquisition..." The Commission did not make the second requested change. Rule 1.7(d) is the appropriate rule to cite with respect to a lawyer's interest in the subject matter of a representation.</p> <p>Agree with change. Comment deleted.</p> <p>Commission did not make the requested revision. Comment [16] has been deleted.</p>

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					<p>“The obligations imposed under this rule apply to lawyers associated in a firm with the lawyer who represents the client directly. These lawyers must make all of the required disclosures before entering into a business transaction with or acquiring an interest adverse to the client.”</p>	
8	Steve Lewis	Agree, only if modified			<p>Lack of clarity between Comments [5] and [7] about whether the Rule applies to a contingent fee in a civil case that has a charging lien. Comment [5] states in last sentence that the rule is not intended to apply to an agreement with a client for a contingent fee in a civil case but Comment [7] references that it does apply when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client, which could apply to a charging lien in a contingency fee.</p> <p>Comment [15] should require the lawyer to communicate with the independent counsel about the matter and should cross-reference Rule 4.2 Comment [8].</p>	<p>The Commission did not make the requested revision. Comment [5] states that the Rule does not apply to an agreement by which a lawyer is retained by a client, unless the agreement confers on ownership, possessory, security or other adverse pecuniary interest. Comment [5] clarifies that a contingent fee in itself is not an adverse pecuniary interest. Comment [7] generally describes what constitutes an adverse pecuniary interest. It does not address whether a charging lien in a contingency fee agreement is an adverse pecuniary interest.</p> <p>The Commission did not make the requested revision. Since the lawyer entering into the transaction also represents the client, requiring the lawyer to communicate only with independent counsel could interfere with the lawyer’s representation of the client.</p>



## Rule 1.8.1: Business Transactions with a Client and Acquiring Interests Adverse to the 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 1.8.1 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 27, 2009 McCurdy E-mail to Lamport, 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.E. Rule 1.5.1 Financial Arrangements Among Lawyers [2-200]** (Dec. 2008 Comparison Chart – Post Public Comment Rule Draft #8.1 dated 6/9/07)

**Codrafters:** Julien, Sapiro, Vapnek

**Assignment:** (1) a chart comparing proposed Rule 1.5.1 to MR 1.5(e); (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.Y. Rule 8.1.1 Compliance with Conditions of Discipline [1-110]** (Post Public Comment Draft dated 7/3/07)  
**Codrafters:** None  
**Assignment:** (1) a chart comparing proposed Rule 8.1.1 to RPC 1-110; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

2. **III.JJ. Rule 1.8.1 Business Transactions and Adverse Interests [3-300]** (Post Public Comment Draft #11 dated 11/17/08 to be revised following the January 2009 meeting)  
**Codrafters:** None  
**Assignment:** (1) a chart comparing proposed Rule 1.8.1 to MR 1.8(a); (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.KK. Rule 1.13 Organization as Client [3-600]** (Post Public Comment Draft #10 dated 11/7/08)  
**Codrafters:** Foy, Melchior, Mohr, Voogd  
**Assignment:** (1) a chart comparing proposed Rule 1.13 to MR 1.13; (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**

No lead drafter assignments.

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

**September 18, 2009 McCurdy E-mail to Drafter (Lampert), cc RRC:**

Stan:

This message provides the assignment background materials for Rule 1.8.1 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)

**September 19, 2009 KEM E-mail to Lampert, cc RRC:**

I've attached a revised Introduction template for Rule 1.8.1 (all I did was add the rule title and draft number & date in the footnote on the first page).

**October 7, 2009 Lampert E-mail to McCurdy & Lee, cc Chair, Difuntorum & KEM:**

Attached are the materials for Rule 1.8.1. Mimi, as we discussed yesterday, the middle column of the comparison table needs to be revised to track the changes to the ABA Model rule comments in the far left column. If you have any questions about the formatting, please call me. I did the best I could with the dashboard, but you will see there are some formatting glitches I just couldn't fix.

**October 7, 2009 Lee E-mail to McCurdy & Lampert, cc Chair, Difuntorum & KEM:**

I've made the changes requested and a few minor formatting adjustments. These look good to go.

***Attachments:***

- Dashboard, Draft 1 (10/7/09)SWL
- Introduction, Draft 1.1 (10/7/09)SWL-ML
- Rule & Comment Chart, Draft 1.1 (10/7/09)SWL-ML
- Public Comment Chart, Draft 2 (10/7/09)RD-SWL

**October 7, 2009 KEM E-mail to Lampert:**

Did you change the Rule itself or the comment language in the middle column? If you did, did you keep records? This very important. We can't undo the changes in the middle column to

create a clean version. If you did make changes (as I've learned some folks have), we have to make the same changes to the parallel clean version of the Rule we keep.

**October 7, 2009 Difuntorum E-mail to KEM, cc McCurdy & Lee:**

We used Mimi's redrafts. In addition, I tweaked the Dashboard ever so slightly to include the rule draft number and date. Word file for the Dashboard is attached.

***Attachment:***

- **Dashboard, Draft 1.1 (10/7/09)SWL-RD**

**October 7, 2009 KEM E-mail to Difuntorum, cc McCurdy & Lee:**

That works. I hadn't received Mimi's e-mail until after I had sent my e-mail - when I got home about 5:45 (I still didn't have it at 5 when I left, but the time stamp says 12:35 p.m. Go figure. Sorry for any confusion.

