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**Subject:** RRC: Model Rule 1.8(i) - Agenda Item IV. B - December 11 & 12, 2009

I am recommending that the Commission not adopt Model Rule 1.8(d) for the reasons set forth below

ABA Model Rule 1.8(i) states:

"(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case."

The Comment to Model Rule 1.8(i) states:

"Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5."

Rule 1.8(i) would carve out a category of adverse pecuniary interests covered by Rule 1.8.1 (ownership interests in a cause of action or subject matter of litigation) to which a client could not consent even if the terms are fair and reasonable.

The rationale for the Rule, as explained in the Comment, is based on (i) common law prohibitions on champerty and maintenance and (ii) the potential difficulty in discharging counsel. Putting aside whether California has embraced prohibitions on champerty and maintenance, it appears to me that an acquisition of an ownership interest would not be fair and reasonable under Rule 1.8.1(a) if it would make it more difficult for a client to discharge the lawyer if the client so desires. I am not prepared to say that every acquisition of such an interest, other than the two interests excepted from the Rule, is inherently not fair and reasonable and cannot pass muster under Rule 1.8.1. The Comment to the Rule suggests that the ABA had a specific transaction in mind; but neither the Rule nor the Comment spell out what that is. The result is a rule that is overbroad (in that it would apply to acquisitions that may be fair and reasonable and could pass muster under Rule 1.8.1) and that covers a subject that is already addressed in Rule 1.8.1. Rule 1.8.1 does a much better job of distinguishing between those acquisitions that should be prohibited and those that should not.

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## Rule 1.8.9: Proprietary Interest in the Subject Matter of Representation

### 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 1.8.9 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.