**October 7, 2009 KEM E-mail to Lamport:**

I just re-read my inartful e-mail. I wasn't suggesting that you might have made substantive changes to the rule or comment. All I was asking is whether you might have made some nit changes to the middle column. That happened w/ another rule. If you did, we have no way of finding them when we put together the final set of clean rules. We have no way of recreating a clean version of the rule from the middle column except by doing it manually and that would take an amount of time we don't have. We've been keeping a parallel, clean version of each rule and after each meeting, we make any changes that were called out during the meeting. Thanks

**October 11, 2009 Kehr E-mail to RRC:**

Here are my comments on these materials:

1. On the second page of the Introduction, at line 10, I request the following addition before the minority statement: "Moreover, if lawyers were required to comply with this Rule with every fee modification, sophisticated lawyers would avoid the problem by providing in advance for future increases, for example, by providing in the initial agreement for the right to increase hourly fees annually by an amount equal to cost of living increases. This would leave only unsophisticated lawyers in jeopardy."
2. On the third page of the Introduction, in the third line, a comma is needed after "objected".
3. In the third paragraph of the paragraph (a) explanation, I would reword the second sentence in the affirmative and add an additional sentence: "The Commission concluded that it would not advance the purposes of the Rule or the interest of client protection to require a lawyer to advise the client to seek the advice of independent counsel when the client already has independent counsel. In fact, a lawyer who did so might be understood as having

denigrated the ability of the independent counsel, which would interfere with the goal of the requirement.”

4. In the paragraph on page 3 of 20 that begins “Third”, I would add an “s” to dealing and remove “between lawyer and client”, both in the third line of the paragraph. An adverse pecuniary interest does not necessarily involve a transaction between lawyer and client.
5. In the Comment [1] explanation, at the sixth line, I would remove the comma that follows the first word in the line.
6. The second paragraph of the Comment [1] explanation largely duplicates the paragraph that precedes it. I would remove the entire paragraph. I don’t see how the third paragraph explains the Comment so I would remove it also.
7. On rereading Comment [2] I have come to doubt its value. I can imagine situations in which a lawyer might be found to have a relationship of trust and confidence with a potential client, as is possible with a former client. I am concerned that this Comment might undercut the purpose of Comments [5] and [6] by suggesting that a lawyer might enter into a business transaction with a potential client by attempting to frame it as something other than a retainer agreement or by attempting to appearance of a delay in the date of the lawyer’s retention. If given the chance, I would vote to remove this Comment. If it is retained, the word “comment” in its first line should be capitalized.
8. In the seventh line of Comment [3], the second word should be “the” rather than “a” b/c a particular lawyer is described (the lawyer who drafted a will for a client). This calls for the definite article.
9. Comment [4] at the bottom of page 7 of 20 refers to a COPRAC opinion. I thought the decision was not to do so (but I would keep that reference in the column three explanation).
10. In line 6 of the Comment [5] explanation, I would insert “The” before “Commission.
11. The second sentence shifts back and forth between singular and plural, in part because “minority” is treated as a plural noun (which I think is true in England). I would restate it as: “A minority of the Commission maintains that an agreement to retain a lawyer is outside the Rule because it is an arms-length transaction that occurs before the lawyer-client relationship commences.” In the next sentence, I would add an “s” to “believe” and I would do the same with “maintain” in the sentence that follows that one.
12. In the final paragraph on page 9 of 20, I would change the first word in line four from “type” to “risk”. Later in that sentence, I would change “that can occur” to “found”, and then add at the end of the sentence: “..., such as when a lawyer borrows from a client.”
13. I would reverse the order of the majority and minority statements regarding Comment [5].
14. In the second complete paragraph on page 10 of 20, at line five, a comma is need after “subject”.
15. I wonder if I could convince the Commission to avoid the double use of “require” in the first sentence of Comment [9]. This could be done by beginning the sentence with: “Paragraph (a) requires ....” while omitting what now precedes it. If the Commission insists on repeating

in the Comment the Rule requirement that the advice be in writing (which I don't favor), we could insert "in writing" after "client" in the third line of the paragraph.

16. The third sentence of the Comment [9] explanation would make sense to me only if it referred to the MR Comment. I suggest removing the sentence as the explanation works fine without it.
17. In the second paragraph of the Comment [10] explanation, I would change "it is addressed in" to: "... its subject is addressed in ...."
18. In the third line of the third paragraph of the Comment [10] explanation, "acquisition" should have an "s".
19. Four lines later, I would remove the word "current". I think that sentence would be easier to follow if we were to remove everything after "Rule" in its last line. The topic here is Rule 1.8.1 and not Rule 1.7.
20. In the second paragraph of the Comment [11] explanation, at the end of the third line, I would insert "... the possible ...."
21. Six lines later I would remove the comma after "protection".
22. The second sentence of the Comment [12] explanation does not seem quite to scan. In the third line, I would change "when" to "the situation in which".
23. The Comment [15] explanation is one place where I found the drafting difficult to follow because of the order in which it is structured and some inaccuracies. Rather than taking the time to try to rewrite this, I make only two suggestions about the first paragraph of the explanation. First, I would remove "Comment" from the middle of the sixth line b/c it is the Model Rule and not its Comment that exempts the lawyer. Second, I would remove the last sentence as redundant to a degree and inaccurate (the latter b/c it implies that our Comment assures that the client will obtain advice from independent counsel).
24. I would reverse the structure of the last sentence in the incomplete paragraph at the top of page 20 of 20 and correct some minor glitches, as follows: "As a result, the Commission voted not to require the lawyer in the transaction or acquisition to provide legal advice to the client when the client is represented by independent counsel in the matter".
25. In the first complete paragraph on page 20 of 20, the first word in the sixth line is "maintain", which should conform to the Commission's handling of this elsewhere.